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ARTICLE: Through the Looking Glass: What are Young People Learning from Unconstitutional Religious Censorship?

John W. Whitehead\*

\* President, The Rutherford Institute, Charlottesville, Virginia. B.A. 1969; J.D. 1974, University of Arkansas.

SUMMARY:

... The U.S. Supreme Court's 1969 *Tinker v. Des Moines Independent Community School District* decision provides such a framework. It protects the First Amendment rights of public school students and, at the same time, also provides an appropriate constitutional model for including religious speech--and thus the values of religion that we as a nation acknowledge to be important--in the public schools. ... In *Barnette*, the Court recognized the right of students to express their views, *regardless of content*, in the public school setting. ... The Court later refined its *Tinker* position in *Bethel School District v. Fraser*. ... For example, the two-part evidentiary inquiry of *Tinker* eliminates most restrictions on student speech. ... Thus, with the *Bethel* exception, *Tinker* should apply to all student speech, including religious expression at graduation ceremonies. ... For instance, had the school district complied with its policy and simply reviewed the copies of the student addresses for disruptive effect (as set forth in *Tinker*) and perhaps lewd and indecent content (as permitted by *Bethel*), no Establishment Clause concerns would have arisen, despite any particular religious content--or the absence of it--in the students' invocation and valedictory addresses. ...

TEXT:

**[\*39]** Time magazine recently published a feature entitled "A Week in the Life of a High School" which explored the contemporary American high school experience. n1 "Look inside a high school, and you are looking in a mirror, under bright lights," writes its author, Nancy Gibbs. "How we treat our children," she says, "what they see and learn from us, tell us what is healthy and what is sick--and more about who we are than we may want to know.... The people on the front lines worry about a lot more than test scores." n2

Gibbs and others worry that safety is too often a more pressing concern in today's schools than providing the education the younger generation needs to become skilled and productive citizens who can hold their own in a global economy. Today's schools resemble miniature towns--and sometimes reform schools. Many are even complete with their own police force. An assistant principal in Gibbs' article neatly summarizes where we are in America's schools: "There are two directions that schools are going in: to improve the climate and build trust, or to have metal detectors and transparent lockers." n3

Instead of preparing our children to handle the issues of the adult world, the perceived explosion of violence in our school systems has caused many school administrators to search for ways simply to eliminate issues that might spawn violence. "High school was once useful as a controlled environment, where it was safe to learn to handle rejection, competition, cruelty,

charisma. Now that we've discovered how unsafe a school can be, it may have become so controlled that some lessons will just have to be learned elsewhere." n4

Fear may be becoming the defining characteristic of our school culture. A kind of siege mentality is creeping in to replace one of our society's most treasured experiences: the opportunity to participate in a robust, full-throated debate on any issue.

In my experience, nowhere is this more evident than in the handling of religious [\*40] expression in our public schools. Cloaked in constitutional trepidation, religious expression is often suppressed, edited, and relegated to another forum. To be exposed to or to express religious ideas is oftentimes seen as just too controversial. Someone might be offended or feel left out, and, at least in the religious realm, that is no longer a risk schools feel comfortable taking.

Yet our young people are a mirror of the culture in which they grow. They are also the living messages to a time that we will not see. They are the combined images of their families and the society around them. What are their images saying?

### **Reflections in the Mirror**

The very concept of what it means to be human is challenged at every turn. We increasingly view people, young and not so young, as simply consumer components of an ever-expanding economy. We are distanced from each other as we embrace medical technologies that require us to abandon our feelings of uniqueness and accept ourselves as fungible parts of some ongoing whole. The politicization of issues has, in many cases, removed the human element--which should be at the heart of every political decision.

The increasing rate of child abuse, the rising numbers of neglected and homeless children, and stories of young mothers (sometimes abetted by the young fathers) simply letting their newborns die in toilet bowls seem to say that our society is losing its grip on how to nurture and teach its young.

The present generation of young people has grown up with the worst home life of any American generation. About 40 percent of them are children of divorce, with the threat of divorce a dominant fear for many others. Their numbers are not great because one of every three pregnancies of Generation X children (those born between 1960 and 1980) was aborted. Having grown up in the midst of headlines about fallen religious leaders and unethical politicians, the Xers' trust in authority figures is low. Cynicism about anything organized, such as church and political power, is high.

Tyler Durden, the virile leader in *Fight Club*, Chuck Palahniuk's powerful novel and director David Fincher's despairing 1999 film, may speak for this generation. "What you have to consider is the possibility that God doesn't like you. Could be, God hates us. This is not the worst thing that can happen." n5 Jack, the miserable white-collar lackey in *Fight Club*, unable to sleep and yet worn out from his job and his slavery to his consumer lifestyle, summarizes Tyler's view of things: "We are God's middle children...with no special place in history and no special attention. Unless we get God's attention, we have no hope of damnation or redemption. Which is worse, hell or nothing?" n6

To get God's attention, or perhaps anyone's, some of these middle children resort to terrorism and the murder of their peers. Others turn to religious cults and other forms of political and social extremism. Some simply kill themselves with drugs, alcohol, disease, or alienation.

### **From Whence Meaning?**

As our nation's schools continue to be rocked by acts of senseless violence, we have, as a nation, tentatively begun a national debate over how best to communicate a sense of meaning

and value to American [\*41] students. At the heart of this discussion is a growing sense that religious principles have too long been left on the sidelines in public education.

Many would agree that there is a place--even a necessity--for the moral values and fundamental ethics that religion teaches. Indeed, many would argue that there is a necessity for such if an individualistic society like ours is to continue.

The question with which we struggle is, simply, how to bring it about. Here is a yardstick by which we can measure our values. This guide also shows us how to include our values in the public education system and, thus, salvage them for future generations. That yardstick is the United States Constitution.

Undoubtedly, the concerns expressed in the Establishment Clause of the First Amendment providing that "Congress shall make no law respecting an establishment of religion..." n7 should be taken seriously. However, at the same time we must be cognizant of the fact that unconstitutional religious censorship in public high schools not only infringes constitutional rights, it also teaches negative values to its victims as well as the students who observe it.

There is another constitutional interest, which is oftentimes seen in tension with regard to the necessary and appropriate proscription against a state religion. This is the Free Speech Clause of the First Amendment, which provides that Congress shall make no law "abridging the freedom of speech..." n8 Too often, free speech interests are subordinated to Establishment Clause concerns when religious expression in the public schools is at issue.

### **Changed Religious Context**

The history of church-state relations in the United States makes it clear that the structural, conceptual, and institutional evolution of the so-called "church" as well as the "state" renders establishment of a national institutional church or control of government by such a church or a particular denomination or sect virtually impossible. n9

For example, the historical context of the religion clauses is much different than the context of contemporary Establishment Clause concerns. America is no longer under the dominant influence of homogeneous Protestantism and state-established Protestant churches, as it was during the drafting of the Constitution. The obvious religious and cultural diversity of contemporary America precludes any serious threat of a government-established church, such as that feared by America's Founders.

Colonial America was a nation of religious diversity. This diversity existed, however, within the boundaries of Protestantism, with the exception of small groups of Catholics and Jews. n10 In contrast, many Americans today classify themselves as Protestants, but a strong number of other Americans profess beliefs consistent with Islam, Hinduism, Jehovah's Witnesses, Buddhism, Catholicism, atheism, and other religions. For example, there are 239 officially recognized religious sects and 1,300 unconventional groups in America today. n11 America's religious demographics continue to be in a state of flux and bear little resemblance to the religious landscape, which existed when the Establishment Clause was written. Thus, the threat to the state that the Framers contemplated does not exist today.

### **Changed Governmental Structure**

On the other hand, the modern American federal government is also different from the limited federal government envisioned by the Framers. In their view, the federal government was to exist only to [\*42] maintain the public peace and security so that individuals and groups would be free to shape their own destinies.

Yet the United States Supreme Court has, over the years, enabled the federal government to become involved in most areas of life in the United States, including America's social order, n12 while at the same time providing uneven decisions on the meaning of the religion clauses. n13 The Framers had expected religion to provide the primary impetus and boundaries in the

socio-moral realms. Indeed, once the United States Supreme Court held that Congress may "[deal] with what it consider[s] a moral problem," n14 Congress had license to, and began to, regulate matters which ran the gamut of social issues, including prostitution and racial segregation.

Thus, the restricted--and therefore relatively weak--government the Framers sought to protect with the Establishment Clause bears little resemblance to the modern American bureaucracy. At the time of the ratification of the Bill of Rights, state governments possessed all powers not explicitly given to the newly established federal government. The authority of the established Protestant churches in many ways paralleled that of state governments, and the Framers did not appear particularly concerned by such a state of affairs. For example, by its very language, the Framers applied the Establishment Clause only to Congress--not to the states. n15

The size and power of today's federal government makes it unlikely that it might require protection from what some may consider to be the powerful and corrupting influence of religious institutions. If anything, the Framers' concerns regarding the Establishment Clause could be seen as *reversed*, in the sense that many individual liberties are presently at risk due to the ever-growing reach of the federal government. In fact, as government continues to expand the scope of its concerns, it must be increasingly sensitive to interests such as religious expression merely to remain neutral.

#### **The Government and Public Education**

As part of its expanded social concern, the federal government has increasingly become involved in matters of public education. As the Court said in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.... It is the very foundation of good citizenship. n16

Thus, the involvement of the state in public education necessitates, among other things, that a framework must be established that protects First Amendment interests of free speech in addition to the residual, albeit modified, Establishment Clause concerns.

#### **The Tinker Solution**

The U.S. Supreme Court's 1969 *Tinker v. Des Moines Independent Community School District* n17 decision provides such a framework. It protects the First Amendment rights of public school students and, at the same time, also provides an appropriate constitutional model for including religious speech--and thus the values of religion that we as a nation acknowledge to be important--in the public schools.

In *Tinker*, the Supreme Court affirmed its earlier view expressed in *West Virginia State Board of Education v. Barnette* n18 and created an objective and manageable standard for school officials to use when considering proscriptions on student speech. [\*43] In *Barnette*, the Court recognized the right of students to express their views, *regardless of content*, in the public school setting. The *Tinker* Court affirmed this principle: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." n19

The *Tinker* Court held that student expression can be proscribed in only two situations: (1) where the expressive activity materially disrupts the educational process; or (2) where the expressive activity "collides with the rights of other students to be secure and to be let alone." n20 In *Tinker*, the Court also acknowledged that the First Amendment rights of students

extend beyond the classroom--to the cafeteria, the playground, and other areas of the school. n21

The Court later refined its *Tinker* position in *Bethel School District v. Fraser*. n22 There it held that a student's lewd, indecent speech disrupted the educational process, offended the rights of other students, and interfered with the school's role in teaching "civil, mature conduct" and proper ways to engage in political discourse. n23

However, under the *Tinker* rubric, there is little Court support for the suppression of free speech--and more room for the promotion of student speech. For example, the two-part evidentiary inquiry of *Tinker* eliminates most restrictions on student speech.

At the same time, the bright line rule of *Tinker* enables administrators as well as students to determine the constitutional boundaries on student expression. This bright line is also helpful with respect to Establishment Clause concerns, which should recede as school involvement with the contents of student speech diminishes. In this regard, the words of the Court that public schools should not attempt to "foster a homogeneous people" n24 are worth noting. Thus, with the *Bethel* exception, *Tinker* should apply to all student speech, including religious expression at graduation ceremonies.

There is another interest at stake with respect to religious expression in the public schools: society's interest in the promotion of truth through the full discourse of ideas. As Justice Holmes stated in his well-known dissent in *Abrams v. United States*: n25

The ultimate good desired is better reached by free trade in ideas--that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [society's] wishes can safely be carried out. n26

The expression of ideas--even, perhaps especially, religious ones--is important to the development of society. Indeed, the mere expression of self is undoubtedly important to the development of the speaker. n27

The First Amendment preserves access to useful information and ideas. As Justice Holmes writes, "pursuit of a better understanding of reality" by society and the individuals within it n28 "enables individuals to formulate and maintain their own political, moral, or religious understandings of reality, free from any right or claim of others to dominate that understanding or of government to control it." n29

Moreover, the Supreme Court has recognized that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." n30 Thus, the Court has recognized that the marketplace of ideas theory is applicable to public schools. n31

### **Unique Constraints on Religious Speech**

Some argue that student discussions [\*44] on certain subjects, especially religion, should be constrained differently in view of Establishment Clause concerns. However, as noted above, there is no monolithic or even dominant "church" in today's America, and the changes in the nature and reach of the modern state (which some view as monolithic) generally obviate most objective concerns. The traditional church-state theory of jurisprudence assumes that the Establishment Clause protects a government with limited powers from the de facto established church. In reality, though, the wall of modern jurisprudence too often separates a pervasive and powerful government only from numerous strands of individual believers.

This seems particularly true in the school context. Students who wish to engage in religious speech often stand alone in attempting to defend their free speech rights against the vastly stronger power of school authorities, courts, public interest advocacy groups, and other

religious views. Indeed, instead of there being a church-state problem, often in the public school context the predicament is one of religious believer versus the state.

Ironically, in restricting the speech of students in deference to their fears of violating the Establishment Clause, school authorities, in truth, pose a more serious threat to the values underlying the *entire* First Amendment! For example, excluding religion alone from student expression in the public schools at least appears to be an unconstitutional hostility--or, at a minimum, an unconstitutional non-neutrality--toward religion in contravention of the Free Exercise Clause. In fact, such content-based prohibitions "prefer those who believe in no religion over those who believe," and "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals." n32

Moreover, even under traditional Establishment Clause frameworks, student religious speech simply does not threaten the concerns of the Establishment Clause: the Establishment Clause prohibits the government from endorsing religion. As the Supreme Court has noted: "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." n33 What is more personal--"private" in the legal sense--than a valedictorian's farewell speech to his classmates, his school, and his family?

Clearly, full student expression must be encouraged in the public school system, subject only, of course, to the schools' (and society's) legitimate interest in maintaining order and safety. As one commentator notes: "Encouraging cognitive conflict and expressive behavior in the school not only forces students to express their own judgments or opinions, but also serves the first amendment goals of self-fulfillment, enlightenment, and preparation of children for participation in a democratic society." n34

#### **Cole, Niemeyer v. Oroville Union High School**

The facts of *Cole, Niemeyer v. Oroville Union High School* n35 fit within the parameters of the *Tinker* analysis and yield a constitutional and practical solution to all concerns of the entire First Amendment. In fact, the school in *Niemeyer* appears to have understood the goals of the First Amendment, as may be seen in its written policy prohibiting the school from inhibiting a student's right "to express opinions, to take stands, and to support causes publicly or privately." n36

For instance, had the school district complied with its policy and simply reviewed the copies of the student addresses for disruptive effect (as set forth in *Tinker*) and perhaps [\*45] lewd and indecent content (as permitted by *Bethel*), no Establishment Clause concerns would have arisen, despite any particular religious content--or the absence of it--in the students' invocation and valedictory addresses.

When the school began making judgments, however, that the prayer and addresses contained "too many" references to God and Jesus, it did, indeed, create significant Establishment Clause concerns. After all, how can a school constitutionally determine how many religious references constitute "too many"? On the other side, could a sound argument be made that the school could constitutionally decide how many references to God and Jesus would be "too few"? I think not. This is precisely the type of involvement with student activity and speech that the Establishment Clause forbids.

Had the school followed the guidelines of *Tinker* and *Bethel*, the school would have simply reviewed the prepared materials to ensure that there would be no disruptive effect at graduation and that the invocation and speeches were not lewd or indecent. No one attending the graduation exercises could reasonably conclude that this limited involvement by the school imparted any imprimatur on the content of the student addresses, religious or otherwise. While serving the interests of student safety and the decorum of the graduation program, the school

would also have demonstrated its commitment to the interests of the entire First Amendment--from free speech to the freedom of religion to the absence of a government sponsored religion.

### **No Isolated Problem**

As a nation, we continue to struggle with our increasing diversity. Religious speech in public schools may be one of the more visible arenas of the struggle since most people have some sort of relationship to a student somewhere.

*Cole, Niemeyer* may be unique because its issues appear so clear-cut. However, confusion over religion's constitutional place in American life--in the public schools as well as in America's workplaces, neighborhoods, government agencies, and elsewhere--is not at all unique, as some of the following cases illustrate.

-- The tragedy at Columbine High School has become embroiled in the issue. Columbine High School officials invited parents of slain and injured children, as well as community members who responded to the shooting, to paint tiles to be placed on school hallways. Yet, tiles with religious material or symbols were censored when the school either refused to put them up or, in some cases, tore down those that had already been put in place. The school was concerned that the religious aspects of the tiles would be an Establishment Clause violation. n37

-- A student in New York has been prohibited by school authorities from distributing flyers announcing social/religious events at her church. The school prohibits private or personal correspondence between students at school on religious topics. n38

-- A California high school salutatorian's graduation ceremony speech was censored of religious references. n39

-- A New York school teacher was fired as a danger to herself and her students for having an eight-minute conversation with her class about a student who had recently died. She told her students that he was in heaven, explained what she believed about salvation, and prayed for the safety of her students. n40

-- The United States Supreme Court will decide whether athletic event prayers are constitutional under the Establishment Clause. It is not clear if the Court will take the occasion to address whether the Establishment Clause and the Free Speech [\*46] Clause permit school authorities to control the content of such prayers to ensure that they are "nonsectarian" and "non-proselytizing." n41

### **Nature of the Problem**

One commentator asserts that: "The tug-of-war over applying the Establishment Clause to public education continues chiefly because some people cannot accept the norms of a pluralistic American social order that is designed to preserve their freedom to practice their religion as they choose--but also designed to keep them from imposing their personal religious preferences on a larger community which may contain people of differing belief or interest. This rather radical brand of religious toleration is the great experiment of our republic..." n42

This view is too simplistic. Religious speech cases in the public schools rarely involve students who fail to appreciate the "norms of a pluralistic American social order." One look around today's classrooms will convince even the most ill-informed that our country is today a nation rich with diversity and the depth of multi-cultural experience. To the contrary, religious speech cases generally involve students who appreciate the merits of our system of government and constitutional protections. The students feel equally strongly that the Constitution provides certain freedoms--one of them being the freedom to express one's religious views in public forums.

The sad truth is that fewer and fewer of our young people seem to have strongly enough held religious views to fuel a desire to express them in public. This makes those who do hold such strongly held views a minority to begin with.

At first glance, then, cases of religious expression might seem less important than the other matters pressing for the resources of school authorities and social agencies charged with the welfare of America's school children. As noted earlier, it is unquestionable that drugs, disease, homelessness, abuse, and violence pose serious consequences, even death, for their victims as well as their society. Yet there is an aspect that links these concerns with religious expression, which is additive to the important and essential constitutional questions. As a society, we acknowledge our need to develop fundamental citizenship capacities in our students, capacities that could enable our young people to cope with the plagues peculiar to their generation. As the term "citizen" is used here, it means persons who are members of a community and who share responsibility for the common good of the community. We need to help our young people develop knowledge and beliefs that will help them make intelligent and responsible contributions to the culture in which they live. We need to empower them to save themselves. Christian apologist C.S. Lewis put the matter this way: "We make men without chests and expect of them virtue and enterprise." If we value virtue and enterprise, we must permit them to develop their "chests," their souls.

It is not enough for the coming generations simply to replicate our notions. It is not enough for them only to rebel against our traditions and old ideas, either. They must be able to acquire their own chests and develop the collective soul of their own generations.

As noted earlier, we need to support and respect constitutional boundaries for speech, religious and otherwise. However, we also need to acknowledge that certain personal characteristics are inherent in the citizens of a healthy democracy.

Unconstitutional censorship of student religious speech bears a high potential for adversely affecting the development of good citizens. Through our students, these effects will also trickle into our society and [\*47] into our future.

### **Understanding of Legitimacy of Authority**

In contrast to totalitarian systems, it is important in a democracy that all of its participants question the legitimacy of any authority. For students, as well as others, such questions include the nature and limitations of the authority's power. They must be able to discern legitimate from illegitimate power and its use.

Like it or not, this ultimately is a religious or moral judgment. It has to do with the value of human beings and their rights--even the sources of rights. These are the essential factors in how power is used, how power is apportioned, and how authority is changed and held accountable.

School officials such as teachers, principals, and administrators have perhaps a disproportionate influence in the formation of notions about authority. Where school authorities appear to act unfairly, arbitrarily, or judgmentally, students undoubtedly receive the wrong messages about the use of power in our society. Some learn to obey; others learn to fear. Still others learn to abuse.

### **Tolerance**

As a society, we have given a great deal of attention--or at least lip service--to the idea of "tolerance." Ideally, tolerance means an authentic respect for differences and respect for minority rights. Both are vital to a functioning democracy.

These, however, cannot develop without some familiarity with difference. And perhaps as importantly, such familiarity must develop between "differents" who feel, at some level at

least, that they are compelled--either internally or by their society--to hold each other as equally valuable to their society.

Thus, admirable efforts are underway in the public schools--and in our society-at-large--to develop tolerance with regard to gender, racial, ethnic, and sexual orientation. Less well understood concerns such as acceptance of obesity and disability issues are coming along, too.

There remains one area, however, where the mechanism for tolerance remains controversial: student religious expression.

As with other issues, tolerance arises from being exposed to the differences, in this case, hearing the religious views of peers and from, in turn, being heard.

Religious tolerance cannot develop if there is no opportunity for religious discourse--and difference--except in private. Moreover, the appearance of arbitrary treatment and censorship of religious speech by school authorities may engender, or at least reinforce student discrimination against religious speech as well as inhibit student religious expression.

### **Cooperation**

Cooperation among peers is an important factor in the development of future citizens and an integrated future society. Negotiation among equals, mutual respect, and a sense of justice are the components of such cooperation. With regard to student religious expression, would not this value of cooperation be better taught through a process that permits such negotiation, mutual respect, and sense of justice instead of censorship by school authorities, regardless of their rationale?

A bedrock principle of this nation is that all deserve to be heard and that all [\*48] citizens owe their fellow citizens the opportunity to express themselves. The unconstitutional censorship of student religious expression in the public schools denies certain students the opportunity to cooperate in the marketplace of all ideas.

### **Moral Identity**

As noted at the beginning of this essay, we are, as a nation, renewing our commitment to moral precepts as foundational to the proper functioning of a democracy. Thus, the development of student commitments to equal justice for all, individual rights and liberties, communal responsibility for governance, and open and truthful information are important. Moral identity is important in fostering the will to make such commitments. It fosters a sense of duty to act in accord with one's sense of personal responsibility.

Nowhere are these concepts more clearly developed than through personal religious experience and discourse. Yet if school authorities view access for student religious expression differently than other speech, students may be deprived of a key avenue for the development of their moral identities.

### **Conclusion**

One of the highest functions of the law is to teach. The law can teach segregation, discrimination, and humiliation. Or the law can inspire integration, tolerance, and self-worth. We have seen the laws of our nation used to accomplish both.

The questions of our young people today--as expressed by Mr. Niemeyer--are not new: Who are we? Why are we here? Where are we going? These are the questions of every generation and every individual within them.

In light of the tragedies occurring daily in our public schools, dare we keep our coming generations from discussing these questions in the light of day? Dare we proscribe those who believe they have answers from offering them in a free marketplace of ideas?

I believe the United States Constitution forbids us from doing so. And I believe the United States Supreme Court has clearly marked a path for us to follow as we abide by the Constitution's mandates.

When we look in the faces of our young people, we will see a mirror of ourselves and the society we have made for them. We send them into the future bearing our imprints. Burdened with our failures, as well as our successes, they will need all the help they can give one another.

FOOTNOTES:

n1 Nancy Gibbs, "A Week in the Life of a High School," *Time* (October 25, 1999).

n2 *Id.*, p. 68.

n3 *Id.*, p. 69, quoting Webster Groves High School assistant principal John Raimondo.

n4 *Id.*, p. 70.

n5 Chuck Palahniuk, *Fight Club* (Henry Holt and Company, New York), 1996, p. 141.

n6 *Id.*

n7 U.S. CONST. amend. I.

n8 *Id.*

n9 For a longer discussion of my position, see John W. Whitehead, *Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 *Tulsa L. Journal* 149 (Winter 1992).

n10 See, e.g., Martin E. Marty, PILGRIMS IN THEIR OWN LAND: 500 YEARS OF RELIGION IN AMERICA 59-62 (1984).

n11 Henry J. Abraham, *Religion, the Constitution, the Court and Society: Some Contemporary Reflections on Mandates, Words, Human Beings, and the Art of the Possible*, in HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 15-17 (Robert A. Goldwine & Art Kaufman, eds., 1987).

n12 Although this may be changing a little if recent Supreme Court decisions become a trend. See *Kimel v. Florida Board of Regents*, 119 S.Ct. 901 (cert. Granted), Sup. Ct. No. 98-791 (January 11, 2000).

n13 See John W. Whitehead, *The Conservative Supreme Court And The Demise Of The Free Exercise of Religion*, 7 *Temple Political & Civil Rights Law Review* 1 (1997).

n14 *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964).

n15 It was not until the twentieth century that the Supreme Court extended the reach of the First Amendment religion clauses to the states. See *Everson v. Board of Educ.*, 330 U.S. 1, 14-15 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

n16 347 U.S. 483, 493 (1954).

n17 393 U.S. 503 (1969).

n18 See *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (state may neither require public school students to salute the American flag nor punish them for refusing to do so).

n19 *Tinker*, 393 U.S. at 506.

n20 *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. at 508.

n21 *Id.* At 512-13.

n22 478 U.S. 675 (1986).

n23 *Id.* at 683.

n24 *Id.* At 511.

n25 250 U.S. 616 (1919).

n26 *Id.* At 630 (Holmes, J., dissenting).

n27 See e.g., MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* (1984); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 *DUKE L. J.* 1, 4-5.

n28 Robert M. Gordon, *Freedom of Expression and Values Inculcation in the Public School Curriculum*, 13 *J.L. & EDUC.* 523, 534.

n29 *Id.*

n30 *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (citing brief for petitioners).

n31 *Healy v. James*, 408 U.S. 169, 180-81 (1972); *Tinker*, 393 U.S. at 511-13; *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

n32 *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

n33 *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

n34 See William B. Senhauser, Note, *Education and The Court: The Supreme Court's Educational Ideology*, 40 *VAND. L. REV.* 939, 979 (1987).

n35 Ferrin Cole and Chris Niemeyer v. Oroville High Sch. Dist., No. CIV S-98-1037 LKK/DAD (E.D. Cal. June 1999).

n36 *Oroville High School Education Code, Section 48901*, "Exercise of Free Expression; rules and regulations."

n37 Donald F. Fleming v. Jefferson County Sch. Dist. No. R-1, Civil Action No. 99-D-1932 (U.S. Dist. Ct. for the Dist. Of CO), Oct. 1999.

n38 Elizabeth Lander v. The Rush-Henrietta Central Sch. Dist., Civil Action # 966 CV 6264 L(B) (U.S. Dist. Ct. for the Western Dist. of NY), June 1999.

n39 Ferrin Cole v. Oroville Union High Sch. Dist., No. 99-16550 (9th Cir. 1999).

n40 Mildred Rosario v. Board of Education of the City of New York, 99 Civ. 9043 (S.D.N.Y. 1999).

n41 *Santa Fe Indep. Sch. Dist. V. Doe*, 168 F. 3d 806 (5th Cir. 1999); *cert granted*, 120 S. Ct. 494 (1999).

n42 Stephen B. Pershing, *Graduation Prayer After Lee V. Weisman: A Cautionary Tale*, 46 *MERCER L. REV.* 1097, 1118 (Spring 1995).