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Filling the First Amendment Gap: Can Gideons Get Away with In-School Bible Distribution by Exploiting the Play in the Joints Between the Free Exercise and Establishment Clauses?

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Filling the First Amendment Gap: Can Gideons Get Away with In-School Bible Distribution by Exploiting the Play in the Joints Between the Free Exercise and Establishment Clauses?

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The First Amendment seems to leave little doubt about the role of government in religion: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[1] But from that one short sentence has come decades of disagreement. Supreme Court opinions extending back to the 1960s have construed the First Amendment as a "unified command that government not give unique consideration to religion."[2] However, there has been dissatisfaction in recent years with the Court's categorical analysis of the First Amendment because it fails to account for the contours of the Amendment's multi-dimensional issues.[3]

Despite these concerns, the First Amendment jurisprudence surrounding the distribution of religious materials in public schools was surprisingly clear for many years. Courts uniformly held that such a distribution would violate the Establishment Clause of the

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1. U.S. CONST. amend. I.

2. F. Phillip Manns Jr., *Finding the "Free Play" Between the Free Exercise and Establishment Clauses*, 71 TENN. L. REV. 657, 657 (2005) ("Government violates the Establishment Clause when it uniquely aids religion by granting an exclusive benefit to religion. Government violates the Free Exercise Clause when it uniquely harms religion by creating an exclusive detriment to religion.").

3. "The categorical distinctions that the Court has previously established—speech occurring in the public forum versus speech occurring in the nonpublic forum, prior restraints versus subsequent punishments, and above all, content-based laws versus content-neutral laws—are too rigid to adequately explain the complexity of First Amendment law." Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-based and Content-neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801, 803 (2004).

First Amendment.[4] However, rulings in recent years have begun to shed some doubt onto this prohibition with regard to schools that allow the distribution of similar, nonreligious literature as part of a limited public forum.[5] Courts have held that school districts with limited public forum policies cannot discriminate on the basis of the group's religious message.[6]

Less clear is whether these rulings will change the way courts deal with the distribution of Bibles by Gideons International.[7] For more than fifty years, part of the Gideons' evangelical campaign has been the distribution of Bibles in public schools,[8] but the courts have an equally lengthy history of finding this practice unconstitutional under the Establishment Clause.[9] Under current case law it appears that a school district with a public forum policy could allow the Gideons to distribute Bibles with the support of the Free Exercise Clause.

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4. *See, e.g.*, Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160 (7th Cir. 1993) (holding that Gideon Bible distribution was unconstitutional).

5.

> When the Board acted to eliminate the absolute prohibition on private religious literature in the schools, "the Board was not exhibiting any favoritism" for religion in general or Christianity in particular, but was simply lifting one forum restriction on religious speech to which most other speech had never been subject and thereby "permitting the distribution of Bibles and other religious material similar in character to material already permitted."

Peck v. Upshur County Bd. of Educ., 155 F.3d 274, 280 (4th Cir. 1998) (citation omitted).

Limited public forums are treated differently than traditional forums in that the state's restrictions on speech are subject to stricter scrutiny if it is a traditional forum. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001). "When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech." *Id.*

6. Courts have allowed everything from the distribution of brochures for religious camps in *Hills v. Scottsdale Unified School District*, 329 F.3d 1044 (9th Cir. 2003), to the distribution of Bibles in high schools by non-student groups in *Peck*, 155 F.3d at 274.

7. Most Americans are accustomed to finding New Testament tracts provided by Gideons International in hotel rooms across the country. *Berger*, 982 F.2d at 1161–62. The Bibles typically provided to public school students by the Gideons contain the entire New Testament as well as the books of Proverbs and Psalms. *Id*. at 1164. The front pages of a Gideon Bible typically contain a picture of the American flag and blank lines so that students can fill in their names under the phrase "Presented to." *Id.* at 1164–65. The goal of Gideons International "is 'to win men and women for the Lord Jesus Christ'" by providing Americans with Bibles. Tudor v. Bd. of Educ., 100 A.2d 857, 858 (N.J. 1953) (citation omitted).

8. *Tudor*, 100 A.2d at 858.

9. *Id.* at 868 ("To permit the distribution of the King James version of the Bible in the public schools of this State would be to cast aside all the progress made in the United States and throughout New Jersey in the field of religious toleration and freedom.").

The conflict between the countervailing interests of the Free Exercise Clause and the Establishment Clause with regard to in-school Bible distribution has been brewing in the court system for many years. The Supreme Court has never ruled directly on the distribution of Gideon Bibles, but its various rulings in other church-state matters[10] have left courts in the position of trying to balance the interests protected by the Free Exercise Clause and Establishment Clause.[11]

These issues have been raised most recently in the case of *Doe v. South Iron R-1 School District* in the Eastern District of Missouri.[12] In *South Iron*, the school district claims that because it has an open forum policy, it cannot prevent the Gideons from distributing Bibles in the school without violating the Free Exercise Clause.[13] Judgments on the federal constitutional issues have gone against the school district, largely because the court has been reluctant to accept that the district actually has a public forum in place.[14] Still, the case raises an

10. Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university may not deny a student group access to campus facilities based on its religious content). *See generally* Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishing a three-part test for First Amendment religion issues, indicating that in order to avoid conflict with the religion clauses of the First Amendment, the statute must have secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion).

11. *See generally Berger*, 982 F.2d at 1160 (holding that distribution of Bibles is unconstitutional under the Establishment Clause and Gideons do not have a free speech right to distribute Bibles in schools under the Free Exercise Clause). *But see Peck*, 155 F.3d at 274 (holding that distribution of Bibles in common areas of a high school as part of a neutral literature distribution policy in accordance with the Free Exercise Clause did not violate the Establishment Clause).

12. Doe v. S. Iron R-1 Sch. Dist., 453 F. Supp. 2d 1093 (E.D. Mo. 2006), *aff'd*, 498 F.3d 878 (8th Cir. 2007). Judge Catherine Perry of the Eastern District of Missouri entered partial summary judgment on behalf of the plaintiffs on January 8, 2008, with regard to the First Amendment issues. Roark v. S. Iron R-1 Sch. Dist., 2008 WL 323173, at *1 (E.D. Mo. Jan. 8, 2008).

13. The South Iron R-1 School District has allowed Gideons to distribute Bibles to fifth graders during class for many years. *Doe*, 453 F. Supp. 2d at 1095. Two parents of elementary students brought suit to enjoin this distribution. *Id.* at 1094. The district had no previous open forum policy in place but adopted a new policy ten days before the preliminary injunction hearing that allowed outside groups to distribute printed material to students. *Id.* at 1095–96.

14. From the beginning, the court was skeptical of whether the school board would follow its new open forum policy because of the district's history:

> As the Board meeting minutes indicate, when Superintendent Lewis suggested that the Board adopt an open forum policy in the spring of 2005, the Board rejected this

important question: If a public elementary school did adopt a limited public forum, could the Gideons' activities fall in the gap between the two religion clauses of the First Amendment?

The critical issue is whether Gideon Bibles can be distributed as part of a public forum, which requires a different degree of scrutiny with respect to viewpoint neutrality.[15] Any school policy that grants specific accommodations to the Gideons should be found unconstitutional under the Establishment Clause. However, there may be some situations where the Bibles can be legally distributed in a public forum. In fact, failure to allow such distribution because of its religious content could amount to a Free Exercise Clause violation. The characteristics of such a public forum policy are (1) the distribution occurs outside the classroom; (2) no school officials actively participate in the distribution; and (3) other, similar types of speech are also permitted. This third point is most important; if at any time the Gideons control the public forum to the point that the policy seems to be a demonstration of approval, the school has violated the Establishment Clause.[16]

Some will contend that the distribution of Bibles in public schools is outside the scope of a public forum policy because Bibles are religious literature.[17] While that may be true in principle, such a

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> proposition and voted "to pretend like this meeting never happened." There was no further discussion of the "open forum" policy in the Board meetings until after this lawsuit was filed.

Id. at 1098 (citation omitted).

The evidence of the board's unwillingness to embrace an open forum policy continued to mount as the court considered motions for summary judgment. After the close of discovery and after parties briefed summary judgment motions, the board amended its policy again on August 7, 2006. *Roark*, 2008 WL 323173, at *5. The new policy prohibits the distribution of literature by any school official. *Id.* However, "[t]he School Board defendants may have voted to pass the new policy, but there is absolutely no indication that they did so because they realized that their old practice was flawed and possibly unconstitutional." *Id.* at *7.

15. "Different kinds of government involvement—(1) namely occasions in which government has provided a forum for private speech and (2) occasions in which government has elected to regulate private speech—require different degrees of scrutiny with respect to viewpoint neutrality." Manns, *supra* note 2, at 679.

16. *Peck*, 155 F.3d at 285 (holding that domination of a public forum by a certain religious group can amount to an endorsement of religion in violation of the Establishment Clause).

17. The court in *South Iron* stated in its preliminary injunction order that, "Bibles are different. Bibles are religious literature and many Christians believe that they contain the word

rationale puts the courts in the position of determining which religious texts rise to the level of sacred religious speech. If the First Amendment means anything, it is that the government should not be meddling in the personal lives of citizens by deciding whether certain literature amounts to fundamental religious speech.[18]

Part I of this Note will explain the history of First Amendment jurisprudence as it relates to the distribution of Gideon Bibles and other religious materials in public schools. Part II will discuss whether the courts were correct in their previous bans on Gideon Bible distribution and consider whether any different conclusion is necessary when schools have a limited public forum policy in place. Finally, Part III will propose guidelines for dealing with Gideon Bible distribution at public forum schools in the future, including an assessment of the *South Iron* case.

I. THE DEVELOPMENT OF COMPETING FIRST AMENDMENT CONSIDERATIONS

Although the First Amendment does not explicitly mandate a separation of church and state,[19] the Supreme Court has long held that

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of God. Bibles do not advertise club meetings or summer camps. The audience for a Bible is the person receiving one." *Doe*, 453 F. Supp. 2d at 1101. This was the basis for the court's argument that in-school distribution of Bibles would be unconstitutional in an elementary school even if the school had an open forum policy because Bibles are clearly different from other literature. The school district argued that Bibles should be allowed under the same rationale that some courts have used to allow the distribution of religious flyers in elementary schools and even Bible distribution in high schools. *Id.* at 1100–01.

18. As eloquently stated by Justice Black, "The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate." Engle v. Vitale, 370 U.S. 421, 431–32 (1962).

19. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

Although the First Amendment applies only to the federal government, the Establishment Clause and Free Exercise Clause are operative against the states under the Fourteenth Amendment. U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). *See Engle*, 370 U.S. at 430 ("Under [the First] Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.").

the Establishment Clause serves this purpose.[20] Historically, in order to avoid a violation of the Establishment Clause, the statute or government decision in question must pass the three-part test outlined in *Lemon v. Kurtzman*.[21] Under that test, it must (1) have a secular purpose; (2) neither advance nor inhibit religion; and (3) foster no excessive government entanglement with religion.[22]

Although the First Amendment refers specifically to the passage of laws restricting religious freedoms or establishing religion, the Supreme Court held in *Lee v. Weisman* that when in-school religious activities are conducted or condoned by a public official, it amounts to a constitutional violation.[23] In some such cases, the religious activity has been deemed so pervasive that it is unconstitutional on its face, even without a *Lemon* inquiry.[24] The Court reasons that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public

20. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

The Court reasoned that the adoption of the First Amendment, in which Thomas Jefferson and James Madison played leading roles, was based on the same principles as the famous Virginia Bill for Religious Liberty that had been written to separate church and state in Virginia. *Id.* at 11–12. Jefferson and Madison also played pivotal roles in the creation of that document. *Id.*

The more controversial issue seems to be whether this wall is crumbling. After seemingly every Supreme Court decision dealing with a church-state issue, pundits weigh in on whether the new case law buttressed the separation of church and state or eroded Jefferson's so-called "wall of separation." *See, e.g.*, Mary Leonard, *Supreme Court's Rulings Weaken Church-State Wall*, B. GLOBE, June 17, 2001, at A16 (arguing that a case forbidding a school from discriminating against a religious club regarding the use of facilities was nothing more than an alternative way to reintroduce religion to elementary schools); William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770 (1984) (arguing that a case sustaining a municipal nativity display against a constitutional challenge illustrated the government's increasing affiliation with religion).

21. 403 U.S. 602, 612–13 (1971).

22. *Id.*

23. 505 U.S. 577, 587 (1992) ("A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.").

24. *Id.* In *Lee*, a religious official delivered a prayer during a middle school graduation ceremony. The Court held that "[t]he government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school." *Id. See also* Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1171 (7th Cir. 1993) (holding the practice of Bible distribution unconstitutional under the notion of pervasiveness in *Lee* without relying on the structure of *Lemon*).

schools."[25] Also, a school cannot escape liability by ceasing in-school religious activities when a suit is filed.[26]

A. Schools May Not Give Preferential Treatment to Bible Distribution

Based on the Court's interpretation of the First Amendment, lower courts have held almost unanimously that it is unconstitutional for public school officials to give preferential access to the Gideons for the purpose of Bible distribution.[27] One rationale for outlawing the distribution of Bibles has been to preserve the right of parents to direct the religious upbringing of their children.[28] Other rationales are based on the *Lemon* criteria. Courts have held that there is no conceivable secular purpose associated with in-school Bible distribution.[29] In determining secular purpose, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion."[30] The Supreme Court has rejected the idea that promotion of moral values can be secular.[31]

Another issue the courts have addressed is whether Gideon Bible distribution creates an excessive government entanglement with

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25. *Lee*, 505 U.S. at 592.

26. Meltzer v. Bd. of Pub. Instruction, 548 F.2d 559, 566 n.10 (5th Cir. 1977) ("[M]ere voluntary cessation of misconduct when a suit is filed does not necessarily render a case moot or remove the necessary justiciability.").

27. Marc D. Stern, *Religion and the Public Schools: A Summary of the Law February 2006 Update*, *in* SIXTH ANNUAL SCHOOL LAW INSTITUTE 7, 26 (PLI/NY, Course Handbook Series No. F-160, 2006).

28. Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181, 185 (Fla. Dist. Ct. App. 1960) ("The right of the parent to teach his own faith to his child, or to teach him no religion at all is one of the foundations of our way of life and enjoys full constitutional protection.") (quoting Schempp v. Sch. Dist., 177 F. Supp. 398, 407 (D.C. Pa. 1959)).

This concern can be traced to the Supreme Court's ruling in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where it held, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

29. Jabr v. Rapides Parish Sch. Bd., 171 F. Supp. 2d 653, 660 (W.D. La. 2001) (holding that a principal who distributed New Testament Bibles to fifth graders in his office had no secular purpose).

30. Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (holding an Alabama school prayer and meditation statute unconstitutional because it had no secular purpose).

31. Sch. Dist. v. Schempp, 374 U.S. 203, 224 (1963) ("[E]ven if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid . . . .").

religion. In *Tudor v. Board of Education*,[32] a public school board passed a resolution that allowed the Gideons to distribute Bibles in schools at the close of the day to students whose parents had signed permission slips.[33] The court held that even this would be viewed as an entanglement with religion.[34]

Finally, courts have outlawed Bible distribution as a state effort to advance Christianity at the expense of other religions.[35] Young students cannot be expected to make the subtle distinctions between instructors invited by the school and those who come of their own accord.[36] In instances where Gideons have been allowed to distribute Bibles in school, it would be naïve to believe that the school administration was neither involved nor interested in getting each student a New Testament Bible.[37]

Some proponents of Bible distribution have tried to argue that Gideons have a free speech right to distribute Bibles in school, but this notion has been rejected by the courts.[38] In *Berger v. Rensselaer Central School Corp.*, the school district argued that (1) school personnel were not involved in the Bible distribution, and (2) the school had a public forum policy.[39] The court dismissed this argument as a "definitional coup,"[40] pointing out that "[a] public

32. 100 A.2d 857 (N.J. 1953).

33. *Id.* at 858–59.

34. "In the eyes of the pupils and their parents the board of education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself." *Id.* at 868.

35. "'[A] government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).' Nothing could be more unabashedly Christian than the New Testament Bibles." Jabr v. Rapides Parish Sch. Bd., 171 F. Supp. 2d 653, 660 (W.D. La. 2001) (citation omitted).

36. Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1166 (7th Cir. 1993).

37. "[T]he image of hundreds of students being marched into an auditorium for the yearly distribution of Bibles cannot but leave the imprimatur of state involvement." *Id.*

38. *Id.* at 1165.

39. *Id.* at 1165–67. The school district argued that it was merely a neutral conduit of ideas. *Id*. at 1165. However, the facts did not support this assertion. Bibles were distributed for decades in the presence of teachers, and students were instructed to return the Bibles to their teachers if they did not want them. *Id*. at 1165–66. Also, the record revealed no regular talks or literature distribution by any group other than the Gideons. *Id*. at 1166.

40. *Id.* at 1165 (holding that the free speech argument "distorts the facts and misconstrues the law").

school cannot sanitize an endorsement of religion forbidden under the Establishment Clause by also sponsoring non-religious speech."[41]

B. Schools with Public Forums May Not Discriminate on the Basis of Religious Content

Even as courts were outlawing Bible distribution on Establishment Clause grounds, a separate line of cases established the doctrine that public schools could not deny access to a group or writing on the basis of its religious content without violating the Free Exercise Clause.[42] Such a distinction would amount to viewpoint-based discrimination.[43] *Widmar v. Vincent*,[44] the leading case in this area, held that "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [school] must therefore satisfy the standard of review appropriate to content-based exclusions."[45] Once a school has created a public forum policy, it can only deviate from that policy if the viewpoint-based regulation serves a compelling government interest and is narrowly tailored to achieve that interest.[46]

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41. *Id.* at 1168. The court also noted that "it is clear that Rensselaer schools—despite the open policy—were not overrun with members of other religions vying for the students' faith. . . . [T]he salient point here is that Rensselaer school classrooms were not, in fact, open and active fora for competing ideas, contrary to assertions by the Corporation." *Id.* at 1166.

42. Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995) (holding that a public university cannot withhold funding from a student group because of the religious nature of the group's message). *See generally* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.") (quoting Cornelius v. NAACP Legal Def., 473 U.S. 788, 806 (1985)).

43. "It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Rosenberger*, 515 U.S. at 831.

44. 454 U.S. 263 (1981).

45. *Id.* at 269–70. In *Widmar*, members of a religious group at a state university brought an action challenging the university's policy of excluding religious groups from its open forum policy that made campus facilities available to students. *Id.* at 264–65. This notion was codified in the Equal Access Act, 20 U.S.C. §§ 4071–74 (2000), which provides that no school that receives federal funding and has a public forum policy can deny access to a student group on the basis of religious content. *Id.* § 4071(a). The law defines a limited public forum as any time a public school has granted "an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.* § 4071(b).

46. *Widmar*, 454 U.S. at 270. The Court held that the school's interest in complying with the Establishment Clause was indeed a compelling interest, but an equal access policy would

Courts have applied this viewpoint-discrimination test to religious expression in public elementary schools.[47] In *Hills v. Scottsdale Unified School District*,[48] the Ninth Circuit considered the constitutionality of a literature distribution program that prohibited literature of a religious nature.[49] The court found that the policy amounted to a limited public forum, and therefore the school district engaged in viewpoint discrimination by refusing to allow the distribution of religious literature.[50] In essence, the courts have determined that the danger that children will misperceive the endorsement of religion is no greater than the risk they will perceive a hostility toward religion if the religious expression is excluded.[51]

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not be incompatible with the First Amendment. *Id.* at 270–71.

47. In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the school district had opened its limited public forum for events "pertaining to the welfare of the community." *Id.* at 108. While finding that teaching morals and character development to children is a legitimate government interest, the Court held that a school's exclusion of a Christian children's club from meeting after hours at the school based on its religious nature was unconstitutional viewpoint discrimination. *Id*. at 108–09. The Good News Club could not be excluded simply for addressing morals and character development from a religious perspective. *Id*. at 110.

48. 329 F.3d 1044 (9th Cir. 2003).

49. *Id.* at 1046. The stated purpose of the open forum policy was to serve as a community service to students and their parents by letting them know about community events: summer camps, art classes, or scouting activities, for example. *Id*. at 1047. The plaintiff in this case ran a Christian summer camp and sought to have his brochures distributed by the school. *Id*. at 1047–48. When he was denied access to the forum based on the religious content of his brochures, he brought suit. *Id.*

50. *Id.* at 1050 ("Restrictions on speech in the context of a limited public forum must be both viewpoint neutral and reasonable in light of the purpose served by the forum.").

There was no risk in this case of an Establishment Clause violation because the brochures were not integrated into the curriculum, the events were not school-sponsored, the camp did not take place on school grounds, and the ultimate decision on whether the child would attend the camp was left up to the parents. *Id.* at 1054–56. The court also addressed the value of teaching students about the First Amendment: "[T]he desirable approach is not for schools to throw up their hands because of the possible misconceptions about endorsement of religion, but that instead it is '[f]ar better to teach [students] about the First Amendment, about the difference between private and public action, about why we tolerate divergent views.'" *Id*. at 1055 (quoting Hedges v. Wauonda Cmty. United Sch. Dist. No. 118, 9 F.3d 1295, 1299–1300 (7th Cir. 1993)).

However, the court did consider the possibility that religious groups might take advantage of the literature distribution policy in an attempt to proselytize. "[T]he District is not obligated to distribute material that, in the guise of announcing an event, contains direct exhortations to religious observance; this exceeds the purpose of the forum the District created." *Id.* at 1053.

51. *Milford Cent. Sch.*, 533 U.S. at 118. "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Id.* at 119.

C. Filling the Gap: The Collision of Free Exercise Clause and Establishment Clause Concerns in Schools with Public Forums

The issue of religious literature distribution in public schools with open forum policies brings the Free Exercise Clause and the Establishment Clause into tension with one another.[52] The Supreme Court has addressed this tension by pointing out a gap between the two: "Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[53] It is within this gap that courts have identified limited situations where religious literature distribution might be constitutionally acceptable.

The Fourth Circuit used the viewpoint-discrimination standard to erode the clear prohibition on the in-school Bible distribution by non-students in *Peck v. Upshur County Board of Education*.[54] In *Peck*, the school district had a long-standing policy of allowing non-student, private groups to distribute literature in public schools.[55] Under this policy, the district allowed a local religious group to distribute Bibles in the school, but placed strict requirements on the time, place and manner of the distribution to ensure that the group received no preferential treatment.[56] The Fourth Circuit held that this practice did

52. This is not, by any means, the only issue that creates this tension. Consider, for example, the issue of legislative prayer: "[L]egislative prayer is permissible under the Establishment Clause; however, someone cannot demand, on the strength of the Free Exercise Clause, that a legislature support such prayers." Alan Trammell, *The Cabining of Rosenberger:* Locke v. Davey *and the Broad Nondiscrimination Principle that Never Was*, 92 VA. L. REV. 1957, 1959 (2006).

53. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970). *See also* Locke v. Davey, 540 U.S. 712, 719 (2004) ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

54. 155 F.3d 274 (4th Cir. 1998).

55. Typical groups who were granted access to the schools included Little League, Boy Scouts, Girl Scouts, 4-H, and the Women's Christian Temperance Union. *Id*. at 275. The board's written policy had historically denied access to groups wishing to distribute religious or political literature, but at the request of a local religious group, the board held the policy to allow the passive distribution of such materials in schools. *Id*.

56. The school's limitations on Bible distribution were quite extensive. The Bibles were to be made available on a single day in a common area of the school and any remaining Bibles were to be removed at the end of the day. *Id*. at 277. No school personnel was to be involved in setting up the table and no one was allowed to stand by the table and encourage students to take a Bible; there was only to be a sign saying "Please feel free to take one." *Id*. The school also

not violate the Establishment Clause because "it was plainly adopted, not to advance religion, but for the secular purpose of 'open[ing] a forum for speech.'"[57] The court also dispatched with concerns about the coercive power of school endorsement, pointing out that "schools do not endorse everything they fail to censor."[58]

Some other circuits have embraced the Fourth Circuit's rationale in *Peck* over the last decade.[59] These opinions rely heavily on the Supreme Court's ruling in *Good News Club v. Milford Central School*,[60] pointing out that "the Court has never ruled that a school's practice might amount to an impermissible endorsement of religion because of the impressionability of the school's young students."[61]

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made it clear that any materials representing other religious beliefs would be given the same treatment if the school was asked to distribute them. *Id*.

57. *Id.* at 279 (citation omitted).

58. *Id.* at 283 (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)). However, the court did acknowledge that a different standard may apply to elementary schools, where the concerns regarding coercion are more pronounced. "[W]e are convinced that a majority of the Supreme Court might well believe that these concerns should be and are sufficient in the elementary school context to invalidate such a policy." *Id*. at 288 n.*.

59. *See generally* Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004) (holding that a school would not violate the Establishment Clause if it allowed a religious organization access to a limited public forum); Rusk v. Crestview Local Sch. Dist., 379 F.3d 418 (6th Cir. 2004) (holding that distribution of religious flyers did not constitute endorsement of religion by school, as would violate the Establishment Clause).

While embracing the Fourth Circuit's rationale in *Peck*, the Sixth Circuit in *Rusk* disagreed with the Fourth Circuit's assertion that the same reasoning does not apply to elementary schools. *Rusk*, 379 F.3d at 424. The Sixth Circuit observed that *Peck* was decided before *Milford*, in which the Supreme Court rejected "the age and impressionability of elementary school students as grounds for ruling that allowing a religious club to meet in school classrooms would violate the Establishment Clause." *Id*.

60. 533 U.S. 98 (2001).

61. *Rusk*, 379 F.3d at 421. In fact, at least one medical expert has testified that in order for young children to perceive an endorsement of religion, they would need to witness direct actions or statements of endorsement by school officials. Child psychiatrist Peter Fink testified on behalf of a school district at the trial in *Sherman v. Community Consolidated School District 21*, No. 92 C 6674, 1993 WL 57522 (N.D. Ill. 1993), *aff'd*, 8 F.3d 1160 (7th Cir. 1993). He contended that children of "Cub Scout age . . . don't get into the subtleties of abstraction unless there are literal and direct behaviors or statements made by individuals." *Id*. at *6. Although that case involved a challenge to the school's pledge of allegiance policy rather than school prayer, the court was forced to confront similar issues of peer coercion and state endorsement. It determined that while peer pressure from fellow students will likely exist in any school environment, there is practically no risk of state coercion when the activities take place outside the classroom and school officials are not directly involved. Dan Mbulu, *First Amendment: Extending Equal Access to Elementary Education in the Aftermath of* Good News Club v. Milford Central School, 16 REGENT U. L. REV. 91, 111 (2003–2004).

D. Defining Religious Literature

A key element of this discussion is whether certain forms of religious speech pose a greater threat to the Establishment Clause than others. Although there has been no debate regarding whether Gideon Bibles are religious by nature,[62] courts have been less clear in whether Bibles deserve a different level of First Amendment protection than other forms of religious literature. In the *South Iron* preliminary injunction order, the court suggested that there is a fundamental difference between religious flyers and the Bible because many people accept the Bible as the word of God.[63] This stance is supported in *Hills*, where the Ninth Circuit held that although flyers for religious camps could not be excluded under the district's public forum policy, Bibles could be.[64] The distinction seems to turn on the definition of religion, which the Ninth Circuit argued is generally a common term that is sufficiently clear to persons of ordinary intelligence.[65]

However, the Supreme Court has held that an individual's understanding of religion cannot be put on trial in First Amendment cases.[66] Banning a certain type of literature from a public forum

62. *See* Tudor v. Bd. of Educ., 100 A.2d 857, 866 (N.J. 1953) (holding that the Gideon Bible is a sectarian book). *See also* Goodwin v. Cross County Sch. Dist. No. 7, 394 F. Supp. 417, 428 (D.C. Ark. 1973) (holding that Gideon Bible distribution is an exercise of religious character).

63. *See supra* note 17. The court reinforced this notion in its summary judgment order, stating that "common sense tells us that a flyer advertising a church camp *is* different from a Bible. A person need only read the Bible to be confronted with a religious viewpoint, but reading a flyer does not have the same effect—the flyer requires a person to take follow-up action." Roark v. S. Iron R-1 Sch. Dist., No. 4:06 CV 392 CDP, 2008 WL 323173, at *15 (E.D. Mo. Jan. 8, 2008).

64. Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1053 (9th Cir. 2003). The court held that the limited public forum was never opened for pure discourse and as such, the district would be well within its rights to exclude a religious tract—such as the Gideon Bible—that was aimed at converting students to a particular belief. *Id*. The court also pointed out that the brochures themselves could cross that line if they stated: "Did you know that if a child does not come to the knowledge of JESUS CHRIST, and learn the importance of Bible reading by age 12, chances are slim that they ever will in this life? We think it is important to start as young as possible!" *Id*. at 1052–53.

65. *Id.* at 1056.

66. United States v. Ballard, 322 U.S. 78, 87 (1944) ("If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom."). *See also* Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S.

because it is deemed "religious" is viewpoint-based discrimination. Because free speech includes the right to distribute literature, a public forum policy cannot include a content-based restriction on literature distribution unless it is narrowly tailored to achieve a compelling state interest.[67] The Supreme Court has upheld the constitutionality of the provisions of the Equal Access Act prohibiting schools with public forum policies from discriminating on the basis of content defined as religious,[68] and therefore the Court has implied that complying with the Establishment Clause is not a sufficiently compelling interest to regulate speech on the basis of religious content in an open forum.[69] Furthermore, a school board cannot be placed in a position of determining what constitutes orthodox religious material.[70]

II. TWO RIGHT ANSWERS: DO BIBLE DISTRIBUTION BANS AND PUBLIC FORUM POLICIES BOTH ACCOUNT FOR THE STANDARDS ESTABLISHED IN *LEMON* AND *LEE?*

In analyzing any First Amendment religion issue, it is important to consider whether lower court decisions are in accord with the Supreme Court mandates set forth in *Lemon* and *Lee*. As recently as the early 1990s, the Supreme Court spurned the invitations of many to scrap the *Lemon* test, so its three-prong approach remains the

707, 714 (1981) ("[R]religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.").

67. Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1381–82 (1990).

68. Bd. of Educ. v. Mergens, 496 U.S. 226, 249 (holding that the Act's purpose was not to "endorse or disapprove of religion").

69. *See* Eugene C. Bjorklun, *Distribution of Religious Literature in the Public Schools*, 68 EDUC. L. REP. 957, 960 (1991). The author argues that the implication of *Mergens* is that the unimpeded distribution of religious literature must be allowed in any context where the distribution of secular literature is allowed. *See id.*

70. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982), a majority of the Supreme Court held that defendant school board was not entitled to summary judgment on a claim that it had reached beyond its constitutional discretion in removing certain books from the school libraries. *Id*. at 872. In the plurality opinion, Justice Brennan wrote that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'" *Id.* (quoting W. Va. Bd. of Educ. V. Barnette, 319 U.S. 624, 642 (1943)).

governing law.[71] However, courts can also rely on *Lee* to reject any religious activity that is so pervasive as to constitute a state-sponsored religious activity.[72]

A. Bible Distribution Bans vs. Lemon

Decisions in the wake of *Lemon* that have banned Bible distribution in public schools without public forum policies have consistently applied the three-part test.[73] The courts that have banned Gideon Bible distribution in schools without public forum policies have decided these cases correctly for three reasons: (1) the inherent pressure to accept Bibles; (2) the infringement on parental rights; and (3) the appearance of preferential treatment for Christianity. First, children in schools where Bibles are distributed during the day will likely feel coerced to participate in religious activity if the majority of their peers are receiving Bibles.[74] This is the very essence of the alternate Establishment Clause test that the Supreme Court applied in *Lee*.[75] Even if children are given an alternative to accepting the Bibles, it is unrealistic to expect children in the middle of a classroom setting to decline the Bibles.[76] Although students might technically have the ability to refuse the Bibles—just as the students in *Lee* could

71. Berger v. Rensselaer Cent. Sch. Corp., 982 F.2d 1160, 1169 (7th Cir. 1993). The Seventh Circuit points out that although the Court in *Lee* refrained from overruling the *Lemon* approach, that case was resolved without reference to the three-prong test. *Id.*

72. Lee v. Weisman, 505 U.S. 577, 587 (1992).

73. *See* Jabr v. Rapides Parish Sch. Bd., 171 F. Supp. 2d 653, 659–61 (W.D. La. 2001) (holding that a district policy allowing a principal to distribute Bibles in his office violated all three prongs of the *Lemon* test). *See also* Meltzer v. Bd. of Pub. Instruction, 548 F.2d 559, 577–79 (5th Cir. 1977) (holding that a board resolution allowing Bible distribution was inconsistent with *Lemon* because it lacked a secular purpose and the primary effect of the statute was to advance religion); *Berger*, 982 F.2d at 1171 (holding that a Bible distribution policy advances the Gideons' beliefs and entangles the government in religion).

74. Tudor v. Bd. of Educ., 100 A.2d 857, 866 (N.J. 1954) ("The law of imitation operates, the non-conformity is not an outstanding characteristic of children. The result is obvious pressure upon children to attend.") (quoting Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring)).

75. *Lee*, 505 U.S. at 587 ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . .").

76. "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain." *McCollum*, 333 U.S. at 227.

technically walk out of the graduation ceremony to avoid a prayer[77]—the First Amendment "prohibits the government from putting children in this difficult position."[78]

The distribution of Gideon Bibles also robs parents of their right to direct the religious upbringing of their children, whether that means teaching a certain faith to their children or teaching their children no faith at all.[79] "If the faith of a child is developed inconsistently with the faith of the parent and contrary to the wishes of the parent, interference with the familial right of the parent to inculcate in the child the religion the parent desires, is clear beyond doubt."[80]

Finally, regardless of the school board's intent, it is clear that a policy allowing the distribution of Bibles in the absence of other literature distribution places a stamp of approval on the Gideon version of the Bible.[81] Elementary school students should not be expected to distinguish between speakers invited by the schools and those whose visit is self-initiated, even when they are told how the distributors arrived at the school.[82]

B. Public Forum Policies vs. Lemon

The dangers presented by Bible distribution are eliminated when Bibles are distributed merely as part of a limited public forum policy. Cases that have allowed the distribution of religious materials in public schools with open forum policies have also carefully applied

77. *Lee*, 505 U.S. at 594–95. In *Lee*, the school district argued that a prayer held by a Rabbi during a graduation ceremony could not be considered an inducement to religion because the ceremony was optional and students could therefore choose not to attend if they opposed the prayer. *Id*. The Court rejected this argument, holding that "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions." *Id.* at 595.

78. *Berger*, 982 F.2d at 1170.

79. *See* Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181, 185 (Fla. Dist. Ct. App. 1960).

80. *Id.* at 184.

81. Meltzer v. Bd. of Pub. Instruction, 548 F.2d 559, 576 (5th Cir. 1977) ("[T]he school board's use of the school system as a means of distribution amounts to its placing, at least in the eyes of children and perhaps their parents, its stamp of approval upon the Gideon version of the Bible, thus creating an unconstitutional preference for one religion over another.").

82. *Berger*, 982 F.2d at 1166.

the *Lemon* criteria.[83] Courts have correctly held that open forum policies in public schools usually stem from a secular purpose.[84] In fact, the Supreme Court has held that public forum policies that include nondiscrimination against religion have an inherent secular purpose and do not amount to government entanglement with religion.[85]

The hardest inquiry for these policies to overcome is whether the primary effect of the policy advances or inhibits religion. Simply because an organization enjoys merely incidental benefits of a public forum policy does not mean that policy is a primary advancement of religion.[86] "[I]t is well established that 'schools do not endorse everything they fail to censor.'"[87] Courts have held that even when a religious group does receive incidental benefits from an open forum policy, there is no realistic danger that the community will see it as an endorsement of religion.[88]

Finally, well-drafted public forum policies limit the coercive dangers addressed by the Court in *Lee*.[89] While the possibility of student pressure might still exist, the characteristics of a properly implemented limited public forum reduce the risk of official coercion because the distribution takes place outside the classroom setting and school officials are not involved.[90] The Supreme Court has held that

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83. *See, e.g.*, Peck v. Upshur County Bd. of Educ., 155 F.3d 274, 279 (4th Cir. 1998) (holding that the school board's policy was adopted not to advance religion but for the secular purpose of opening a forum of speech to advance the school's educational mission).

84. In *Peck*, the court found that the school board's express purpose for creating an open forum policy was to allow private speakers to enhance education by exposing students to a broad range of ideas. *Id.*

85. Widmar v. Vincent, 454 U.S. 263, 271–72 (1981).

86. *Id.* at 273. The Court held that the religious group in this case enjoyed merely incidental benefits because the policy no more committed the university to the goals of religion than it did to the goals of any other secular student group. *Id.* at 274. Also, there were more than one hundred groups recognized by the university, the majority of which were not religious. *Id*.

87. *Peck*, 155 F.3d at 283 (quoting Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990)). The court relied on *Mergens* in stating that this proposition is true even when the limited public forum is meant to help shape the character of students. *Id.*

88. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (holding that the risk of community misperception was low because the school had also been used by a number of nonreligious private organizations).

89. Lee v. Weisman, 505 U.S. 577, 592 (1992) ("[T]here are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.").

90. *Peck*, 155 F.3d at 287. The court also specifically addressed the concerns raised in

it "cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive hostility toward the religious viewpoint if the [religious group] were excluded from the public forum."[91] The state's coercive power over children will play a role in their perception of religion regardless of officials' decision to allow religious activity in the school. Thus, it is better to allow the speech as part of the limited public forum and then educate the students about the First Amendment.[92]

III. PLAY IN THE JOINTS: FINDING A MIDDLE GROUND BETWEEN THE ESTABLISHMENT AND FREE EXERCISE CLAUSES IN GIDEON CASES

Most instances of Gideon Bible distribution would still amount to violations of the Establishment Clause. However, Supreme Court rulings over the last two decades have carved out an exception to the once-categorical ban on such distribution in public schools.[93] In very limited situations, the Gideons may be allowed to distribute Bibles. This will occur only when there is a true limited public forum: (1) distribution takes place outside the classroom; (2) no school

Lee, saying that "no student will be put to the choice of 'participating [in a religious exercise], with all that implies, or protesting.'" *Id.* (quoting *Lee*, 505 U.S. at 593).

91. Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118 (2001).

92. Hills v. Scottsdale Unified Sch. Dist., 329 F.3d 1044, 1055 (9th Cir. 2003) ("The school's proper response is to educate the audience rather than squelch the speaker. Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the [ ] schools can teach anything at all.") (quoting Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299–1300 (7th Cir. 1933)) (alteration in original).

93. The Supreme Court still has not directly addressed the distribution of Gideon Bibles in public schools. However, its holdings relating to the Equal Access Act and the availability of public schools for use by religious groups have implied that there may be a place for religious literature in a limited public forum. *See Milford Cent. Sch.*, 533 U.S. at 112 (holding that a school's exclusion of a Christian club was unconstitutional viewpoint discrimination). *See also* Bd. of Educ. Of Westside Cmty. Schools v. Mergens, 496 U.S. 226, at 253 (1990) (holding that the Equal Access Act was constitutional).

Lower courts have relied on these precedents to allow religious literature distribution. *See* Rusk v. Crestview Local Sch. Dist., 379 F.3d 418, 422–23 (6th Cir. 2004) (relying on *Milford* and *Mergens* in holding that distribution of flyers did not constitute endorsement of religion by the school). *See also* Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 531 (3d Cir. 2004) (relying on *Milford* and *Mergens* in holding that granting equal access to public facilities does not offend the Establishment Clause).

personnel are present; and (3) other, similar types of speech are also permitted.[94]

Applying this standard to the *South Iron* case study, it seems clear that a variation on the school's new policy[95] would be constitutional if it had been in place and utilized by other private groups.[96] However, the fact that the policy was designed specifically for the Gideons means that it fails the third prong of the proposed test.[97] In that respect, the court was correct in its decision to issue a preliminary injunction against the distribution of Gideon Bibles and a partial summary judgment order for the plaintiffs.

The court in *South Iron* also contended that the policy would be unconstitutional regardless of when it was enacted, because "[d]istinguishing Bibles from flyers . . . does not require drawing a line that has not been drawn before."[98] The problem with this perspective is that while it addresses the Establishment Clause concerns, it fails to balance these interests with the competing Free

94. This third point is particularly important. In *Peck*, the Fourth Circuit noted Justice O'Connor's suggestion that "'a private group may so dominate the forum that a formal policy of equal access is transformed into a demonstration of approval,' and that the resulting 'endorsement' of religion violates the Establishment Clause." *Peck*, 155 F.3d at 285 (quoting Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring)).

95. The Fourth Circuit in *Peck* was careful to observe the safeguards put in place by the school to prevent the perception of endorsement. These included allowing distribution of religious material only once a year, putting signs on the table to disclaim endorsement, and exerting no pressure on students (by faculty or others) to take materials. *Id.* at 287. In its summary judgment order, the court in *South Iron* correctly observed that the district's so-called open forum policy had none of these elements. Roark v. S. Iron R-1 Sch. Dist., No. 4:06 CV 392 CDP, 2008 WL 323173, at *16–*17 (E.D. Mo. Jan. 8, 2008).

96. The first policy was implemented just ten days before both the start of the school year and the preliminary injunction hearing, so no group had been given an opportunity to utilize the policy before the matter was presented in court. Doe v. S. Iron R-1 Sch. Dist., 453 F. Supp. 2d. 1093, 1095–96 (E.D. Mo. 2006). At the time of the court's preliminary injunction ruling, no requests had been made under the policy, but the court held that "past events show that such a request is highly likely to be forthcoming, if not from the Gideons, then from the local Ministerial Alliance or a similar group." *Id.* at 1099. The district modified its policy again in May 2007, apparently attempting to adopt some of the characteristics of the policy in *Peck* by specifically prohibiting school officials from being involved in distribution. *Roark*, 2008 WL 323173, at *5.

97. The court noted that "the evidence of the School Board's behavior here raises a very strong inference that the purpose of this new policy is to promote Christianity by providing a means for Christian Bibles to be distributed to the elementary school students." *Doe*, 453 F. Supp. 2d at 1102.

98. *Id.* at 1101.

Exercise Clause considerations. The court's assessment puts the court itself in the position of defining what constitutes fundamental religious speech. Given the Supreme Court's holdings that state actors should not be entitled to define orthodox religion,[99] it seems counterintuitive to allow the court to do so.[100] Such line drawing, where the limitations on speech are directly proportional to its level of religious content, is the very essence of viewpoint-based discrimination under the Free Exercise Clause.[101] Distribution of religious literature in public schools is either acceptable or it is not; the Constitution does not permit a sliding scale based on the religious content of the speaker.

The *South Iron* court's reliance on *Schempp v. School District*, and the proposition that "the place of the Bible as an instrument of religion cannot be gainsaid"[102] is misplaced because the cases are factually distinguishable. In *Schempp*, the school argued that the Bible was being used "as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects."[103] In that context, the obvious religious nature of the Bible cannot—and should not—be denied. However, in a true limited public forum as described above, there would be no debate about the religious nature

99. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (holding that any state action taken for the purposes of prescribing orthodox beliefs is inescapably condemned by Supreme Court precedent).

100. "The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task . . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question. . . ." Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 714 (1981).

101. In *Rosenberger*, the student-publication funding policy in question did not exclude religion as a subject matter but disfavored students with religious editorial viewpoints. Rosenberger v. Rector & Visitors, 515 U.S. 819, 831 (1995). The Court held that this was viewpoint discrimination because "the specific motivating ideology or the opinion or the perspective of the speaker is the rationale for the speaker." *Id.* at 829. This rationale is inconsistent with the court's argument in *South Iron* that distributing religious flyers is acceptable but distributing Gideon Bibles is not. Banning Gideon Bibles while allowing flyers punishes the Gideons because of the specific ideology and viewpoint expressed by the speakers. Those who wish to disseminate religious philosophy would be halted while those who wish to sell religious instruction would be allowed.

102. Sch. Dist. v. Schempp, 374 U.S. 203, 224 (1963).

103. *Id.* This case was the result of two companion cases (one from Pennsylvania and one from Maryland) in which state action required public schools to begin each day with Bible readings. *Id.* at 205. In Pennsylvania, the rule was a state statute, while the Maryland rule was a school board decision. *Id.* at 205, 211.

of the Bibles—or the Koran or Torah, for that matter—if a group chose to distribute those religious texts. Students would be aware that the content of the literature was religious, but the safeguards in place would ensure that they did not associate that religious message with school personnel or the state. In this way, Gideon Bible distribution could fall within the gap between the Free Exercise Clause and Establishment Clauses: it would be permitted by the Establishment Clause if the school chose to enact a limited public forum policy, but schools would be under no obligation from the Free Exercise Clause to do so.[104]

Allowing Bible distribution in the three-part limited public forum framework outlined above would ensure that schools acting in good faith to expose students to a diverse set of viewpoints were able to do so. But if, as in *South Iron*, the school district has exhibited a clear preference for a particular religious belief,[105] courts would be able to intervene to limit the Establishment Clause dangers presented by such a policy. In all likelihood, a school like South Iron, which seems intent on promoting Christianity, would probably choose to end Bible distribution if it meant the adoption of a policy that would allow other religious texts to be distributed as well. In this way, a limited public forum would balance the Establishment Clause rights of the students and parents to be free from state-sponsored religious activities with the Free Exercise rights of the Gideons to distribute literature in an open forum without being subjected to viewpoint discrimination.

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104. In *Locke v. Davey*, 540 U.S. 712 (2004), Chief Justice Rehnquist adopted the Supreme Court's "play in the joints" holding from *Walz v. Tax Commission*, 397 U.S. 664 (1970), clarifying that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." *Id*. at 719. While this gap between the Establishment Clause and the Free Exercise Clause is largely intuitive, *Davey* was the first Supreme Court case to specifically endorse "play in the joints" as an actual holding. Trammell, *supra* note 52, at 1959.

105. In its preliminary injunction order, the district court in *South Iron* held that, based on the undisputed facts in the case and the provided school board minutes, the only conceivable purpose for the district's action was "promotion of Christianity by distributing Bibles to elementary school students." Doe v. S. Iron R-1 Sch. Dist., 453 F. Supp. 2d 1093, 1102 (E.D. Mo. 2006).

CONCLUSION

Based on the notion that there is some play in the joints of the First Amendment, there may be an opportunity for the Gideons to slip into that gap and, in very limited situations, legally distribute Bibles in public elementary schools. In order for this to occur, the school in question must have an open forum policy in which (1) the distribution occurs outside the classroom; (2) no school officials actively participate in the distribution; and (3) other, similar types of speech are also permitted. This does not mean that the Gideons would have a constitutional right to distribution in all elementary schools. Only under extremely limited circumstances could Bible distribution fall into a gap where it is "permitted by the Establishment Clause, but not required by the Free Exercise Clause."[106] The distribution would be at the school's discretion.

This is not, as some might argue, an erosion of the wall separating church and state. Rather, it is an acknowledgement of the competing interests embodied by the First Amendment. The Supreme Court has made it clear that the Free Exercise Clause forbids government entities that operate limited public forums from discriminating on the basis of religious content in literature distribution. To create a higher standard for Bibles would put the Court in the position of creating viewpoint-based restrictions based on its understanding of religion, thus violating the Establishment Clause.

In the vast majority of cases, Gideon Bible distribution in public schools would still be unconstitutional; for example, the court in *South Iron* was correct to issue a preliminary injunction and partial summary judgment order because the evidence indicates that the school's goal in creating its so-called open forum policy was to advance the interests of the Gideons. Schools without public forum policies, schools that grant access only to the Gideons, or schools that enact public forum policies only as a pretext for the advancement of a specific religion still violate the Establishment Clause. However, a

106. *Locke*, 540 U.S. at 719.

blanket ban on in-school Bible distribution does not stand when considered in the limited public forum context and in light of the Supreme Court's Free Exercise Clause jurisprudence.