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BISHOP V. ARONOV: RELIGION-TAINTED VIEWPOINTS ARE BANNED FROM THE MARKETPLACE OF IDEAS*

Recent developments in the academic community have evidenced increasing tension between university professors' and students' First Amendment rights on one hand and a university's right to establish and regulate its curriculum and protect its standards and reputation on the other.¹ Many schools have responded to this tension by formulating speech codes and censoring individuals for vulgar, offensive or otherwise inappropriate or, more cynically, politically incorrect speech.² Such actions by a university necessarily encroach on students' and professors' First Amendment rights and run counter to the Supreme Court's notion that a university should be an open "marketplace of ideas."³ The Supreme Court only partially has

* The Supreme Court denied certiorari to Professor Bishop's appeal just after the Washington & Lee Law Review submitted this note for publication. *Bishop v. Delchamps*, 112 S. Ct. 3026 (1992). The failure of the Supreme Court to address these issues does not effect the relevancy of the cases or analysis presented in this note.

1. See David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., vol. 53, Summer 1990, at 227 (noting that friction exists between professors' academic freedom and schools' institutional freedom and suggesting balancing approach). Professor Rabban argues that when a professor engages in speech in a public forum or in speech that is within the ambit of the professor's area of personal expertise, the professor's right to academic freedom should prevail over institutional freedom. *Id.* at 300. Conversely, institutional freedom should prevail when courts review institutional decisions regarding selection of teachers, students, curriculum and teaching strategy. *Id.*; see also, Gregory A. Clarick, Note, *Public School Teachers and The First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990) (arguing that professors' academic freedom to express their own ideas in classroom is essential to prevent school boards from indoctrinating students with government favored viewpoints). Clarick criticizes the Supreme Court for its decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which lowered the level of review applied to school board restrictions on professor and student speech to a de facto rational basis test. *Id.* at 734. Clarick argues that such restrictions constitute viewpoint discrimination and that viewpoint discrimination has no rational basis in schools that are training students to be critical thinkers. *Id.*

2. See, e.g., *Doe v. University of Mich.*, 721 F. Supp. 852 (E.D. Mich 1989) (holding unconstitutional school speech policy which censored speech that stigmatized or victimized individuals on basis of race, ethnicity or religion); Chester E. Finn, Jr., *The Campus: "An Island of Repression in a Sea of Freedom,"* COMMENTARY, Sept. 1989, at 17 (noting that number of universities have adopted codes that censor blatantly offensive speech); David Rosenberg, Note, *Racist Speech, The First Amendment, and Public Universities: Taking a Stand on Neutrality*, 76 CORNELL L. REV. 549, 587-88 (1991) (same).

3. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that school could not prohibit its students from wearing black armbands in protest of Vietnam War); see also Rosenberg, *supra* note 2, at 587-88 (arguing that courts ought to strike down university speech codes because such codes are inherently vague and tend to chill open speech). Rosenberg notes that a university subverts its own constitutional purpose as a marketplace of ideas when it employs a speech code that censors offensive political speech. *Id.*

defined the notion of freedom of speech on campus, or "academic freedom," as a constitutional right.⁴ While decisions dealing with academic freedom at the university level have addressed free speech occurring outside the classroom, these discussions have left open the issue of classroom speech.⁵ A number of the Court's decisions involving academic freedom at the primary and secondary school level, on the other hand, have defined the ambit of academic freedom within the classroom.⁶ These cases, however, are not dispositive at the university level. Because college students are more mature than their primary and secondary school counterparts, the Supreme Court has held consistently that more freedom of expression is appropriate at the university level than at the secondary or primary school level.⁷ The issue becomes even more complicated in cases like *Bishop v. Aronov*⁸ in which the professors' and students' speech at a public university involves religious doctrines because Establishment Clause and freedom of religion doctrines come into play.⁹ The *Bishop* case attempts to explore the legal void at the university level.

CASE BACKGROUND

Phillip A. Bishop is a professor of exercise physiology at the University of Alabama.¹⁰ During the fall of 1984, Professor Bishop commented to his class that he was a Christian and that, because his religious beliefs colored every aspect of his life, his students should recognize and filter this Christian bias.¹¹ In response to student questions regarding academic pressures, Pro-

4. See *infra* notes 51-52 and accompanying text (arguing that Supreme Court had historically used term academic freedom for rhetorical effect rather than as statement of substantive constitutional rights).

5. See *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (holding that Board of Regents cannot censor its teachers' extra-curricular speech concerning communism without proving teacher's specific intent to engage in unlawful action).

6. See *Tinker*, 393 U.S. at 514 (holding that high school administrators may not censor students' classroom speech unless the speech causes substantial and material disruption of school's educational operations); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (holding that high school administrators may regulate student or teacher speech that occurs during all programs that school affirmatively promotes, such as curriculum, provided that such action is reasonably related to legitimate pedagogical concerns).

7. See *Widmar v. Vincent*, 454 U.S. 263, 274 & n.14 (1981) (stating that college students were sufficiently astute to recognize that views of particular campus organizations were not reflective of university policies and that allowing these clubs to meet in school buildings did not confer imprimatur of university approval on clubs).

8. *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991).

9. See *infra* notes 162-227 and accompanying text (arguing that Professor Bishop's classroom comments do not impact on Establishment Clause concerns or, assuming that the comments do impact on Establishment Clause concerns, University of Alabama's speech regulation is more a violation of Establishment Clause than comments it regulates).

10. *Bishop*, 926 F.2d at 1068.

11. *Id.* at 1068 (citing Affidavit of Phillip A. Bishop in District Court opinion). Although no transcript of Professor Bishop's classroom comments exists, the Affidavit contains the

fessor Bishop stated that his religious beliefs helped him to surmount the academic stresses in his life.¹² Professor Bishop occasionally would mention "God" as an ontological explanation for the incredible complexity of human physiology.¹³ In addition, Professor Bishop held an optional class, open to all students, entitled "Evidences of God in Human Physiology."¹⁴ Professor Bishop employed a blind grading system for all of his courses and did not require any of his students to attend the optional class.¹⁵

The University alleged that a number of students had objected to Professor Bishop's classroom comments and to the optional class, complaining that they felt coerced by his proselytizing, especially because Professor Bishop held the optional class just prior to final examinations.¹⁶ In response to the students' grievances and because the University administration found Professor Bishop's remarks to be inappropriate, the school forbade Professor Bishop from making further religious remarks in the classroom and from holding similar optional classes.¹⁷ The University cited

following approximation of Professor Bishop's classroom comments:

After giving it considerable thought, I have decided for myself when I die, I would like to leave something behind something more important and valuable than a stack of technical papers. I think that people are important and eternal, paper is neither. I want to invest my time mainly in people. I personally believe that God came to earth in the form of Jesus Christ and [H]e has something to tell us about life which is crucial to success and happiness. Now this is simply my personal belief, understand, and I try to model my life after Christ, who was concerned with people, and I feel that this is the wisest thing I can do. You need to recognize as my students that this is my bias and it colors everything I say and do. If that is not your bias, that is fine. You need, however to, filter everything I say with that (Christian bias) filter. If you observe something in my life that is inconsistent with Christianity, please let me know, because, I believe that it is much more important than a pile of papers.

Id.

12. *Id.*

13. Deposition of Phillip A. Bishop, taken 3-14-89, p. 81, line 21 - p. 20, line 11. As an example of this other type of allegedly religious comment, Professor Bishop would describe the production and destruction of red blood cells and how they adapt to temperature. He noted that if this system is out of balance by even the most minuscule amount, the body would cease to function within minutes. Professor Bishop then commented how "God designed this intricate system." *Id.* at p. 18, lines 14-21; p.30, line 18 - p.31, line 12. In using the term "God," Professor Bishop claimed that he was referring to a creative and purposeful force rather than specifically to the Judeo-Christian God. *Id.*

14. Bishop v. Aronov, 926 F.2d at 1068-69.

15. *Id.* at 1069.

16. *Id.* In actuality, Professor Bishop's supervisor, Professor Westerfield, could not remember the names of any of the students who made complaints. Deposition of Carl Westerfield, taken 1-5-89, p.21, lines 5-21. Neither did Professor Westerfield recall how many students had complained, but he did remember that at least three students complained over a four year span. *Id.* These students seemingly complained in response to Professor Bishop's optional class. *Cf. Id.* at p.16, line 7 - p.17, line 10 (this assumption is based on record that stipulates that even though Professor Bishop had been teaching and making religious comments for four years, none of complaints surfaced until soon after Professor Bishop presented his optional class).

17. *Id.* at 1069-70.

also a concern with transgression of the Establishment Clause as justification for the restriction on Professor Bishop's speech.¹⁸ Professor Bishop appealed the school's actions to the University of Alabama's president and, upon losing his case there, filed suit in federal district court.¹⁹

The Federal District Court for the Northern District of Alabama found for Professor Bishop, holding that the University of Alabama could not restrict Professor Bishop's classroom comments.²⁰ The district court prohibited also the University of Alabama from enjoining Professor Bishop's optional classes provided that the classes were clearly independent of his students' grades.²¹ The district court, employing a strict scrutiny standard, held that a university may not enjoin disfavored religious speech unless the exclusion is necessary to further a compelling governmental interest.²² The district court noted that because the University of Alabama opened its classroom and facilities to other divergent ideas and theories, it could not discriminate against religious ideas and theories.²³

The district court also held that Professor Bishop's comments and optional class did not constitute a violation of the Establishment Clause.²⁴ The district court noted that, at the university level, a professor's or student's speech is a free expression of that particular individual's ideas and does not, therefore, reflect on the university.²⁵ As authority for this proposition, the district court cited prior cases in which the Supreme Court had held that a professor's or student's out-of-class statements did not reflect on a university's reputation or policies.²⁶ The district court noted further that the

18. *Bishop*, 926 F.2d at 1069. The memo from the administration to Professor Bishop read as follows:

Foremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms. From discourse with you and others, I feel that certain actions on your behalf are unwarranted at a public institution such as the University of Alabama and should cease. Among those actions that should be discontinued are: 1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a "Christian Perspective" of an academic topic is delivered. I must also remind you that religious beliefs and/or the strength of a belief can not be utilized in the decisions concerning the recruitment, admission or retention [of students].

Id.

19. *Id.* at 1069-70.

20. *Bishop v. Aronov*, 732 F. Supp. 1562, 1568 (N.D. Ala. 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991).

21. *Id.* at 1566-67.

22. *Id.* at 1566.

23. *Id.* at 1565-66.

24. *Id.* at 1566-67.

25. *Id.*

26. *Id.* at 1565 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981)) (stating that students have sufficient maturity to ascertain that views of professors and campus organizations do not necessarily reflect views of university); *see also Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (holding that school cannot censor teacher for disagreeing with school policy in local newspaper); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (holding that Board of

University of Alabama held classes that discussed Christian theology and that the University did not consider these classes to implicate the Establishment Clause.²⁷

Finally, the district court found that the University of Alabama's speech restriction was vague and overbroad.²⁸ The district court stated that the University's order to excise "all religious comments" was too vague because it did not delineate adequately between proscribed speech and appropriate speech.²⁹ Additionally, the district court felt that the restriction was overbroad because the restriction prohibited Professor Bishop from discussing essential course topics such as the history of the development of physiology in medieval universities.³⁰

The Eleventh Circuit Court of Appeals reversed the district court's decision regarding Professor Bishop's classroom comments, holding that the University of Alabama could regulate its professors' and students' classroom speech during instructional periods provided that the restrictions are reasonably related to legitimate pedagogical concerns.³¹ The appellate court based its decision on a line of cases dealing with primary and secondary school education in which the courts relied on a policy that dictates that the school administration has a duty to inculcate certain values to its students, and may, therefore, enjoin any speech it deems inconsistent with those values.³² Based on the secondary school cases, the appellate court held

Regents may not censure professor for extracurricular activities involving communist party unless it can show that professor is engaging in unlawful activity).

27. *Bishop v. Aronov*, 732 F. Supp. 1562, 1567 (N.D. Ala. 1990) *rev'd* 926 F.2d 1066 (11th Cir. 1991).

28. *Id.* at 1566.

29. *Id.*

30. *Id.*

31. See *Bishop v. Aronov*, 926 F.2d 1066, 1074 (1991) (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) for proposition that school may restrict speech in forums that it affirmatively promotes provided that restrictions are reasonably related to legitimate pedagogical concerns).

32. See *id.* at 1074, 1075 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) for proposition that educators may regulate student's and professor's speech provided that their reasons for restrictions are reasonably related to legitimate pedagogical concerns); *Virgil v. School Bd.*, 862 F.2d 1517, 1523-25 (11th Cir. 1989) (holding that school board does not violate constitutional rights of students when it removes vulgar textbooks from curriculum because school board's action is reasonably related to its legitimate concern of matching curriculum with maturity of students). *But see* *Alabama Student Party v. Student Gov't Ass'n*, 867 F.2d 1344, 1345 (11th Cir. 1989) (holding that Student Government Association of University of Alabama did not violate First Amendment rights of candidates for student government offices by placing time, place and manner restrictions on campaigning because regulations were reasonably related to university's legitimate interest in minimizing disruptive effect of campaigning). Although *Alabama Student Party* did address speech at the university level, that case merely involved time, place and manner restrictions upon an otherwise public forum. *Id.* *Kuhlmeier* and *Virgil*, on the other hand, held that the school facilities were nonpublic forums. *Kuhlmeier*, 484 U.S. at 267; *Virgil*, 862 F.2d at 1523-25; see *infra* notes 87-148 and accompanying text (discussing and applying forum analysis).

that the university classroom is not a public forum.³³ The appellate court then engaged in a balancing approach, weighing Professor Bishop's First Amendment rights against the University of Alabama's right to control the use of its property.³⁴ The appellate court also noted that the University of Alabama's position as a public employer might allow it to restrain its employees' First Amendment rights to a greater extent than it could restrict the rights of other persons, such as students, who use the University of Alabama's facilities.³⁵ Instead of a strict scrutiny standard of review, the appellate court used a rational basis standard of review.³⁶ The appellate court was concerned that application of a strict scrutiny standard in analyzing school regulations affecting speech would tempt courts to supplant their own opinion in place of the school administration on the issue of which subjects have academic merit.³⁷

Although the appellate court expressly declined to address the Establishment Clause issue, the court cautioned that Professor Bishop's optional class represented a possible infraction.³⁸ The appellate court indicated that the topic of Professor Bishop's optional class was very similar to the study of scientific creationism.³⁹ The Supreme Court prohibited the teaching of scientific creationism in public high school biology classes in *Edwards v. Aguillard*⁴⁰ because the Establishment Clause proscribed the use of government resources, such as a public high school class, to advance religious views.⁴¹

33. See *Bishop* at 1071 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) for proposition that if educators reserve classroom facilities for other intended purposes, such as instructional periods, then they have not created a public forum).

34. *Id.* at 1074-77 (adopting balance between University's interest in regulating speech of its professors in classrooms and Professor Bishop's interest in free speech).

35. See *id.* at 1074 (stating that State's interest in regulating speech of its employees is substantially different than its interest in regulating the speech of general public).

36. *Id.*

37. See *id.* at 1075 (stating that courts should not supplant university discretion in promulgating schools' curriculum thereby becoming "ersatz deans or educators").

38. *Id.* at 1077.

39. See *id.* (noting that creation or design facet of Professor Bishop's optional class was very similar to teaching of Creation Science curriculum that Court found to violate Establishment Clause in *Edwards v. Aguillard*, 482 U.S. 578 (1987)). The *Edwards* Court struck down a statute that mandated the teaching of Creation Science anytime teachers instructed students on evolutionary science. *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987). The *Edwards* Court was concerned that because the government mandated the teaching of Creation Science, the action was a violation of the Establishment Clause. *Id.* The *Edwards* Court did not address, however, whether a public school teacher, who might discuss Creation Science of his or her own volition, would violate the Establishment Clause. *Id.* at 587.

40. 482 U.S. 578 (1987).

41. *Edwards v. Aguillard*, 482 U.S. at 596-97 (1987). *Edwards* addressed the constitutionality of the Louisiana Balanced Treatment for Creation-Science and Evolution-Science Act, LA. REV. STAT. ANN., §§ 17:286.1-286.7 (West 1992), which mandated that Louisiana public schools teach creation science whenever evolution science is included in the curriculum. *Edwards*, 482 U.S. at 580-81. Utilizing the *Lemon* test, the Court declared the statute unconstitutional because it violated the Establishment Clause. *Id.* at 582; see *infra* notes 206-

DEFINING ACADEMIC FREEDOM

The controversy in *Bishop* arose from the fact that the Supreme Court has yet to reconcile clearly the two major aspects of academic freedom.⁴² The Court and scholars traditionally have defined academic freedom along the lines of two seemingly complimentary premises—individual or academic freedom and institutional freedom.⁴³ The first premise, individual or academic freedom, posits that the government should not impinge on a teacher's right to advance unpopular or unconventional ideas because the university ideally should be a marketplace of ideas where students can encounter and examine diverse points of view.⁴⁴

The second premise, institutional freedom, protects the university's right to freedom from government oversight.⁴⁵ This premise posits that a university should be free from government regulation in establishing its curriculum lest the curriculum otherwise become a vehicle for indoctrinating the masses with government-favored views.⁴⁶ Under this premise, courts and scholars originally viewed institutional and academic freedom as consistent because a university's institutional freedom provided teachers and students an extra layer of protection from government interference with their academic freedom.⁴⁷ The incompatibility of academic freedom and institutional freedom became apparent when students and professors began to express opinions that were unpalatable to school administrators,

08 and accompanying text (discussing *Lemon* test). *Edwards* held that the statute violated the first prong of the *Lemon* test because the legislature had enacted it with a non-secular intent. *Id.* at 589. The Court held that the statute also violated the second prong of the *Lemon* test because it had the primary effect of advancing religion. *Id.* at 594.

42. See *infra* notes 42-50 and accompanying text (arguing that Supreme Court traditionally has defined academic freedom in terms of two seemingly complimentary policies—students' and professors' free speech rights and universities' rights to establish curriculum—and that *Bishop* represents conflict of these policies).

43. See Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266-67 (1988) (arguing that two definitions of academic freedom have developed that appear to be compatible but are often in conflict). Hereinafter, I will use the term 'academic freedom' to refer to the rights of students and teachers under the First Amendment and 'institutional freedom' to refer to universities' freedom from government interference.

44. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Warren, C.J., plurality opinion) (noting that university lecturer has right under First Amendment to academic freedom); See Rabban, *supra* note 1, at 236 (stating that *Sweezy* first constitutionalized professor's right to academic freedom).

45. See Rabban, *supra* note 1, at 239 (arguing that institutional freedom protected institutional autonomy from whims of democratic society). Academic freedom has become increasingly important as university administrations increasingly have become involved in political matters. See *supra* note 2, and accompanying text (noting increase in university speech codes).

46. Rabban, *supra* note 1, at 255.

47. See *id.* at 237 (stating that, prior to Civil War, academic and institutional freedom were in harmony because academic freedom barely existed and because courts and scholars viewed academic freedom, to extent it existed, to be related to institutional freedom from governmental interference).

such as opposition to the Vietnam War,⁴⁸ public disagreement with school policy,⁴⁹ and advocacy of communism.⁵⁰

When the Supreme Court initially employed the term "academic freedom," the Court used the term as a platitude and left it generally undefined.⁵¹ The Court usually resolved these cases on some other constitutional basis, such as due process, the privilege against self-incrimination, or basic First Amendment freedoms.⁵² Academic freedom first attained a level of special constitutional protection in 1957 in *Sweezy v. New Hampshire*.⁵³ In *Sweezy* the Supreme Court struck down a New Hampshire statute that censored a university professor for lecturing in support of communism.⁵⁴ In analyzing the professor's First Amendment right, Chief Justice Warren's plurality opinion dedicated a paragraph to the concept of academic freedom:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait [sic] jacket upon the intellectual leaders in our colleges and universities would imperil the future of

48. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (holding that school may not enjoin students from wearing black armbands to protest Vietnam War in classroom unless such activity materially disrupts classroom).

49. See *Pickering v. Board of Educ.*, 391 U.S. 563, 574-75 (1968) (holding that Board of Education violated teacher's First Amendment rights when it dismissed teacher because of his public criticism of school policies).

50. *Keyishian v. Board of Regents*, 391 U.S. 589 (1967) (holding that Board of Regents could not censor professors for their support of communism).

51. See Rabban, *supra* note 1, at 235-36 (arguing that Supreme Court had historically used term academic freedom for rhetorical effect rather than any statement of substantive Constitutional rights).

52. *Id.*

53. 354 U.S. 234 (1957).

54. *Sweezy v. New Hampshire*, 354 U.S. 234, 254-55 (1957) (Warren, C.J., plurality opinion). In *Sweezy*, the Court addressed the constitutionality of a New Hampshire statute that empowered the State Attorney General to investigate all subversive activities. *Id.* at 236-39. The Attorney General investigated Sweezy, a professor at the University of New Hampshire, because of his relations with the Progressive Party. *Id.* at 238-42. During that investigation, Professor Sweezy refused to answer questions about his associates' political affiliations, but the Attorney General did not pursue the matter any further. *Id.* at 241-42. The Attorney General reopened his investigation of Professor Sweezy after his office learned that Professor Sweezy had lectured his class on communism. *Id.* at 243. Professor Sweezy again refused to answer certain questions pertaining to his associates, but this time the Attorney General instituted contempt proceedings against Professor Sweezy. *Id.* at 244. Professor Sweezy refused to answer questions concerning his associates' political affiliations before the Superior Court of Merrimack County and the court had Professor him incarcerated for contempt. *Id.* at 244-45. The Supreme Court of New Hampshire affirmed the contempt verdict and the United States Supreme Court reversed. *Id.* at 254-55. The Court read the New Hampshire statute narrowly and concluded that the Attorney General had exceeded his statutory authority. *Id.* The Court held that the Attorney General's questioning violated Professor Sweezy's Due Process rights. *Id.* The Court expressly did not reach the issue of whether New Hampshire constitutionally could confer the powers of a one-man tribunal on the Attorney General. *Id.*

our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true of the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁵⁵

Chief Justice Warren's definition makes clear that universities' freedom from government control is of special constitutional importance.⁵⁶ The definition does not, however, shed light on the rights of professors and students vis-a-vis the university itself.⁵⁷

The Supreme Court first addressed the relationship between a teacher's academic freedom and a university's right to institutional freedom in *Keyishian v. Board of Regents*.⁵⁸ Keyishian was a professor at the University of New York who brought suit against the university for dismissing him for his refusal to sign a loyalty oath stating that he never had been involved with the Communist Party.⁵⁹ In addressing the constitutionality of the Board of Regent's policy, *Keyishian* acknowledged the importance of academic freedom which the Supreme Court set forth in *Sweezy*.⁶⁰ Because the wording of the university policy was overly vague, the Court felt that the policy conferred too much discretion on university officials and would chill free speech.⁶¹ The University policy, therefore, discouraged freedom of expression that administrators and professors should cultivate to encourage and foster academic growth.⁶²

Although the *Keyishian* Court acknowledged only vaguely that academic freedom protects a teacher's activities outside the classroom, the Court elaborated later on this protection in *Pickering v. Board of Education*.⁶³

55. *Id.* at 250.

56. *Id.*; see also *id.* at 261 (Frankfurter, J., concurring) (stating that government interference and control of America's universities would imperil universities' function of enhancing knowledge of various academic disciplines).

57. See Rabban, *supra* note 1, at 239 (noting that *Sweezy* Court's description of academic freedom does not address differences between academic freedom and institutional freedom from government control).

58. 385 U.S. 589 (1967).

59. *Keyishian v. Board of Regents*, 385 U.S. 589, 590 (1967).

60. *Id.* at 603.

61. See *id.* at 601 (stating that Board of Regent's policy was complicated and vague, thereby making it "highly efficient in *terrorem* mechanism"). The *Keyishian* Court further noted that the Board of Regent's policy would stifle free speech because only the most courageous professors would risk their living and entire career by testing the limits of this vaguely defined policy. *Id.*

62. See *id.* (stating that Board of Regent's policy smothers academic freedom and thereby prevents university from fulfilling role as marketplace of ideas).

63. 391 U.S. 563 (1968). In *Pickering*, the Board of Education fired Pickering, a public school teacher, for writing a letter to the local paper that criticized the Board's allocation of

Pickering held that a school may restrict a teacher's speech regarding public concerns only in situations in which the speech would impair the school's ability to operate efficiently or would significantly diminish the teacher's ability to function in her capacity as an employee.⁶⁴ Because the school can enjoin speech only in the most dire circumstances, when the speech threatens the school's or teacher's essential function, this rule appears reminiscent of the "compelling interest" test utilized by the courts when applying a strict scrutiny analysis in substantive due process cases.⁶⁵

Because the *Pickering* Court's definition of academic freedom essentially echoed traditional First Amendment protections, academic freedom, which Chief Justice Warren had characterized as a special concern of the First Amendment, did not appear to afford any additional protection to professors and students than did the First Amendment generally.⁶⁶ In fact, the *Pickering* Court's concept of academic freedom apparently provided less protection than the First Amendment.⁶⁷ The First Amendment unconditionally protects a private employee's speech from employer restriction both outside and inside the workplace, while *Pickering* and *Keyishian* addressed speech occurring only outside the workplace.⁶⁸ If this is the case, then the question arises as to what use is the concept of academic freedom?⁶⁹

The Supreme Court answered this question in *Tinker v. Des Moines Independent Community School District*,⁷⁰ stating that "[n]either students [n]or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁷¹ *Tinker* held that a school could not enjoin students from wearing armbands to protest the Vietnam War unless such activity was disruptive or impinged on the rights of others.⁷² In so

school funds and the Board's nondisclosure of its allocation choices. *Id.* at 566. The Court held that the Board violated *Pickering*'s First Amendment rights. *Id.* at 574-75. The Court acknowledged that the school has some interest in a teacher's extracurricular speech, but held that a school may not censure extracurricular speech unless such comments interfere with a teacher's pedagogical duties or the comments are knowingly or recklessly false. *Id.*

64. See *Pickering v. Board of Educ.*, 391 U.S. 563, 572-73 (1968) (holding that school's interest in regulating speech of its teachers is no greater than its right to regulate speech of public generally except in circumstances where teacher's speech materially impedes classroom performance or disrupts operation of school).

65. See *Widmar v. Vincent*, 454 U.S. 263, 270 (1981) (utilizing compelling interest test once Court determined that plaintiff's First Amendment rights were at stake).

66. See *supra* notes 63-65 and accompanying text (noting that *Pickering* Court used compelling interest test for violations of academic freedom, which is same test courts use for First Amendment cases generally).

67. See *Clarick, supra* note 1, at 701 (noting that *Pickering* only addresses teachers' public, not classroom, speech).

68. See *id.* (noting that First Amendment protected all speech, but academic freedom only protects teachers' speech that occurs outside workplace).

69. *Cf. id.* at 702 (stating that *Pickering* does not address protection of teacher's in-class speech).

70. 393 U.S. 503 (1969).

71. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

72. *Id.* at 513.

holding, the Court extended the reach of academic freedom to protect speech both outside and inside the classroom.⁷³ The Court stressed that, in order for democracy to flourish, the public school system, which trains the nation's youth, should aspire to be a "marketplace of ideas."⁷⁴ To this end, the Court required schools to provide a compelling reason for any injunction against the free speech of their students or professors⁷⁵.

In the years following *Tinker*, the federal district courts enlarged the principle of academic freedom.⁷⁶ In *Cooper v. Ross*,⁷⁷ the Federal District Court for the Eastern District of Arkansas held that a university could not terminate a professor for teaching a history class from a Marxist perspective.⁷⁸ A year later, the United States Court of Appeals for the Fifth Circuit held in *Kingsville Independent School District v. Cooper*⁷⁹ that a school could not discharge a high school teacher for the teacher's use of an unorthodox teaching technique.⁸⁰ The Fifth Circuit held that the teaching technique itself was a form a free expression and, therefore, the First Amendment protects the teacher's choice of pedagogical technique.⁸¹

The Supreme Court reversed this expansion of the right of academic freedom in *Hazelwood School District v. Kuhlmeier*.⁸² The *Kuhlmeier* Court held that school administrators may promulgate reasonable speech restrictions in forums that the school affirmatively promotes.⁸³ *Kuhlmeier* noted

73. See *id.* at 506 (holding that First Amendment protects classroom speech of students); see also Clarick, *supra* note 1, at 705-708 (noting that courts have interpreted *Tinker* as extending full First Amendment protection to teachers' and students' classroom speech).

74. *Healy v. James*, 408 U.S. 169, 180-81 (1972); see also *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

75. See *Tinker*, 393 U.S. at 514 (holding that school cannot censor students' speech unless speech substantially disrupts operation of school).

76. See *infra* notes 77-81 and accompanying text (discussing cases that expanded concept of academic freedom).

77. 472 F. Supp. 802 (E.D. Ark. 1979).

78. *Cooper v. Ross*, 472 F. Supp. 802, 813-14 (E.D. Ark. 1979). *Cooper* arose because the University of Arkansas at Little Rock declined to reappoint Cooper as an assistant professor. *Id.* at 806-08. The district court noted that the fact that Cooper recently had joined the Progressive Labor Party and had taught his history class from a Marxist perspective substantially motivated the University's action. *Id.* at 808. The district court stated that Cooper had a First Amendment right to decide the manner in which his class would be taught. *Id.* at 813-15. The district court, therefore, held that the University's action directly impinged on Cooper's academic freedom, thereby violating the First and Fourteenth Amendments. *Id.*

79. 611 F.2d 1109 (5th Cir. 1980).

80. *Kingsville Indep. Sch. Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980). The *Kingsville* case arose when the Kingsville Independent School District refused to renew Cooper's contract as a teacher of American History due to Cooper's use of an unorthodox pedagogical method. *Id.* at 1111. The appellate court stated that the First Amendment protected Cooper's teaching technique because it was expressive activity. *Id.* at 1112-13. The Fifth Circuit held that the school district had violated Cooper's First Amendment rights in the absence of a showing that the teaching technique destroyed Cooper's effectiveness as an instructor. *Id.*

81. *Id.*

82. 484 U.S. 260 (1988).

83. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). The dispute in

that one example of a forum that the school affirmatively promotes is the curriculum in its classrooms.⁸⁴ *Kuhlmeier* distinguished *Tinker* on the basis that *Tinker* only involved independent student speech that the school did not affirmatively promote.⁸⁵ Although it is clear that academic freedom provides some protection to Professor Bishop's classroom comments, it is unclear after *Kuhlmeier* exactly how far the Supreme Court will go to protect these rights.⁸⁶

THE CLASSROOM AS A PUBLIC FORUM

When addressing the constitutionality of government regulation of speech that occurs on government-owned property, the courts first will determine whether the property on which the speech occurs is a public or nonpublic forum.⁸⁷ This classification affects dramatically the First Amendment rights associated with the use of that forum.⁸⁸ In a public forum the courts will subject any restriction to strict scrutiny, with the result that the government

Kuhlmeier arose because a high school teacher overseeing a journalism class exercised his editorial power to excise two student-written articles from the school newspaper. *Id.* at 262-65. The two articles dealt with teen pregnancies and the effect of divorce on children, subjects that the teacher deemed inappropriate for many high school students. *Id.* at 263-64. *Kuhlmeier* held that the school newspaper was not a public forum because the school administrators had reserved the newspaper for other intended purposes, namely providing a curriculum for the journalism class. *Id.* at 267-70. Because the newspaper had published the views of different students, Plaintiff argued that the school had created a public forum. *See id.* at 265 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 795 F.2d 1368, 1372-74 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988) which held that school had turned newspaper into public forum because newspaper was conduit for student speech). Because the school administration did not intend to open the newspaper for indiscriminate use by the general public, *Kuhlmeier* held that the newspaper remained a nonpublic forum. *Id.* at 267-70. *Kuhlmeier* concluded that school administrators can regulate student speech in a non-public forum provided that their restrictions are reasonably related to legitimate pedagogical concerns. *Id.* at 271. *Kuhlmeier* held that the teacher acted reasonably in excising the objectionable articles to prevent student exposure to ideas that were inappropriate for high school students. *Id.* at 274-76.

84. *Id.* at 269-70.

85. *Id.* at 272-73.

86. *See infra* notes 87-148 and accompanying text (discussing whether Supreme Court ought to apply strict scrutiny or rational basis analysis to university restrictions of students' and professors' classroom speech).

87. *See Kuhlmeier*, 484 U.S. at 267 (addressing issue of whether school newspaper was public or nonpublic forum in order to determine constitutionality of school's regulation of student newspaper articles).

88. *E.g.*, *Bishop v. Aronov*, 732 F. Supp. 1562 (N.D. Ala. 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). The principle distinction between the district and appellate court decisions in *Bishop* is that the district court determined that the University had opened its classrooms to all viewpoints, thereby creating a limited public forum; whereas, the Eleventh Circuit ruled that the University had not opened its classrooms for public debate. *Bishop*, 732 F. Supp. at 1565-66; *Bishop*, 926 F.2d at 1070-71. This distinction was very determinative of the outcome, as the district court struck down the University's regulation and the Eleventh Circuit overturned the district court decision. *Bishop*, 732 F. Supp. at 1568; *Bishop*, 926 F.2d at 1077-78.

must provide a compelling interest for restriction on free speech.⁸⁹ The strict scrutiny standard is extremely difficult to satisfy.⁹⁰ In a nonpublic forum, on the other hand, the government's restriction need only be reasonable in light of the forum's purpose and must be viewpoint neutral.⁹¹ Thus, the issue of whether the government can restrict speech will depend primarily on whether the forum is public or nonpublic.⁹² The Supreme Court has justified the lesser standard for the nonpublic forum by likening the government's status in a nonpublic forum to a private owner of property, who may restrict the general public's access to that property.⁹³ Because the government, like a private owner, may prohibit access to property that qualifies as a nonpublic forum, the government may impose also discriminatory criteria in granting access.⁹⁴ Regardless of the forum, however, the government cannot discriminate against particular viewpoints.⁹⁵

The Eleventh Circuit Court of Appeals in *Bishop v. Aronov*⁹⁶ strongly indicated that any analysis of the issues in *Bishop* should not focus on a public-forum approach.⁹⁷ The appellate court, nevertheless, relied heavily

89. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (holding that state may place content-based restrictions on speech in public forum only if it substantiates compelling state interest and state narrowly draws regulation to achieve desired end).

90. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361-62 (1978) (Brennan, White, Marshall, Blackmun, J.J., concurring in part and dissenting in part) (arguing that Court ought to apply mid-level scrutiny to beneficial race classifications because strict scrutiny analysis automatically would invalidate statute despite strong state interests); Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that courts' application of strict scrutiny standard is almost always fatal to statute being reviewed).

91. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (stating that in non-public forum, such as high school sponsored newspaper, school administrators may place restrictions on student speech provided restrictions are reasonably related to legitimate pedagogical concerns).

92. See *supra* note 87-92 and accompanying text (arguing that court's determination of forum status is often determinative of outcome).

93. See *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (quoting *Commonwealth v. Davis*, 140 Mass. 485 (1886) for proposition that state restriction of public speeches in middle of interstate highways is comparable to private owner of land forbidding public speech on that citizen's front lawn); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1752 (1987) (noting that theory that government can regulate use of forum by public is predicated on fact that government, if it so chose, could completely exclude public).

94. See *supra* note 93-94 and accompanying text (noting policy justifications behind government's power to regulate speech in public forum).

95. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983) (stating that government may not enjoin speech simply because it disagrees with speaker's viewpoint); Geoffrey R. Stone, 25 WM. & MARY L. REV. 189, 202 (1983) (arguing that equal treatment of viewpoints is at epicenter of First Amendment protections against government regulation of free speech).

96. 926 F.2d 1066 (11th Cir. 1991).

97. See *Bishop v. Aronov*, 926 F.2d 1066, 1070-71 (11th Cir. 1991) (stating that *Bishop* is not forum case).

on *Kuhlmeier* and its progeny, which employed the public-forum analysis.⁹⁸ Although the Eleventh Circuit stated that it was attempting to establish a balance between institutional and individual academic freedom, in fact the appellate court relied on the principles governing the nonpublic forum analysis.⁹⁹ For example, as a first step, the court indicated that the classroom is not a public forum during instructional time.¹⁰⁰ The Eleventh Circuit then analyzed whether the University's restrictions were reasonably related to pedagogical goals.¹⁰¹ The *Bishop* court's analysis, therefore, clearly resembles the *Kuhlmeier* nonpublic forum analysis.¹⁰² Thus, when the *Bishop* court declared that "this is not a forum case," the court must have meant only that the classroom was a nonpublic forum during instructional periods, not that the forum analysis was inappropriate in this context.¹⁰³

In arriving at the conclusion that the university classroom is a nonpublic forum during instructional periods, the *Bishop* court relied heavily on the principles which *Kuhlmeier* set forth for identifying the forum status of a scholastic venue.¹⁰⁴ *Kuhlmeier* is distinguishable from *Bishop*, however, because *Kuhlmeier* involved school-sponsored speech at the secondary-school level, whereas *Bishop* involved university-level speech.¹⁰⁵ The distinction is

98. See *Bishop*, 926 F.2d at 1074 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), as basis of Eleventh Circuit's balancing test for rights of Professor Bishop and University). *Kuhlmeier* distinguishes between those areas of a school which the school has opened to the public and those areas to which the school has lent its resources and thereby bear the imprimatur of the school. *Kuhlmeier*, 484 U.S. at 268-73. Areas which fall into the second classification, such as a school newspaper that is associated with the curriculum, are non-public areas. *Id.* The *Bishop* court also relied on *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), and *Alabama Student Party v. Student Government Association*, 867 F.2d 1344 (11th Cir. 1989), as authority for the proposition that a school has a right to control the speech of its teachers in the classroom because teachers' classroom speech may reasonably be deemed to bear the imprimatur of the school. *Bishop*, 926 F.2d at 1073.

99. See *infra* notes 96-103 and accompanying text (arguing that *Bishop* court utilized non-public-forum analysis in arriving at its decision despite court's adamant statement that *Bishop* was not forum case).

100. See *Bishop*, 926 F.2d at 1071 (concluding that University of Alabama had not opened up its classrooms for indiscriminate public use during instructional periods).

101. *Id.* at 1074-75 (holding that University of Alabama is entitled to place restrictions on classroom activities provided that restrictions are reasonably related to legitimate pedagogical concerns).

102. *Id.* In fact, the *Bishop* court's holding that school administrators do not offend the First Amendment by regulating the content of speech in school-sponsored, expressive activities provided that the administrators' actions are reasonably related to legitimate pedagogical concerns is almost a direct quote from the Supreme Court's holding in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). *Bishop*, 926 F.2d at 1074.

103. See *Bishop*, 926 F.2d at 1071 (holding that University of Alabama's classrooms are not public forums).

104. See *id.* (following *Kuhlmeier* in holding that school-sponsored, expressive activities are non-public forums).

105. Compare *id.* at 1066-68 (noting that *Bishop* involved speech restrictions at University of Alabama), with *Kuhlmeier*, 484 U.S. at 262 (noting that *Kuhlmeier* involved student speech at Hazelwood East High School). See *infra* notes 101-104, and accompanying text (distinguishing *Bishop* and *Kuhlmeier*).

significant because one of the major policies behind *Kuhlmeier* is that primary and secondary schools must be able to restrict and regulate student and teacher speech in order to fulfill their function to inculcate civic values.¹⁰⁶ Because primary and secondary schools educate a less mature audience and act as an important source of values for those students, the Supreme Court has held that those schools may regulate heavily the content of speech within their facilities provided that the restrictions are rationally related to legitimate pedagogical concerns.¹⁰⁷ This policy of inculcating values is inconsistent, however, with the Supreme Court's description of universities as marketplaces of ideas.¹⁰⁸ Because students at the university level are more mature than high school students, inculcation of values is an inappropriate doctrine in the university setting and does not justify the extensive control of speech that *Kuhlmeier* grants to the secondary schools.¹⁰⁹

A more appropriate standard for reviewing school regulation of students' and teachers' speech at the university level is the standard first articulated in *Tinker* and utilized as well by the district court in *Bishop*: That university officials may not enjoin students' or professors' speech unless the activity substantially or materially disrupts class.¹¹⁰ *Kuhlmeier*'s low standard of review provides little protection to professors' First Amendment rights, thereby decreasing the diversity of views discussed in America's universi-

106. *Kuhlmeier*, 484 U.S. at 272. The *Kuhlmeier* Court indicates that a secondary school may discriminate between particular viewpoints in fulfilling its role as an inculcator of civic values. *Id.* For example, the *Kuhlmeier* Court stated that a high school could discriminate against speech that advocated the use of illegal drugs or irresponsible sex. *Id.* Considering the fact that many schools promote programs that advance an anti-drug (Say No to Drugs) or a safe sex theme, discrimination against speech advocating drug use and sex is content-based. The Court might take a dimmer view of such viewpoint discrimination at the collegiate level, given universities' mission as the marketplace of ideas. See *supra* notes 53-56, and accompanying text (noting that Supreme Court has recognized right of academic freedom which protects and encourages free exchange of ideas).

107. *Kuhlmeier*, 484 U.S. at 272. See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986) (stating that rights of students in public schools are not as broad as rights of adults in other forums); *Board of Educ. v. Pico*, 457 U.S. 853, 864, 869 (1982) (stating that local school boards must be allowed to regulate public school curriculum in order to accomplish their mission to inculcate community values).

108. See *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (stating that college campuses possess many of characteristics of public forum because of its status as marketplace of ideas); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Warren, C.J., plurality opinion) (same); *Healy v. James*, 408 U.S. 169, 180 (1972) (same).

109. *Cf. Widmar*, 454 U.S. at 274 n.14, 271 n.10 (noting that university students are more mature than primary and secondary school students and that universities are open forums for exchange of ideas). The paradigm of the university campus as an open forum where mature individuals test and exchange ideas in a search for knowledge seems antithetical to the paradigm of primary and secondary schools which envisions public schools as an inculcator of values, thus justifying limitation of free speech. See *supra* notes 105-13 and accompanying text (arguing that policies underlying Court's treatment of free speech at primary and secondary schools are inappropriate at university level).

110. See *Clarick*, *supra* note 1, at 732 (arguing that universities should not be allowed to place restrictions on teachers' speech unless university can show that speech would undermine educational process).

ties.¹¹¹ The Court has recognized that diversity of viewpoints, for its own sake, is a constitutionally fundamental concern of university education.¹¹² Additionally, the First Amendment rights of teachers ensure that the government cannot successfully inculcate an orthodoxy of state approved ideas by exerting its considerable influence over the massive public university system.¹¹³

Despite the important distinctions between the goals of secondary schools and universities, *Kuhlmeier* indicates unfortunately that the principles governing the restriction of free expression in high schools are equally applicable to a university setting.¹¹⁴ Because the Eleventh Circuit was concerned that school officials, both at the university and secondary school level, must retain control of the curriculum to accomplish their objectives, the court used the same principles to analyze speech at the university and secondary school levels despite the important difference in their goals.¹¹⁵ The Eleventh Circuit observed that if the First Amendment protects a professor's speech in the classroom, then precedent would require courts to subject any school

111. See Clarick, *supra* note 1, at 728-29 (arguing that strict First Amendment protection encourages teachers to express and discuss wider spectrum of viewpoints and theories). Clarick argues that diversity of teaching style and classroom environment encourages students to evaluate the diverse viewpoints and thereby enhances the students' critical thinking skills. *Id.* at 724-26.

112. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 340-41 (1978) (Powell, J., plurality opinion) (holding that University's interest in diverse student body is sufficiently compelling interest to satisfy strict scrutiny standard that was applied by Court to suspect classifications such as race); *Sweezy v. New Hampshire* 354 U.S. 234, 250 (1957) (Warren, C.J., plurality opinion) (noting that mankind does not have such complete knowledge of any academic discipline as to preclude usefulness of new theories).

113. See Clarick, *supra* note 1, at 730 (noting that pervasive size and influence of public school system makes it an excellent vehicle for government to inculcate government approved views). See also *supra* notes 42-47, and accompanying text (noting that teachers' academic freedom can complement institutional freedom to prevent government control of students' minds). *But see* *Rust v. Sullivan*, 111 S.Ct. 1759, 1776 (1991) (stating that government cannot constitutionally tie conditions to funding of public university system).

114. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (using indiscriminately holdings of both university and secondary school cases).

115. See *Bishop v. Aronov*, 926 F.2d 1066, 1074 (11th Cir. 1991) (holding that *Kuhlmeier* standard for determining when school may enjoin expressive activity is equally applicable to college classroom during instructional periods). The Eleventh Circuit was concerned greatly that the university must be able to regulate speech in order to fulfill its educational purpose. *Id.* at 1075. However, the standard of review articulated in *Tinker* would permit the university to censor any speech which materially disrupts its educational operations. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 513 (1969). The university may influence also the professor's conduct through its administration of work evaluations, compensation and tenure. See generally David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy*, 66 TEX. L. REV. 1405 (1988) (noting that university review committees have great deal of coercive force influence over professors' actions). Additionally, professors' ethical conduct is governed by a code of conduct promulgated by the American Association of University Professors (AAUP) which mandates that a professor may not abuse his or her position to indoctrinate students. See American Assoc. of Univ. Professors, *Declaration of Principles*, reprinted in Louis Joughin, *American Freedom and Tenure*, app. A at 170, 173 (1969).

restrictions on a professor's expressive activity to strict scrutiny.¹¹⁶ Because strict scrutiny requires a case-by-case approach in analyzing the legitimacy of any government regulation on free speech, the court of appeals posited that imposing such a standard on classroom speech restrictions would embroil the courts in curriculum decisions.¹¹⁷ The Eleventh Circuit also might have been concerned that application of strict scrutiny to school regulations on expressive activity would violate the principle of institutional freedom because the federal courts are a branch of the federal government.¹¹⁸

If cases governing restrictions on speech in secondary schools are applicable to restrictions on speech at the university level, then *Kuhlmeier* is dispositive on the issue of whether the college classroom is a public forum during instructional periods.¹¹⁹ *Kuhlmeier* held that if the school administration reserves the forum for particular school programs or other specific purposes then the administration has not created a public forum.¹²⁰ *Kuhlmeier* defines "other specific purposes" to include any activity that the school affirmatively promotes, such as traditional classroom activities.¹²¹ *Kuhlmeier* further held that a school does not transform a nonpublic forum such as the classroom into a public forum merely by sanctioning limited discourse unless the school intentionally opens the nonpublic forum for public use.¹²² Under the *Kuhlmeier* approach, because the University of

116. Cf. *Bishop*, 926 F.2d at 1075 (noting that if Court would hold that professors have independent First Amendment right protecting classroom speech, Court would become "ersatz deans"). Strict scrutiny analysis is extremely difficult to satisfy. See Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (arguing that courts' application of strict scrutiny standard is almost always fatal to statute being reviewed). It is very likely that any restriction the school would attempt to fashion would fail to satisfy this rigorous standard of review. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 361-62 (1978) (Brennan, White, Marshall, Blackmun J.J., concurring in part and dissenting in part) (arguing that Court ought to apply mid-level scrutiny to beneficial race classifications because strict scrutiny analysis automatically would invalidate statute despite strong state interests).

117. See *Bishop*, 926 F.2d at 1075 (stating that the courts should not invade province of school administrators by remaking curriculum decisions).

118. See J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 304-07 (1989) (arguing that judges are federal officials who threaten institutional freedom of universities). Although intervention in school operations by the judicial branch has been found traditionally to be less dangerous than intervention by the executive or legislative branch, this perception may change given the politicizing of the Supreme Court and the Court's past willingness to engage in pseudo-legislative activities. *Id.*

119. See *Bishop*, 926 F.2d at 1074 (stating that case was controlled by Supreme Court's decision in *Hazelwood Sch. Dist. v. Kuhlmeier*).

120. *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 267 (1988) (citing *Perry Educ. Assn v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, n.7 (1983), for proposition that school is open forum only if school administration has intentionally opened school facilities to public by policy or practice).

121. *Id.* at 270-71.

122. See *id.* at 267 (citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 802 (1985), for proposition that government never creates public forum by inaction, but only when government intentionally opens forum for public discourse). The University of

Alabama did not intentionally open its classes to the general public for expressive activity, its classrooms are nonpublic forums during instructional periods.¹²³

Because *Kuhlmeier* held that the classroom is a nonpublic forum during instructional periods, any school regulation of expressive activity in the classroom must be for reasons that are reasonably related to pedagogical concerns and must be viewpoint neutral.¹²⁴ One of the University of Alabama's rationales for enjoining Professor Bishop's religious speech was that the University, not the Professor, should define the scope of the curriculum.¹²⁵ Because the primary purpose of a university is to fashion a curriculum for its students, the Supreme Court most likely would find such a rationale for enjoining Professor Bishop's comments and optional class to be reasonable.¹²⁶

Although the Eleventh Circuit did address the reasonableness of the University of Alabama's restrictions on Professor Bishop's speech, the court

Alabama did encourage its professors to engage in "opinion speech," or speech that does not fall within the confines of the course description, with their students in order to establish rapport. Although the University intentionally promoted "opinion speech," such activity probably does not fall under the rubric of intentionally opening the forum to public discourse. *Bishop*, 926 F.2d at 1069.

123. See *Bishop*, 926 F.2d at 1071 (holding that University of Alabama did not open its classrooms to public during instructional periods).

124. See *supra* notes 97-126 and accompanying text (applying forum analysis to college classroom speech); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983) (holding that government restrictions in non-public forum must not suppress expression merely because public officials oppose speaker's view). Some scholars have interpreted this language in *Perry* as meaning that the government officials must oppose personally the speaker's views. See Post, *supra* note 91, at 1750 (noting that government may place restrictions on speech in nonpublic forums provided that restrictions are reasonable and are not result of official opposition to speaker's viewpoint). This construction would mean that the government could unintentionally engage in viewpoint discrimination without violating the speaker's First Amendment rights. *Id.* Because viewpoint discrimination is the most abhorrent form of speech discrimination, this construction would violate the Supreme Court's holding that viewpoint discrimination of any kind is impermissible. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985).

125. *Bishop*, 926 F.2d at 1075. The University also claimed that it imposed the restrictions because the University was concerned that classroom comments and optional classes containing religious bias may violate the Establishment Clause. *Id.* at 1565.

126. See *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (holding that government may choose between different types of nonprofit organizations in selecting participants for charity drive provided that discrimination is reasonable in light of purpose of forum). In *Cornelius*, the Court found that avoidance of controversy was reasonable in light of the forum's purpose. *Id.* In *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), the Court evaluated the existence of alternative channels that remained open for public discussion as a factor bearing on the reasonableness inquiry. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 52-53 (1983); see *infra*, note 129 (describing case background). Professor Bishop had alternative means, such as extracurricular meetings and seminars, in which to express his views to his students. Deposition of Rodney Roth, taken 1-5-89, p. 24, lines 1-5. The University's restriction on religious speech and optional classes involving religious themes would appear to be reasonable under the Court's analysis in *Perry*. *Perry*, 460 U.S. at 52-53.

did not consider whether these restrictions were viewpoint neutral.¹²⁷ In a nonpublic forum, the government may discriminate permissibly on the basis of subject matter or speaker identity, but may not discriminate against particular viewpoints.¹²⁸ The Supreme Court has not clearly differentiated subject matter discrimination and viewpoint discrimination, but Justice Brennan provided some guidance in his dissent in *Perry Educational Ass'n v. Perry Local Educators' Ass'n*.¹²⁹ Justice Brennan indicated that subject matter discrimination permits the government to select those subject areas that are suitable to a particular forum, whereas the requirement of viewpoint neutrality prohibits discrimination between viewpoints on those selected subjects.¹³⁰ The Eleventh Circuit tackled the subject-matter-based discrimination versus viewpoint-based discrimination problem in *Chandler v. Georgia Public Telecommunications Commission*.¹³¹ The *Chandler* court addressed whether a television station engaged in viewpoint discrimination when it

127. See *Bishop*, 926 F.2d at 1077-78 (noting only that University did not discriminate against Christian viewpoint only but against all religious viewpoints). *Bishop* did address viewpoint discrimination, but only in the context of an Establishment Clause violation. See *Bishop*, 926 F.2d at 1077 (noting that University of Alabama enjoined Professor Bishop's speech because the University did not want to appear to support Professor Bishop's religious viewpoint). Professor Bishop argued that the University, by excluding religious speech, was establishing a religion itself, namely atheism. *Id.* The Eleventh Circuit held that such restrictions did not advance any religion but were an attempt to maintain a neutral, secular forum. *Id.*

128. See *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983) (stating that the school did not discriminate between unions on basis of viewpoint but rather on basis of union's status). In *Widmar v. Vincent*, 454 U.S. 263 (1981), the government impermissibly discriminated on the basis of content, favoring secular student groups over religious student groups. *Widmar*, 454 U.S. at 269. In *Hazelwood School Dist v. Kuhlmeier*, 484 U.S. 260 (1988), the Court was careful to note that the school officials discriminated on the basis of emotionally mature topics that were inappropriate for secondary school students rather than on hostility to the speakers' viewpoints. *Kuhlmeier* 484 U.S. at 272.

129. 460 U.S. 37 (1983). As part of a collective bargaining agreement, the Board of Education designated the Perry Education Association (PEA) as the exclusive representative for the school district's teachers. *Perry*, 460 U.S. at 39-41. The collective bargaining agreement also contained a clause whereby the PEA would have exclusive access to the teachers' school mailboxes. *Id.* The Perry Local Educators' Association (PLEA) brought suit against PEA and school officials, contending that the exclusive access policy violated the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 41. The Court held that the school board had not violated PLEA's First Amendment rights because it had reserved the forum (the mailboxes) for other intended purposes. *Id.* at 48. Because the school board had restricted access to the mailboxes, they were not a public forum. *Id.* The Court stated that in a nonpublic forum, the school board's restriction of access to PLEA need only have a rational basis. *Id.* at 49. The Court held that the school board's interest in complying with its collective bargaining agreement is a sufficiently rational reason to withstand PLEA's First Amendment claim. *Id.* at 50-53.

130. *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 59, 61 (1983) (Brennan, J., dissenting). See Paul B. Stephan, III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 218 (1982) (arguing that government engages in viewpoint discrimination when it singles out particular views or ideas for regulation while exhibiting no control over closely related or directly competing ideas); *Board of Educ. v. Pico*, 457 U.S. 853, 879 (1982) (holding that government permissibly may discriminate between ideas).

131. 917 F.2d 486 (11th Cir. 1990).

excluded the Libertarian candidate for lieutenant governor from a debate which involved Republican and Democratic candidates.¹³² *Chandler* held that the government was not discriminating against the excluded speaker's viewpoint, but rather that the government discriminated only against the candidate's status as a minority party candidate.¹³³ *Chandler* held that administrators of the forum could discriminate provided that the officials were not motivated by opposition to the speaker's views.¹³⁴

Bishop is distinguishable from *Chandler* because in *Chandler* the forum administrators did not discriminate against individual's opinion, but rather against his status as a minority candidate and the limited resources of the television station.¹³⁵ In *Bishop*, however, the University of Alabama generally permitted all opinion speech except that with religious overtones.¹³⁶ As an example, the University of Alabama's restriction would not prevent a Marxist from revealing his political opinions in his physiology course, but would prevent a professor from revealing his religious opinions in a sociology course.

The Eleventh Circuit characterized the University of Alabama's injunction against Professor Bishop's religious speech as subject matter discrimination because the University simply was limiting the exercise physiology curriculum so as not to include religious topics.¹³⁷ The district court, on the other hand, characterized the University of Alabama's restriction as viewpoint-based discrimination for several reasons.¹³⁸ First, the record in *Bishop* showed that the University of Alabama did not prohibit other faculty members from engaging in speech involving personal views and opinions that were outside the stated curricula for their courses.¹³⁹ In fact, the University of Alabama actually encouraged other faculty members to engage in opinion speech to establish a rapport with students and to facilitate academic freedom.¹⁴⁰ Second, the University's speech restriction only pro-

132. *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d at 487-88.

133. *Id.* at 489.

134. *Id.* at 489 (citing *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985), for proposition that government impermissibly discriminates against viewpoints only when it intentionally enjoins particular viewpoint on basis of hostility toward that viewpoint).

135. See *supra* notes 132-34 and accompanying text (noting that *Chandler* court held that television station had discriminated on basis of speaker's status and not speaker's viewpoint).

136. See *supra* notes 10-19 and accompanying text (noting that University of Alabama prohibited Professor Bishop from interjecting personal religious beliefs into classroom discussion).

137. *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991). The *Bishop* court indicated that the University of Alabama wished only to prohibit Professor Bishop from making comments about religion which were unrelated to the subject matter of his course. *Id.* at 1075.

138. See *Bishop v. Aronov*, 732 F. Supp. 1562, 1568 (N.D. Ala. 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991) (stating that University of Alabama's speech restriction only enjoins Christian perspectives on academic topics and does not address Jewish, Hindu or other religious viewpoints that might be brought up in classroom).

139. *Bishop v. Aronov*, 926 F.2d 1066, 1069 (11th Cir. 1991).

140. See *id.* at 1069, 1071 (finding opinion speech to be norm, provided that it did not

hibited the discussion of Christian perspectives and not the perspectives of other religions.¹⁴¹ Additionally, the idea of grand design in human evolution is a valid scientific viewpoint on the subject of the development of human physiology.¹⁴² Thus, the University of Alabama's speech restriction apparently constitutes viewpoint discrimination and is, therefore, invalid despite its rational relationship to legitimate pedagogical concerns.¹⁴³

Assuming that the University of Alabama is engaging in viewpoint discrimination by proscribing professors from making comments of a religious nature during instructional periods, the University is violating its professors' First Amendment rights.¹⁴⁴ The appropriate level of review for First Amendment violations is strict scrutiny.¹⁴⁵ To have its prohibition upheld, the University bears a heavy burden to prove that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.¹⁴⁶ Although there were arguments at trial concerning whether the regulation was sufficiently narrow to satisfy the second prong of this test,¹⁴⁷ the first prong of this test, evaluating the compelling interest

interfere with basic curriculum and finding that University of Alabama endorsed use of opinion speech by faculty to establish rapport with students).

141. See *supra* note 18 (quoting University of Alabama's memo to Professor Bishop); see also *Bishop v. Aronov*, 732 F. Supp. 1562, 1568 (N.D. Ala. 1990) (noting that University of Alabama's speech restriction only addresses Christian doctrines), *rev'd*, 926 F.2d 1066 (11th Cir. 1991).

142. See *Edwards v. Aguillard*, 482 U.S. 578, 612 (1987) (Scalia, J., dissenting) (noting that some agnostic scientists who are adherents of evolutionary theory also recognize existence of evidence consistent with Judeo-Christian theories of origin).

143. See *supra* notes 137-43 and accompanying text (arguing that University of Alabama's speech restriction constitutes viewpoint discrimination).

144. See *Cornelius v. NAACP Defense & Educ. Fund*, 473 U.S. 788, 806 (1985) (holding that government violates speaker's First Amendment rights when it engages in viewpoint discrimination absent compelling interest); see also *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (holding that University of Missouri at Kansas City abridged plaintiff's First Amendment rights when University engaged in content-based discrimination absent compelling interest by prohibiting religious groups from using facilities because of religious viewpoint).

145. See *Widmar v. Vincent*, 454 U.S. 263, 270 n.7 (1981) (citing *Healy v. James*, 408 U.S. 169, 180 (1972), for proposition that burden of proof rests decidedly with university to show that its regulation is appropriate when university impinges on students' First Amendment rights).

146. *Id.* at 271.

147. See *Bishop v. Aronov*, 732 F. Supp. 1562, 1566 (N.D. AL 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991) (discussing plaintiff's argument that University of Alabama's regulation was overbroad); *Bishop v. Aronov*, 926 F.2d 1066, 1070-71 (11th Cir. 1991) (same). Plaintiff argued that the University's regulation prohibiting any religious commentary proscribed him from teaching about the history of physiology, much of which concerned theories of creationism formulated in medieval European Universities. *Bishop*, 732 F.Supp. at 1566. The appellate court did not accept the plaintiff's argument, stating that when the court encounters a facial challenge to a statute, it will uphold that statute if it is amenable to a narrow construction that would make it constitutional. See *Bishop*, 926 F.2d at 1071 (citing *Virginia v. American Booksellers Assoc.*, 484 U.S. 383, 397 (1988), as precedent for narrow construction of statutes when addressing facial challenges). The appellate court held that Professor Bishop should understand simply by applying standards of professionalism that the regulation meant he should separate his personal and professional beliefs. *Id.*

of the University in promulgating its regulation, is of particular importance in this case.¹⁴⁸

ESTABLISHMENT CLAUSE AND ACADEMIC FREEDOM

To satisfy the first prong of the strict scrutiny standard, the University of Alabama advanced two rationales for its regulation barring religious speech.¹⁴⁹ First, the University of Alabama alleged that it had a compelling interest in controlling the content of its curriculum.¹⁵⁰ Second, the University argued that it would violate the Establishment Clause of the First Amendment if it permitted religious opinion speech in its classrooms.¹⁵¹ The Eleventh Circuit in *Bishop* relied heavily on the first rationale and did not reach the Establishment Clause argument.¹⁵² The Eleventh Circuit used a rational basis standard of review to analyze whether the University's interest in controlling its curriculum was sufficiently compelling to justify impinging on its professors' free speech rights.¹⁵³ However, because this case involves viewpoint discrimination, the Eleventh Circuit should have applied a strict scrutiny standard.¹⁵⁴

The Supreme Court addressed the question of whether a school's interest in its curriculum was a sufficiently compelling interest to satisfy strict

148. *Cf. Bishop*, 926 F.2d at 1071-77 (evaluating University of Alabama's interest in regulating speech of its students and professors).

149. Deposition of Carl Westerfield, taken 1-5-89, p. 15, line 14 - p.16, line 19 (stating that University of Alabama originally took action against Professor Bishop's religious classroom comments in response to student complaints). As it turned out, only one student had complained about Professor Bishop's religious speech. Deposition of Phillip A. Bishop, taken 3-14-89, p. 81, line 2 - p. 82, line 3.

150. *Bishop*, 926 F.2d at 1074, 1077.

151. *Id.*

152. *Id.* at 1077. Although the appellate court did not reach the Establishment Clause issue, it noted that the University's concern would be justified if one of its professors engaged in proselytizing in the classroom. *Id.* In particular, the appellate court found that Professor Bishop's optional class particularly was suspect as an Establishment Clause violation. *Id.*

153. *See id.* at 1074 (relying on language in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266-67 (1988), indicating that high schools should be able to place reasonable restrictions on school-sponsored speech). It should be noted that the proscribed speech in *Kuhlmeier* would fall within the ambit of subject matter discrimination. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (holding that school may prohibit speech on sensitive topics). For example, students could not put articles in the paper that dealt with adult subjects like pregnancy. *Id.* at 263. Thus, *Kuhlmeier* is not a case of viewpoint-based discrimination as defined for the purposes of this article. *See supra* notes 129-34, and accompanying text (arguing that subject matter discrimination involves excluding certain topics from forum whereas viewpoint discrimination involves excluding certain viewpoints that are related to otherwise permissible topics).

154. *See Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981) (holding that University of Missouri at Kansas City's prohibition against religious student groups using university facilities violates student's First Amendment rights and that, absent university's compelling interest, prohibition is unconstitutional); *see supra* notes 105-13, and accompanying text (arguing that rational basis test is too low level of review at university level because of distinctions between students' analytical abilities and schools' educational goals at different levels).

scrutiny in *Tinker v. Des Moines Independent School District*.¹⁵⁵ In *Tinker*, the Court held that a school's interest in controlling its curriculum was insufficient to justify the abridgement of its teachers' and students' First Amendment rights unless the speech causes significant disruption and interference in the classroom.¹⁵⁶ Because no University of Alabama administrator, professor, or student asserted that Professor Bishop's remarks materially disrupted the educational process, the University cannot justify, as a compelling interest, its concern for the content of its curriculum.¹⁵⁷ The University of Alabama's interest in adhering to the constitutional requirements of the Establishment Clause, on the other hand, is a sufficiently compelling interest to satisfy strict scrutiny.¹⁵⁸ The Establishment Clause protects against government action that tends to involve or encroach on religious concerns.¹⁵⁹ The Establishment Clause prohibits the government from actively or passively supporting a particular religious sect.¹⁶⁰ If the Establishment Clause is not triggered by Professor Bishop's comments, however, then there is no

155. 393 U.S. 503 (1969).

156. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 509 (1969) (holding school's regulation against wearing of armbands unconstitutional because armbands did not materially disrupt class).

157. Deposition of Rodney Roth, taken 1-5-89, p. 29, lines 1-6 (asserting that University of Alabama regarded Professor Bishop to be excellent instructor and that he was making steady progress toward early tenure). The only evidence of a disruption in Professor Bishop's classroom was the single student complaint that Professor Bishop's comments were offensive. Deposition of Phillip A. Bishop, taken 3-14-89, p. 81, line 2 - p. 82, line 3. As noted by the Ninth Circuit in *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir. 1985), cert. denied, 474 U.S. 826 (1985), the fact that speech is offensive is not a sufficient basis for the government to enjoin it:

The inevitability of this conflict between plaintiffs' religious rejection of "secularization" and the secularization of society suggests why antipathy alone . . . is never enough to sustain a free exercise challenge. Plaintiffs are religiously offended by a particular novel; others previously before us have been religiously offended by Trident submarines or the nuclear arms race. Were the free exercise clause violated whenever government activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.

Id. at 1542.

158. See *Widmar*, 454 U.S. at 271 (holding that university's interest in complying with Establishment Clause was compelling interest); see also, *Engel v. Vitale*, 370 U.S. 421, 436 (1962) (holding that New York statute requiring recitation of non-denominational prayer in public schools violated Establishment Clause because statute had primary effect of advancing religion).

159. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that state funding of teaching of secular subjects in parochial schools is unconstitutional); see also *Walz v. Tax Comm'n*, 397 U.S. 664 (1980) (upholding government's granting of tax-exempt status to churches as not violative of Establishment Clause).

160. See *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982) (stating that mere appearance of government action favoring particular religious sect is of great symbolic importance to that sect); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-5, at 825 (1st ed. 1978) (arguing that perception of public school endorsement of particular religion constitutes especially egregious violation of Establishment Clause because public schools are primary medium used to inculcate values in American youth).

need to discuss whether those comments violated the Establishment Clause using the test outlined in *Lemon v. Kurtzman*.¹⁶¹

Triggering the Establishment Clause

The facts in *Bishop* do not trigger the Establishment Clause for two reasons: first, Professor Bishop's students could not have perceived that his comments bore the imprimatur of the University; and second, Professor Bishop's comments were not truly religious.¹⁶² The Establishment Clause is implicated only when the government intentionally supports or undermines a particular religious sect, or when it is likely that the public will perceive that the government seeks to support or undermine a particular religion.¹⁶³ With regard to the first factor that triggers the Establishment Clause, the Court may look at Professor Bishop's background to determine if Professor Bishop made his comments with an intent to support religion.¹⁶⁴ Professor Bishop is an avowed Christian and had, at one time, advocated special scholarships for Christian students.¹⁶⁵ The Court could infer from these facts that Professor Bishop intended to indoctrinate his students.¹⁶⁶ Professor Bishop's actions, however, refute this notion. Professor Bishop's candid exposure of his bias and his invitation to students to critically analyze his statements clearly indicate that Professor Bishop did not intend to indoctrinate.¹⁶⁷

The motivating concern behind the second factor that triggers the Establishment Clause is that students might perceive that the school encourages them to adopt a particular religious viewpoint when religion enters the classroom.¹⁶⁸ This is especially true at the primary and secondary school

161. 403 U.S. 602 (1971). See *infra* note 206 and accompanying text (noting that if Professor Bishop's opinion speech during instructional periods did trigger Establishment Clause then Court must apply three prong test which Court first articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

162. See *infra* notes 162-205 and accompanying text (arguing that Professor Bishop's comments do not trigger Establishment Clause).

163. See *Lynch v. Donnelly*, 465 U.S. 688, 688 n.1 (1984) (O'Connor, J., concurring) (stating that central concern of Establishment Clause is that public not perceive government as supporting particular religion).

164. See generally *Edwards v. Aguillard*, 482 U.S. 578 (1987) (discussing past history of Arkansas state legislature in determining nature of legislature's intent in promulgating statute that mandates that Scientific Creationism be taught whenever evolutionary theory is studied).

165. *Bishop v. Aronov*, 926 F.2d 1066, 1068, 1069 n.2 (11th Cir. 1991).

166. See generally *Edwards*, 482 U.S. at 589 (noting that Arkansas state legislature had history of promulgating statutes which promoted religion).

167. *Bishop*, 926 F.2d at 1068.

168. See Nadine Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333, 359 (1986) (noting that Supreme Court's primary concern has invariably been that students will perceive that government supports religion if public school curriculum includes religious material); see also TRIBE, *supra* note 160, at 825 (noting that Supreme Court has held that public school's symbolic support of religion violates Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding unconstitutional statute that requires equal

level where students are at very impressionable ages.¹⁶⁹ The perceived indoctrination is particularly egregious in a scholastic setting because students are a captive audience and under great pressure to assimilate themselves.¹⁷⁰ Thus, the Court has struck down statutes which authorize the school to release students from regular classes to attend special on-campus religious classes,¹⁷¹ programs that mandate the teaching of Scientific Creationism,¹⁷² as well as policies that allow for the reading of a nondenominational prayer¹⁷³ or a moment of silence at the beginning of each school day.¹⁷⁴

The reasons for finding Establishment Clause violations for religious activity by teachers at the primary and secondary level are not as salient at the undergraduate and graduate school level.¹⁷⁵ College students are less impressionable than their primary and secondary school counterparts and, therefore, less likely to feel pressured by religious ideas or doctrines.¹⁷⁶ In

time for Scientific Creationism whenever public schools include evolutionary theory in curriculum because students might well perceive that government advocates Judeo-Christian religious traditions).

169. See Strossen, *supra* note 168, at 370 (citing Jesse H. Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 343-44 (1963), for proposition that students at primary and secondary school level are under powerful compulsion to conform, so that religious material in curriculum will strongly pressure students in religious minority to adopt religious viewpoints); *FCC v. Pacifica Found.*, 438 U.S. 726, 757-58 (1978) (recognizing that public has right to control more actively children's access to information than adults' because 'a child . . . is not possessed of that full capacity for individual choice which is presupposition of First Amendment guarantees'); see also, *supra* notes 105-13 and accompanying text (arguing that courts should not treat First Amendment rights of undergraduate and graduate students the same as primary and secondary school students due to increased maturity of students and different functions of forums).

170. See Strossen, *supra* note 168, at 369 (noting that state compulsory education laws require that children attend school); see also Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953) (arguing that government has deprived commuters riding on public buses of their liberty by subjecting riders to radio advertisement that subconsciously affects riders' behavior).

171. See *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (holding that Illinois program which permitted students to elect to leave regular classes and attend religious classes violated Establishment Clause because program indirectly coerced students to attend religious classes).

172. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding unconstitutional statute that required equal time for Scientific Creationism whenever public schools taught evolutionary theory because schoolchildren might well perceive that government advocates Judeo-Christian explanation for origin of human life). U

173. See *Engel v. Vitale*, 370 U.S. 421 (1962) (holding unconstitutional New York statute requiring mandatory prayer in public schools).

174. See *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding unconstitutional Alabama statute requiring one minute period of silence at beginning of class).

175. See *supra* notes 105-13 and accompanying text (arguing that universities have different educational purpose than primary and secondary schools which requires that courts subject speech restrictions to higher level of scrutiny at collegiate level than at primary and secondary school level).

176. See *Tilton v. Richardson*, 403 U.S. 672, 686 (1976) (stating that college students are much less impressionable and will approach opinions and doctrines with skeptical eye); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (noting that college students are less impressionable than younger students and are able to make valid and informed judgments as to whether university is supporting or undermining religion).

fact, the Supreme Court has recognized that the public university system ought to provide university students with a skeptical academic environment and expose students to a wide variety of ideas and doctrines.¹⁷⁷

Because university students attend a variety of classes that expose students to varying and often conflicting opinions of different professors, it is unlikely that a student could point to the personal comments of a single professor and perceive that the professor's ideas bear the imprimatur of the university.¹⁷⁸ The situation is similar to that presented in *Widmar v. Vincent*.¹⁷⁹ In *Widmar*, the University of Missouri at Kansas City (UMKC) was concerned that it would violate the Establishment Clause by allowing a student religious organization to use its facilities, thereby causing other students to perceive that UMKC supported a particular religious sect.¹⁸⁰ The *Widmar* Court reasoned that because the university's facilities were open to all groups, it did not confer any special benefit on one particular viewpoint.¹⁸¹ *Widmar* suggests that whenever the university provides open access to its facilities, the use of the facility by a religious group does not violate the Establishment Clause.¹⁸² Thus, in a more narrow sense, because the University of Alabama allows and encourages professors to use their class-

177. See *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (stating that university ought to be market place of ideas). The Supreme Court recently reaffirmed its view that the university ought to be a marketplace of ideas in *Rust v. Sullivan*, 111 S.Ct. 1759, 1776 (1991), wherein the Court held that the Secretary of Health and Human Services did not violate the First Amendment when it placed content-based restrictions on the doctor-patient dialogue in a federally funded abortion clinic. *Rust*, 111 S.Ct. at 1778. Despite upholding the restrictions on such an important communication, the Court stated that such restrictions would not withstand judicial scrutiny when placed on university speech. *Id.* The *Rust* Court noted that the university was a "traditional sphere of free expression fundamental to the functioning of society." *Id.*

178. See Deposition of Rodney Roth, taken 1-5-89, p. 48, line 15 - p. 56, line 17 (stating that, according to University of Alabama Faculty Handbook, professors' statements of personal beliefs and bias in classroom are appropriate); see also *Bishop v. Aronov*, 732 F. Supp. 1562, 1564 (N.D. Ala. 1990) (stating that professors at University of Alabama often discussed their personal beliefs and theories in classroom to establish rapport with students), *rev'd*, 926 F.2d 1066 (11th Cir. 1991); *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 756 (1976) (stating that professors at undergraduate level exercise academic freedom when they display religious symbols in classroom, wear religious garb or even open class with prayer). When the Court indicates that an activity falls within the ambit of academic freedom, that activity does not bear on the imprimatur of the school. *Cf. Widmar v. Vincent*, 454 U.S. 263, 274 n.14, 271 n.10 (1981) (noting that students are unlikely to perceive that university is imposing a particular viewpoint when professors and students freely discuss that viewpoint under auspices of their First Amendment rights). If a professor's decision to incant a prayer in the classroom does not indicate an intentional action on the part of the school to promote a religion, then neither should a teacher's decision to make admittedly personal observations with religious connotation indicate that the school promotes those observations. *Cf. Roemer*, 426 U.S. at 756 (stating that teacher's choice to wear clerical garb or to open class with daily prayer is an aspect of academic freedom and does not bear imprimatur of university).

179. 454 U.S. 263 (1981).

180. *Widmar v. Vincent*, 454 U.S. 263, 271-72 (1981).

181. *Id.* at 273.

182. *Id.*

rooms to advance and debate personal insights, the University does not violate the Establishment Clause when its professor espouses a viewpoint that has a religious connotation.¹⁸³

In *Bishop*, it is even more unlikely that a student would perceive that Professor Bishop's comments bore the imprimatur of the University of Alabama because he specifically qualified his comments as reflecting his own personal bias.¹⁸⁴ The Supreme Court has held that such a disclaimer could disassociate effectively a person who might normally be associated with the expression of certain ideas.¹⁸⁵ In *Pruneyard Shopping Center. v. Robins*¹⁸⁶ the Court addressed whether requiring a shopping center owner to allow individuals to hand out political pamphlets violated the owner's First Amendment rights by forcing him to become associated with speech that the owner found to be repugnant.¹⁸⁷ The *Pruneyard* Court held that a disclaimer by the shopping center owner would effectively disassociate the owner from the objectionable speech and satisfy the First Amendment.¹⁸⁸ As in *Pruneyard*, Professor Bishop's warning to his students that the statements he made reflected his own personal bias effectively disassociated the University from his statements, thereby further preventing students from perceiving that the University supported Professor Bishop's viewpoint.¹⁸⁹

183. See *supra* notes 178-82 and accompanying text (arguing that university does not confer imprimatur on religious classroom comments of its professor because college students encounter personal opinions from other professors and thereby are disabused of any notion that particular professor is proclaiming university policy).

184. See *Bishop v. Aronov*, 926 F.2d 1066, 1068 (11th Cir. 1991) (noting that Professor Bishop warned students he was espousing his own personal viewpoints). In fact, Professor Bishop encouraged his students to filter out his bias. *Id.*

185. See *infra* notes 186-89, and accompanying text (arguing that disclaimer can effectively remove perception that speech has imprimatur of owner of forum).

186. 447 U.S. 74 (1980).

187. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)J

188. *Id.* at 87. This case arose when a security guard at the Pruneyard Shopping Center prevented Robins from soliciting signatures for a petition that objected to a United Nations resolution. *Id.* at 77-79. The Court held that Pruneyard had violated Robins's First Amendment rights because the shopping center, which was open to the public, had become a quasi-public forum. *Id.* at 83-84. The Court rejected Pruneyard's claim that by not allowing Pruneyard to exclude Robins, the government was taking his property. *Id.* The Court noted that the government's taking of Pruneyard's right to exclude did not materially effect the value of the shopping center. *Id.* Thus, the Court concluded that the government did not take Pruneyard's property without due process because Pruneyard did not lose any substantial rights. *Id.* The Court also rejected Pruneyard's argument that the Court's decision violated the First Amendment rights of Pruneyard's owner by forcing the owner to become associated with speech and viewpoints that the owner did not support. *Id.* at 85-89. The Court stated that Pruneyard could post disclaimers which would effectively disassociate Pruneyard's owner from any speech occurring in the shopping center. *Id.*

189. See Strossen, *supra* note 168, at 383 (arguing that discussion of religious viewpoints and beliefs in public schools is not violative of Establishment Clause if students and professors are discussing viewpoints in academic setting where students are encouraged to objectively analyze and critique various doctrines and if administration gives students options as to which areas they would like to explore). Professor Strossen argues that statements by school officials,

Bishop does not implicate the Establishment Clause concerns because Bishop's classroom comments were not truly "religious" in nature.¹⁹⁰ In class, Professor Bishop would observe an intricate feature of human physiology and would conclude that such unfathomable complexity belied any creationary theory which provided that human development was guided only by chance.¹⁹¹ As Professor Bishop noted, this comment is philosophical or ontological in nature, rather than an espousal of a religion per se.¹⁹² Professor Bishop's comments are quite unlike the classroom speech which the Supreme Court has found to violate the Establishment Clause. Professor Bishop's comments did not involve religious incantations such as mandatory prayers or moments of silence¹⁹³ nor did the comments favor a particular religious sect such as mandatory teaching of Scientific Creationism.¹⁹⁴ In fact, Professor Bishop's comments appear to be less an indoctrination of religion than the teaching of religious doctrines and philosophies in religion classes.¹⁹⁵ The fact that some agnostic scientists maintain that there is

indicating their actual position on the religious materials, will remove any imprimatur of religion from the public school and government. *See id.* (citing *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), for proposition that disclosure by owner of forum can remove perception of support of speech that occurs within forum); *see also* U.S. S.W. Afr./Namib. Trade & Cultural Council v. United States, 708 F.2d 760, 772 (D.C. Cir. 1983) (stating that FAA can prevent public perception that government supports political opinions advertised in displays in Dulles International Airport and Washington National Airport by posting disclaimers near displays); *McCreary v. Stone*, 739 F.2d 716, 728-29 (2d Cir. 1984) (holding that government's posting of disclaimers, coupled with secular purpose of providing public forum, ensures that public will properly perceive that creche display in public park does not bear imprimatur of government), *aff'd mem.*, 471 U.S. 83 (1985).

190. *See* *Bishop v. Aronov*, 732 F. Supp. 1562, 1566 (N.D. Ala. 1990) (indicating that Professor Bishop's speech amounted to exchange of ideas between professors and students), *rev'd*, 926 F.2d 1066 (1991); *see also*, David S. Caudill, *Law and Worldview: Problems in the Creation-Science Controversy*, 3 J.L. & RELIGION 1 (1985) (arguing that evolution is as religious in nature as Scientific Creationism because both rely on major assumptions or "fundamental beliefs" as centerpiece for their worldview). Professor Bishop's comments, however, do not seem to rise to even the level of scientific creationism because they indicate only that some guiding sentient force is responsible for human development. *See* Deposition of Phillip A. Bishop, taken 3-14-89, p.30, line 4 - p. 31, line 12 (stating Professor Bishop's comments are based on probabilities and other scientific evidence).

191. Deposition of Phillip A. Bishop, taken 3-14-89, p. 18, line 21 - p. 20, line 11.

192. *See* Deposition of Phillip A. Bishop, taken 3-14-89, p. 18, lines 14-16 (stating that Professor Bishop did not consider his classroom statements to be religious and that he used term God in generic sense of grand designer); *see also id.* at p. 26, lines 14-17 (indicating that Professor Bishop had been conveying his view of truth in philosophical sense).

193. *See* *Engel v. Vitale*, 370 U.S. 421 (1962) (holding unconstitutional New York statute requiring mandatory prayer in public schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding unconstitutional Alabama statute requiring one minute period of silence at beginning of class).

194. *See* *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding unconstitutional Arkansas statute that required teachers to teach Scientific Creationism whenever teacher included evolutionary theory in curriculum).

195. *See* *Bishop v. Aronov*, 732 F. Supp. 1562, 1567 (N.D. Ala. 1990) (noting that Professor Bishop's classroom comments do not advance religion nearly as much as University of Alabama's regular religion and theology courses), *rev'd*, 926 F.2d 1066 (11th Cir. 1991).

evidence that implies a theory of origin consistent with Professor Bishop's comments indicates that his comments are not mere religious dogma.¹⁹⁶

Professor Nadine Strossen asserts that the Court will have to engage in an increasingly more intensive examination of the purposes and effects of "religious" statements or activity as those statements and activities further differ from traditional religious forms.¹⁹⁷ Professor Strossen argues that the courts should not consider a government statement or activity to violate the Establishment Clause if the statement or activity is analytical rather than indoctrinating in nature.¹⁹⁸ In fact, the Supreme Court has found that the teaching of Christian or other religious doctrines in a public school does not violate the Establishment Clause because the teacher presented the subject in an objective and analytical manner.¹⁹⁹ Applying this analysis to the *Bishop* case, although Professor Bishop's comments did have religious connotations, he presented the comments in a philosophical context.²⁰⁰ Professor Bishop identified his bias and invited the students to filter and analyze his statements.²⁰¹ He advanced these statements in order to encourage

196. See *Edwards*, 482 U.S. at 612 (Scalia, J., dissenting) (noting that some agnostic scientists who are adherents of evolutionary theory also recognize existence of evidence that is consistent with Judeo-Christian theories of origin).

197. See Strossen, *supra* note 168, at 372-73 (noting that Supreme Court's decisions striking down religion in schools primarily involved cases where sectarian religious doctrine and ceremonies were included in public school curriculum). Professor Strossen argues that the Supreme Court would have to take a closer look at a case which involved the teaching of religion in public schools in a critical and analytical fashion. *Id.*

198. See Strossen, *supra* note 168, at 358-59 (arguing that if teachers presented religious beliefs in analytical fashion, rather than inculcative fashion, Establishment Clause concerns would be minimized because students would not perceive that beliefs bore imprimatur of school administration). Professor Strossen cites as support for her conclusion the dicta in *School District v. Schempp*, 374 U.S. 203, (1963), and *Stone v. Graham*, 449 U.S. 39, 42 (1980), wherein the Court indicates that public school teachers would not violate the Establishment Clause by teaching religious beliefs in the classroom if the religious material were taught in a neutral, objective and critical atmosphere. *Id.* at 358-59. Professor Strossen develops a list of factors to determine whether a subject is being taught in an analytical manner:

1. Whether a subject of reasonable dispute is presented as a theory or opinion.
 2. Whether there are competing theories with similar degrees of acceptance.
 3. Whether alternate theories are presented.
 4. Whether students are encouraged to be critical.
 5. Whether students can select from a range of materials representing diverse viewpoints.
 6. Whether students' grade depends on a critical analysis of the material rather than rote regurgitation.
 7. Whether school officials explain to students that the school does not favor any one particular viewpoint.
- Id.* at 383.

199. See *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (stating that public schools would not violate Establishment Clause by including Bible in school curriculum provided that study was conducted in secular and academic manner).

200. See *infra* notes 201-03 and accompanying text (noting that Professor Bishop exposed his bias and explained that there were other viewpoints on subject).

201. See *supra* note 11 (recounting text of Professor Bishop's classroom remarks).

his students to analyze critically the physiology material.²⁰² Additionally, Professor Bishop used a blind grading system and his exams did not cover this "enrichment" material.²⁰³ From this evidence, it seems that Professor Bishop made his comments in an analytical, rather than indoctrinating, setting.²⁰⁴ Because Professor Bishop's comments did not bear the imprimatur of the University of Alabama and were not truly religious statements, it appears that the comments do not trigger the Establishment Clause.²⁰⁵

Establishment Clause Analysis

Assuming *ad arguendo* that Professor Bishop's comments implicate Establishment Clause concerns, the Court must determine if the government action in question violates the Establishment Clause by applying the three part test set forth in *Lemon v. Kurtzman*.²⁰⁶ The governmental action in question: 1) must have a secular purpose; 2) must have a primary effect that neither advances nor inhibits religion and 3) must not foster excessive government entanglement with religion.²⁰⁷ The government activity must satisfy all three of the *Lemon* criteria or the Court will find it violative of the Establishment clause.²⁰⁸ In *Bishop*, the governmental activity in question

202. See Deposition of Phillip A. Bishop, taken 3-14-89, p. 23, line 8 - p. 24 line 22 (stating that Professor Bishop made statements relating to "designer" or "god" to encourage students to more complex usage of curriculum). Professor Bishop cites Bloom's taxonomy which sets out the five levels of knowledge and cognitive function. *Id.*

203. See *Bishop v. Aronov*, 732 F. Supp. 1562, 1564 (N.D. Ala. 1990) (noting that Professor Bishop used blind grading system), *rev'd*, 926 F.2d 1066 (1991); Deposition of Phillip A. Bishop, taken 3-14-89, p. 38, lines 22-3, p. 89, lines 7-8 (indicating that Professor Bishop did not think his conversations concerning evidence of designer in human evolution to be testable material).

204. See *supra* notes 197-203 and accompanying text (arguing that Professor Bishop used comments to foster academic curiosity rather than religious indoctrination).

205. See *supra* notes 184-89 and accompanying text (arguing that Professor Bishop's comments do not bear the imprimatur of University because Professor Bishop disclaimed the comments as his bias); see also *supra* notes 176-78 and accompanying text (arguing that Professor Bishop's comments do not bear the imprimatur of University because college level students are sufficiently mature to perceive that their various professors are articulating personal, not university supported, opinions); *supra* notes 176-83 and accompanying text (arguing that Professor Bishop's comments were based on academic curiosity rather than religious indoctrination).

206. 403 U.S. 602 (1971). *Lemon* addressed the issue of whether the government violates the Establishment Clause when it gives financial operating aid to parochial schools. *Lemon v. Kurtzman*, 403 U.S. 602, 606-07 (1971). The Court devised a three part test to evaluate Establishment Clause violations which mandated that government actions must: 1) must have a secular purpose; 2) must have a primary effect that neither advances nor inhibits religion and 3) must not foster excessive government entanglement with religion. *Id.* at 612-13. The Court held that the school aid programs violated the entanglement prong because the government would have to monitor closely parochial school operations to ensure that government funds were not used for religious purposes. *Id.* at 619-20.

207. *Id.* at 612-13. The Court is currently reconsidering the usefulness of the *Lemon* test in *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S.Ct. 2822 (1991).

208. *Lemon*, 403 U.S. at 612-13.

was Professor Bishop articulating his theory that a designer of human evolution exists.

To determine whether the government acted with a secular purpose, the Supreme Court has looked at both the stated intentions of the government actor²⁰⁹ and the legislative history of the act.²¹⁰ Professor Bishop stated that his purpose in presenting the material was to foster thought and to encourage his students to analyze and synthesize the basic physiology material.²¹¹ In addition, Professor Bishop felt it his duty as a teacher to discuss with his students his personal viewpoints on the material.²¹²

Next, the Court must consider whether Professor Bishop's statements have the primary effect of advancing religion.²¹³ The Court has held that government action has the primary effect of advancing religion when it supports an institution in which religious doctrines dominate or when it specifically funds religious activity in what otherwise would be a secular setting.²¹⁴ Professor Bishop's comments hardly could be said to dominate the classroom as they accounted for a very small fraction of the class time.²¹⁵ University officials consistently gave Professor Bishop high marks as a teacher, indicating that he was faithfully and successfully teaching the course material and not allowing his class to be subsumed by religious doctrine or his personal beliefs.²¹⁶ The University did not specifically fund

209. See *id.* (stating that proposed legislation to aid parochial education satisfied first prong of test because legislators indicated that their purpose was to promote better secular education in private schools).

210. See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (concluding that legislation had sectarian purpose after reviewing past attempts of legislature to force Scientific Creationism on schools).

211. See *supra* notes 200-04 (noting that Professor Bishop included personal opinions in classroom discussion to encourage students to engage in higher applications of basic physiology curriculum).

212. See Deposition of Phillip A. Bishop, taken 3-14-89, p. 26, lines 9-17 (stating that Professor Bishop, in making his classroom comments, complied with guidelines set forth by Association of American University Professors which ethically mandates that university professors convey truth as professors see it); see also *Bishop v. Aronov*, 732 F. Supp. 1562, 1564 (N.D. Ala. 1990) (stating that professors at University of Alabama often discussed their personal beliefs and theories in the classroom to establish rapport with students), *rev'd*, 926 F.2d 1066 (11th Cir. 1991).

213. See *supra* notes 206-08 and accompanying text (outlining criteria of *Lemon* test for determining if government act violates Establishment Clause).

214. See *Hunt v. McNair*, 413 U.S. 734, 743 (1973) (stating that government violates second prong of *Lemon* test when it funds institutions which are subsumed by religious activity or when government specifically supports religion in otherwise secular forum).

215. Deposition of Phillip A. Bishop, taken 3-14-89, p. 96, lines 2-10. Professor Bishop indicated that his comments regarding his personal bias and the comments regarding evidence of "God" in human physiology accounted for approximately five minutes out of a total 2250 minutes of instructional time. *Id.*

216. See Deposition of Rodney Roth, taken 1-5-89, p. 28, line 22 - p. 30, line 3 (stating that Professor Bishop was making very good progress toward eventual tenure). In fact, the University of Alabama was contemplating conferring early tenure on Professor Bishop at the time that the University sanctioned him for his classroom comments and optional class. *Id.*

religion,²¹⁷ and no indication exists that the University, by funding different classes, intended to adopt or support the views of the various professors whom the University encouraged to share views with their classes.²¹⁸

The *Lemon* test also requires the Court to examine whether Professor Bishop's statements excessively entangle the government with religion.²¹⁹ Although this is a rather vague test,²²⁰ it does not appear that Professor Bishop's comments, which account for a minuscule proportion of class time, excessively entangle the University of Alabama with religion.²²¹ On the other hand, the University of Alabama's regulation prohibiting expression of personal religious viewpoints in the classroom does appear to excessively entangle the University with religion. As the Court noted in *Widmar v. Vincent*, regulations that exclude religious groups from meeting on university grounds require the university to determine what is and what is not a religious group and to police meetings to make sure that no religious activities take place.²²² The University of Alabama's regulation against

The University awards early tenure only in cases of superior scholarship and pedagogy. *Id.* The University since has awarded tenure to Professor Bishop and he now is head of the Physiology Department. See Scott Jaschik, *Academic Freedom Could Be Limited by Court Ruling*, CHRON. HIGHER EDUC., April 17, 1991, at A1 (noting that Professor Bishop holds the position of associate professor and director of University of Alabama's Human Performance Laboratory).

217. Cf. Deposition of Rodney Roth, taken 1-5-89, p. 36, lines 12-16; p. 22, line 19 - p. 33, line 14 (stating that University of Alabama felt that it was inappropriate for professors to make religious comments in classroom). In fact, Professor Bishop's classroom comments appear to be a much less egregious infringement of the Establishment Clause than the Pennsylvania statute providing for government aid to private schools that the Court upheld in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* statute resulted in a proportion of the state aid going directly to parochial schools. *Lemon*, 403 U.S. at 621.

218. See Deposition of Rodney Roth, taken 1-5-89, p. 37, lines 6-17 (stating that administration of University of Alabama considers it inappropriate for teachers to make religious comments during instructional periods); see also Deposition of Carl Westerfield, taken 1-5-89, p. 15, line 23 - p. 16, line 19 (stating that University of Alabama censored Professor Bishop within one term after he held optional class). The fact that University administrators acted so quickly in restricting Professor Bishop's "religious" comments indicates a hostility to the use of any classroom time to discuss theories which involve religious connotations. *Id.* Both Mr. Westerfield, Professor Bishop's immediate supervisor, and Mr. Roth, dean of the School of Education, indicated that they felt that religious remarks had no place in a University of Alabama classroom. Deposition of Carl Westerfield, taken 1-5-89, p. 15, lines 16-22; Deposition of Rodney Roth, taken 1-5-89, p. 18, lines 2-22.

219. See *supra* notes 206-08 and accompanying text (outlining criteria of *Lemon* test for determining if government act violates Establishment Clause).

220. See *Roemer v. Maryland Public Works Bd.*, 426 U.S. 736, 768-69 (1976) (J. White and J. Rehnquist, concurring) (arguing that excessive entanglement prong is vague and redundant to secular purpose prong).

221. Deposition of Phillip A. Bishop, taken 3-14-89, p. 95, line 8 - p. 96, line 10 (noting that Professor Bishop's religious comments took up approximately five minutes out of 2,250 total instructional hours per class).

222. See *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (stating that University of Missouri at Kansas City's regulation preventing Christian student group from using university facilities for meetings creates greater risk that UMKC will become entangled with religion than would general open forum policy).

religious speech and personal bias appears to be even more expansive and entangling than the regulation addressed by the *Widmar* Court.²²³ Not only does the University policy require the University to determine what is religious and personal and what is not, but also it requires the University to ferret out every statement made by its professors.²²⁴ This effect of the University of Alabama's regulation also may cause the regulation to fail the second prong of the *Lemon* test because the policy inhibits religion.²²⁵ The University prohibition clearly indicates that the administration felt that religious philosophies are without academic merit.²²⁶ Thus, the regulation appears to inhibit religion by characterizing it as unworthy of consideration and banning any idea traditionally associated with religious doctrines from the scrutiny of the collegiate marketplace of ideas.²²⁷

CONCLUSION

Viewpoint discrimination is both inappropriate and unnecessary as a mechanism for university control and regulation of its curriculum.²²⁸ Viewpoint discrimination does not become any more palatable because it is used in conjunction with the Establishment Clause.²²⁹ There is no academic discipline that scholars so thoroughly comprehend that it precludes the usefulness of new or different ideas.²³⁰ Measures that restrict whole sources of knowledge from the academic debate go against the very nature of the university system and serve only to instill orthodoxy by limiting the spectrum

223. See *infra* notes 224-27 and accompanying text (arguing that University of Alabama's speech restriction violates third prong of *Lemon* test).

224. See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981) (noting that university risks greater entanglement with religion by attempting to enforce its restriction barring use of its facilities by religious groups because university will have to monitor group meetings to ensure that no religious activities take place and it will have to define what is and is not religious).

225. See *infra* notes 226-27 and accompanying text (arguing that University of Alabama's speech restriction violates second prong of *Lemon* test because it undermines religion).

226. Cf. Deposition of Rodney Roth, taken 1-5-89, p. 54, line 2 - p. 56, line 17 (stating that Professor Bishop's religious views are irrelevant to study of physiology); Deposition of Carl Westerfield, taken 1-5-89, p. 35, lines 14-22 (stating that University deemed it inappropriate for professors to make religious comments in classroom).

227. See *Edwards v. Aguillard*, 482 U.S. 578, 589 (1987) (noting that Louisiana Balanced Treatment Act had effect of discrediting evolution science by mandating that teaching of creation science whenever teachers include evolution in curriculum). It seems that the University of Alabama's speech restriction, which completely excludes religious ideas from the classroom, would have a much greater discrediting effect on religion than the Balanced Treatment Act had on evolution science. Cf. *id.*

228. See *infra* notes 229-35 and accompanying text (arguing that courts ought to utilize the *Tinker* material disruption of educational operation test in evaluating university speech restrictions).

229. See *infra* notes 219-27 and accompanying text (arguing that University of Alabama's speech restriction is more violative of *Lemon* test than Professor Bishop's classroom comments).

230. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

of inquiry.²³¹ The worth of religious ideas ought to be tested in the crucible of the academic environment rather than exempted from the debate by speech codes or the Establishment Clause.²³² If the Establishment Clause means that anything that receives public funds must be devoid of religion, then given the ever expanding role of the government in education, the religious principles upon which our country was founded will be excluded unfairly from the academic forum. This application of the Establishment Clause is not religion-neutral, it is anti-religion.

A better standard for defining the relationship between academic and institutional freedom is that which the Supreme Court articulated in *Tinker*.²³³ Under the *Tinker* approach, a university only may enjoin free speech that materially disrupts the classroom. Thus, a university may restrict speech that interferes with its educational mission.²³⁴ In addition, a university can utilize compensation and the tenure system to encourage teachers to accomplish their classroom responsibilities and engage in professional behavior.²³⁵ Thus, a university can effectively control the content of its curriculum without chilling the academic freedom which has promoted diversity and critical thinking in the college classroom.

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231. *See id.* (noting that university should be marketplace of ideas); *see also* Rabban, *supra* note 1, at (noting that academic freedom provides professors and students protection from government orthodoxy).

232. *See supra* note 112 and accompanying text (noting that exposure to diverse ideas enhances student's critical thinking skills).

233. *See supra* notes 110-13 and accompanying text (arguing that appropriate standard for evaluating university restrictions of speech is that university can only restrict professors' or students' speech when that speech materially disrupts educational process).

234. *Id.*

235. *See supra* note 115 (noting that university can ensure professional behavior of professors through work evaluations, compensation and tenure).