

## FREEDOM FROM COMPULSION

TESS SLATTERY\*

### INTRODUCTION

The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”<sup>1</sup> In *West Virginia Board of Education v. Barnette*, the Supreme Court held that students have a constitutionally protected right not to be compelled to perform a flag salute or Pledge.<sup>2</sup> In coming to this conclusion, the Court stated that “censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.”<sup>3</sup>

Recently, the United States Court of Appeals for the Eleventh Circuit upheld as facially constitutional a Florida statute requiring that all students at public schools—from kindergarten through twelfth grade—recite the Pledge of Allegiance to the flag each day.<sup>4</sup> While the statute acknowledges that the student has the *right* not to participate in this recitation, the student can only be excused upon the written request of a parent.<sup>5</sup> The Eleventh Circuit claimed its holding was consistent with *Barnette* because the statute protects parental rights; “the State, in restricting the student’s freedom of speech, advances the protection of the constitutional rights of parents.”<sup>6</sup>

It appears that the State of Florida, knowing that it could not directly compel a student to participate in a flag ceremony, has attempted to sidestep the Supreme Court’s *Barnette* holding by reassigning the right that that case protects. The Florida statute requires that a student obtain parental permission to abstain from participating in the Pledge of Allegiance; this can create tension between students’ First Amendment rights and parents’

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1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).
2. *Id.* at 642 (majority opinion).
3. *Id.* at 633.
4. *Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1281, 1285–86 (11th Cir. 2008).
5. *Id.* at 1281.
6. *Id.* at 1284.

rights to control the upbringing of their children. However, the Eleventh Circuit upheld the statute without weighing the students' First Amendment rights and the parents' right to control the upbringing of their children—thereby implying that there is no affirmative right for students to be free from compelled speech.<sup>7</sup> This is an incorrect interpretation of the Supreme Court's position on student rights. In *Barnette*, the Supreme Court held that students cannot be compelled to espouse a belief or idea;<sup>8</sup> the Court later held, in *Tinker v. Des Moines Independent Community School District*, that students have an affirmative right to free speech in public schools.<sup>9</sup> Given these two cases, the Court of Appeals of the Eleventh Circuit should not have accepted the State's balancing of students' and parents' constitutional rights without weighing them.

A student's right to be free from compelled speech cannot be erased solely in the name of parental rights. Similarly, parental rights are not universally trumped by a student's First Amendment rights. The Florida statute considered in *Frazier* struck a balance between these two independent rights; this note will address the competing rights presented by *Frazier* and attempt to develop a framework to balance those rights. Part I will provide a summary of the foundation of students' First Amendment rights as established by the Supreme Court's holdings in *Barnette* and *Tinker* as well as a brief look at how the Court defined the rights involved in a suit concerning the Pledge of Allegiance in *Elk Grove Unified School District v. Newdow*.<sup>10</sup> Part II will review lower federal courts' interpretations of those holdings to determine the scope of a student's right to be free from compelled speech. After establishing that there is an affirmative right for a student to be free from compelled speech, Part III will summarize how courts have defined parents' right to control their children's upbringing. Part IV will discuss the Eleventh Circuit case, *Frazier ex rel. Frazier v. Winn*. This will be followed by a description of Justice Breyer's new balancing approach to First Amendment Constitutional interpretation in Part V. Finally, through the framework Justice Breyer has developed, Part VI will argue that the proper balance of rights in the area of flag statutes leans towards the student. Protecting students' First Amendment rights encourages the democratic purpose that Justice Breyer extols by promoting discussion that is necessary for a healthy democracy.

7. *Id.* at 1285.

8. *Barnette*, 319 U.S. at 642.

9. 393 U.S. 503, 514 (1969).

10. 542 U.S. 1 (2004).

## I. SCOPE OF STUDENTS' FIRST AMENDMENT RIGHTS

In order to have a full understanding of the Supreme Court's position on students' First Amendment rights, both *Barnette* and *Tinker* need to be examined. In *Barnette* the Supreme Court limited what the State could compel a student to do<sup>11</sup>, while in *Tinker* the Court acknowledged that students have an affirmative right to exercise free speech in schools.<sup>12</sup> Taken together, these cases establish that students have protected First Amendment rights which include the right to be free from compelled affirmation of ideas or beliefs.

In *Barnette* the Court broke with precedent and found that students could not be compelled to say the Pledge of Allegiance. Previously, the West Virginia legislature passed a law that required schools to include courses in their curriculum "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism."<sup>13</sup> Pursuant to this law, the Board of Education issued a resolution ordering all students and teachers to participate in the Pledge of Allegiance.<sup>14</sup> Failure to comply with the flag ceremony rule resulted in expulsion, and for the duration of the expulsion the student was considered a delinquent and her or his parents were liable for prosecution which could result in a fine and jail time.<sup>15</sup>

The suit before the Court in *Barnette* was brought by students and their parents who were practicing Jehovah's Witnesses and whose faith prohibited them from saluting the flag.<sup>16</sup> In finding the regulation unconstitutional, the Court noted that a student's refusal to participate did not conflict with anyone else's rights and that it was peaceful behavior.<sup>17</sup> Furthermore, the Court stated that because "the compulsory flag salute and pledge require[d] affirmation of a belief and an attitude of mind," it is only constitutional if refraining from participation in the salute and pledge "present[ed] a clear and present danger of action of a kind the State is empowered to prevent and punish."<sup>18</sup> The Court found that, in this context, students were being compelled to speak without a showing that abstaining from a flag salute created a clear and present danger.<sup>19</sup>

The Court did not limit its holding on the issue of compulsion to in-

11. *Barnette*, 319 U.S. at 642.

12. *Tinker*, 393 U.S. at 514.

13. *Barnette*, 319 U.S. at 625.

14. *Id.* at 626.

15. *Id.* at 629.

16. *Id.*

17. *Id.* at 630.

18. *Id.* at 633.

19. *Id.* at 633-34.

stances when the student possessed certain religious views. The Court positioned the issue within the Free Speech Clause of the First Amendment and not the Establishment Clause; thus, while the appellees of this case were refusing to affirm based on religious convictions, the Court did not find that fact germane and determined that citizens may refuse to participate in the Pledge of Allegiance on any ground.<sup>20</sup> In deciding that the Board of Education was required to act within the limits of the Constitution, the Court emphasized schools' formative role in children's lives and the resulting need for "scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."<sup>21</sup> The Court held that "compelling the flag salute and pledge transcends constitutional limitations on [governmental] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."<sup>22</sup>

In *Tinker* the Court announced that students have affirmative First Amendment rights. In this case, junior high and high school students were suspended from school for wearing black armbands in protest of the Vietnam War.<sup>23</sup> The Court found that the wearing of the armbands was "closely akin to 'pure speech' which, [they] have repeatedly held, is entitled to comprehensive protection under the First Amendment."<sup>24</sup> The Court stated that students, as well as teachers, do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>25</sup> Like *Barnette*, this case did not deal with a clash of student and parent rights; rather it was a clash of First Amendment rights and the rules of school authorities.<sup>26</sup>

The Supreme Court acknowledged that there are circumstances in which a school may limit a student's freedom of speech, such as when that speech "would substantially interfere with the work[ings] of the school or impinge upon the rights of other students."<sup>27</sup> The Court pointed out that in *Tinker* the "school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners."<sup>28</sup> As in *Barnette*, the actions of the

20. *Id.* at 634–35.

21. *Id.* at 637.

22. *Id.* at 642.

23. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

24. *Id.* at 505–06.

25. *Id.* at 506.

26. *Id.* at 507.

27. *Id.* at 509.

28. *Id.* at 508.

students did not “intrude in the school affairs or the lives [and rights] of others.”<sup>29</sup> The Court explained that the school could not prohibit speech merely because it did not approve:

Students in school as well as out of school are ‘persons’ under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.<sup>30</sup>

The Supreme Court emphasized that the protection of students’ First Amendment rights is especially important because of schools’ role as a “market place of ideas.”<sup>31</sup> The Court stated that speech could only be regulated in “carefully restricted circumstances;” the Court reasoned that if the government were allowed to limit speech under any circumstance where it could show some reason for the limitation, the right to free speech would “be so circumscribed that it exists in principle but not in fact.”<sup>32</sup> The Court’s holding in *Tinker* indicates that students—with an exception for school discipline—are afforded the same constitutional rights to free speech as adults.<sup>33</sup>

In another Supreme Court case considering students and the Pledge of Allegiance, *Elk Grove Unified School District v. Newdow*, a non-custodial father sued to prevent his daughter from participating in the Pledge of Allegiance at her elementary school.<sup>34</sup> The thrust of the Court’s decision makes clear that students have constitutional rights apart from their parents. According to the custodial mother in this case, her daughter was not opposed to participating in the Pledge of Allegiance.<sup>35</sup> In addition to stating that “children themselves have constitutionally protectable interests,”<sup>36</sup> the Court pointed out that “in a fundamental respect, [i]t is the future of the

29. *Id.* at 514.

30. *Id.* at 511.

31. *Id.* at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

32. *Id.* at 513.

33. *Id.* at 514–15 (Stewart, J., concurring) (“I cannot share the Court’s uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. . . . [A] state may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.” (quoting *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring))).

34. 542 U.S. 1, 5 (2004).

35. *Id.* at 15.

36. *Id.* at 15 n.7 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 243 (1972)).

student, not the future of the parents,' that is at stake."<sup>37</sup> Thus, while the Court ultimately determined that the father did not have standing to sue, it placed an emphasis on the fact that it is not only the parents who have an interest in whether or not a student pledges allegiance, but also the child.<sup>38</sup>

## II. FEDERAL COURTS' INTERPRETATION OF *BARNETTE*

In *Holloman ex rel. Holloman v. Harland*, the Court of Appeals for the Eleventh Circuit considered whether a school's punishment of a student for silently raising his fist during the recitation the Pledge of Allegiance was constitutional.<sup>39</sup> Pursuant to *Barnette*, the State of Alabama had enacted statutes that required schools to recite the Pledge daily and excused students from compelled participation.<sup>40</sup> The court noted that the record showed that the student's actions were not disruptive to normal school procedures.<sup>41</sup> The court pointed out that there are two rights, both of which exist in public schools, within the First Amendment: "(1) the right to freedom of expression[] and (2) the right to be free from compelled expression."<sup>42</sup> The Eleventh Circuit stated in its holding that "*Barnette* clearly and specifically established that school children have the right to refuse to say the Pledge of Allegiance."<sup>43</sup> Thus, the court held that the punishment was unconstitutional, because "any 'reasonable person would have known' that disciplining [the student] for refusing to recite the pledge impermissibly chills his First Amendment rights."<sup>44</sup>

In *Goetz v. Ansell*, the Court of Appeals for the Second Circuit considered whether the First Amendment protected a student's choice to remain quietly seated during the Pledge of Allegiance.<sup>45</sup> The court held that since standing was statutorily defined as part of the Pledge, and *Barnette* held that "the state may not compel students to affirm their loyalty 'by word or act,'" the student could not be punished for not standing.<sup>46</sup>

Another case that considered the right of students to remain seated in the classroom during the Pledge of Allegiance was *Fran v. Baron*—a case in the District Court of the Eastern District of New York—a suit initiated

37. *Id.*

38. *Id.* at 15, 17–18.

39. 370 F.3d 1252, 1260 (11th Cir. 2004).

40. *Id.* at 1262.

41. *Id.* at 1261.

42. *Id.* at 1264 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001)).

43. *Id.* at 1269 (citing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

44. *Id.* (quoting *Thomas v. Roberts*, 261 F.3d 1160, 1170 (11th Cir. 2001)).

45. 477 F.2d 636, 636 (2d Cir. 1973).

46. *Id.* at 637 (quoting *Barnette*, 319 U.S. at 642).

by junior high and high school students.<sup>47</sup> It was the students' position that standing silently during the Pledge of Allegiance was a form of participation, which they sought to avoid due to their belief that the Pledge is a lie.<sup>48</sup> Furthermore, the students argued that being excluded from the classroom and required to stand in the hallway constituted a punishment levied in reaction to the students' exercise of their constitutional rights.<sup>49</sup> The school's principal maintained that "permitting a student to remain seated during the Pledge could be 'a real and present threat to the maintenance of discipline' and would be 'pedagogically foolhardy.'"<sup>50</sup>

The *Fran* court began its analysis with the principle that, "it is now beyond dispute that the constitution goes to school with the student and that the state may not interfere with the student's enjoyment of its presence."<sup>51</sup> When reviewing the Supreme Court's position on a student's First Amendment right, the court took note of the need to look at the progression from *Barnette* to *Tinker*; "the original concern [of] limit[ing] the state's power to compel a student to act contrary to his beliefs has shifted to a concern for affirmative protection of the student's right to express his beliefs."<sup>52</sup> In *Barnette*, the court rejected "compulsory participation as a proper vehicle for instilling patriotism."<sup>53</sup> As in *Barnette*, the *Fran* case dealt with an asserted right that did not conflict with another's rights.<sup>54</sup>

The district court pointed out that while *Tinker* was not about the Pledge of Allegiance, the Supreme Court, in that case, gave a rule of general applicability:

[for a school] to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid discomfort or unpleasantness . . . [E]xercise of the forbidden right [must] materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.<sup>55</sup>

Thus, *Tinker* gave students the right to express themselves in any form that does not disrupt school activities or infringe on the rights of other students.<sup>56</sup> The district court emphasized that the school had the burden of

47. 307 F. Supp. 27, 29–30 (E.D.N.Y. 1969).

48. *Id.* at 29.

49. *Id.*

50. *Id.* at 30.

51. *Id.* at 28–29 (quoting Theodore F. Denno, *Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM L. REV. 35, 56 (1969)).

52. *Id.* at 30.

53. *Id.* at 31.

54. *Id.*

55. *Id.* (internal citations omitted).

56. *Id.* at 32.

proving that, by sitting silently during the Pledge, the students were causing a disruption or infringing on other students' rights.<sup>57</sup>

Similarly, *Lipp v. Morris* involved a statute that required all students to stand at attention during the Pledge of Allegiance.<sup>58</sup> The student who brought suit—a sixteen year old—asserted that the statute requiring her to “stand during the recitation of the pledge of allegiance to the flag, compel[led] her to make what she termed a ‘symbolic gesture,’ [and] it violated her rights under the First and Fourteenth Amendments.”<sup>59</sup> The court accepted her argument that *Barnette* gave her the right not to stand or speak during the flag ceremony, because being forced to do either of those things amounts to compelled speech.<sup>60</sup> The court held that the mandatory condition that the student stand when not participating in the Pledge of Allegiance was “an unconstitutional requirement that the student engage in a form of speech and may not be enforced.”<sup>61</sup>

A father attempted to stop schools from reciting the Pledge because of the influence it would have on his first grade son in *Sherman v. Community Consolidated School District 21*.<sup>62</sup> The Seventh Circuit held that the school was free to recite the Pledge each day because it was “entitled to hold [its] causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.”<sup>63</sup> Even though this case involved a very young student, a first grader, the court stood by the holding in *Barnette*, and held the school may only lead “willing pupils” in the Pledge and no student was to be compelled.<sup>64</sup>

The Court of Appeals of the Third Circuit considered a statute similar to that involved in *Frazier*.<sup>65</sup> The Pennsylvania statute considered in *Circle Schools v. Pappert* did not require students to obtain parental permission to be excused from the flag ceremony; rather it required school officials to notify parents when a student did not participate in the Pledge of Allegiance.<sup>66</sup> The Third Circuit found this statute to be unconstitutional, noting

57. *Id.*

58. 579 F.2d 834, 835 (3d Cir. 1978).

59. *Id.*

60. *Id.* at 836.

61. *Id.*

62. 980 F.2d 437, 439 (7th Cir. 1992).

63. *Id.* at 444.

64. *Id.* at 445.

65. *Circle Sch. v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

66. *Id.* at 174 (citing 24 PA. STAT. ANN. § 7-771(c) (West 2003)).

the possible chilling effect of the parental notification on student free speech.<sup>67</sup> The state attempted to justify the parental notification by citing abortion cases which have held that since “immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences, a State reasonably may determine that parental consultation often is desirable and in the best interest of the minor.”<sup>68</sup> However, unlike the Eleventh Circuit, the Third Circuit found this reliance to be misplaced.<sup>69</sup> In finding the statute requiring parental notification to be unconstitutional, the Third Circuit stated that the “Supreme Court has repeatedly stated that ‘constitutional violations may arise from the deterrent or ‘chilling’ effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.’”<sup>70</sup>

### III. PARENTAL RIGHTS IN COMPETITION WITH CHILDREN’S RIGHTS.

This section will summarize how the courts have defined parental rights. There will then be a brief examination of how States are permitted to promote their interests through legislation. Finally, this section will review cases that have considered balances struck through legislation, and determine what limitations are placed on legislatures in this area.

Parents have historically been given broad rights over their families; “constitutional interpretation has consistently recognized that parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”<sup>71</sup> Parental rights, such as the nurture, care, and custody of children, are protected as a liberty interest by the Fourteenth Amendment.<sup>72</sup> The Supreme Court has repeatedly acknowledged that parents play a vital “guiding role” when it comes to the rearing of their children, and this role “presumptively includes counseling them on important decisions.”<sup>73</sup> Despite the broadness of parental rights over the rearing of their children, it is not an absolute right; “legal protection for parental rights is frequently tempered if not replaced by concern for the child’s interest. Whatever its importance elsewhere, parental authority deserves *de minimis* legal enforcement where the minor’s exercise of a fun-

67. *Id.* at 180–81.

68. *Id.* at 179 (quoting *Bellotti v. Baird*, 443 U.S. 622, 640 (1979)).

69. *Id.*

70. *Id.* at 181 (quoting *Bd. of Cnty. Comm’rs v. Umbehr*, 518 U.S. 668, 674 (1996)).

71. *H. L. v. Matheson*, 450 U.S. 398, 410 (1981) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

72. *Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260, 274 (3rd Cir. 1998).

73. *Matheson*, 450 U.S. at 410 (quoting *Bellotti*, 443 U.S. at 633–39).

damental right is burdened.”<sup>74</sup>

While parents have the constitutional right to control the upbringing of their children, states have a similar “strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”<sup>75</sup> Given this State interest, the Court has allowed the State “to adjust its legal system to account for children’s vulnerability and their needs for concern, sympathy, and paternal attention.”<sup>76</sup> In addition to protecting minors individually, the State may have an inherent interest in maintaining the familial structure itself.<sup>77</sup>

This section will now look at some cases which have considered the proper balance of competing rights. Conflicts involving minor and parental rights are most common in legislation dealing with abortion. In *Ayotte v. Planned Parenthood of Northern New England*, the Supreme Court considered a statute that provided for parental notification of a minor’s decision to have an abortion but did not require parental consent.<sup>78</sup> In determining whether parental notification was an unconstitutional burden on the minor’s rights, the Supreme Court acknowledged the role states can assign to parents when it comes to minors obtaining abortions; the Court stated that “[s]tates unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their ‘strong and legitimate interest in the welfare of [their] young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.’”<sup>79</sup>

Similarly, in *H.L. v. Matheson*, the Supreme Court considered whether requiring parental notification before the performance of an abortion violates a minor girl’s constitutional rights.<sup>80</sup> This case came to the United States Supreme Court from the Utah Supreme Court, where that court had “unanimously upheld the statute.”<sup>81</sup> The Utah Supreme Court rested its opinion on the ground that requiring parental notification worked to protect “significant state interest[s]” that are special to a minor having an abortion.<sup>82</sup> The Utah Supreme Court found that the notification was proper

74. *Id.* at 449 (Marshall, J., dissenting) (footnote omitted).

75. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326 (2006) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990)) (alteration in original).

76. *Bellotti*, 443 U.S. at 635 (internal citations and ellipses omitted).

77. *Matheson*, 450 U.S. at 419 (Powell, J., concurring).

78. 546 U.S. at 323–24.

79. *Id.* at 326 (quoting *Hodgson*, 497 U.S. at 444–45) (alteration in original).

80. *Matheson*, 450 U.S. at 399–400.

81. *Id.* at 404.

82. *Id.* (alteration in original).

because it did not give parents “veto power over the minor’s decision, [and, therefore] it [did] not unduly intrude upon a minor’s rights,” and it also worked to maintain the parent’s role in child-rearing.<sup>83</sup>

The *Matheson* Court noted that in the case of a minor obtaining an abortion, the State “does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.”<sup>84</sup> That being said, the Supreme Court has never “suggest[ed] that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.”<sup>85</sup> Recognizing that both the minor and the parents have valid constitutional rights, the Supreme Court in *Matheson* engaged in a weighing of those rights to determine if the State had reached the proper balance.

In his concurring opinion for *Matheson*, Justice Powell explicitly stated all of the interests involved in the case. Justice Powell’s opinion pointed out that there are several significant interests that must be considered when a minor wants to have an abortion.<sup>86</sup> While there are competing interests, the minor’s “right to make that decision may not be unconstitutionally burdened.”<sup>87</sup> In laying out the interests involved, Justice Powell stated that no single interest of any party is absolute—the minor has an interest in having her decision honored; the state has an interest in both promoting childbirth over abortion and getting parents involved so as to provide guidance to the minor in her decision making process, as well as a general interest in maintaining the familial structure itself; and the parents “have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, especially during immature years.”<sup>88</sup>

The *Matheson* Court reviewed parental rights and stated that “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”<sup>89</sup> Furthermore, “it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations

83. *Id.* at 405.

84. *Id.* at 408 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

85. *Id.* (quoting *Danforth*, 428 U.S. at 75).

86. *Id.* at 418–19 (Powell, J., concurring).

87. *Id.* at 419.

88. *Id.*

89. *Id.* at 410 (majority opinion) (quoting *Ginsberg v. New York*, 390 U.S. 629, 639 (1968)).

the state can neither supply nor hinder.”<sup>90</sup> The Court noted that it has repeatedly acknowledged that parents play a vital “guiding role” when it comes to the rearing of their children, this role “presumptively includes counseling them on important decisions.”<sup>91</sup>

Justice Marshall’s dissenting opinion in *Matheson* elaborated on the minor’s rights; the Due Process Clause of the Fourteenth Amendment provides women with the right to privacy.<sup>92</sup> The right to privacy protects women from “unwarranted state intervention” in their decision to have an abortion, as well as from having their personal information disclosed to others.<sup>93</sup> This right to privacy has been extended to minors, and as Justice Marshall’s opinion pointed out, “there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.”<sup>94</sup> Justice Marshall emphasized that minors do not exist in a constitutional vacuum until they reach the age of majority, “minors as well as adults, are protected by the Constitution and possess constitutional rights.”<sup>95</sup> Despite the existence of minor’s constitutional rights, “the Court . . . [has long] recognized that the State has somewhat broader authority to regulate the activities of children than of adults.”<sup>96</sup> This authority however does not mean that a minor’s constitutional rights are “somehow less fundamental . . . the more sensible view is that state interests inapplicable to adults may justify burdening the minor’s right.”<sup>97</sup>

In coming to its conclusion as to the constitutionality of the Utah statute, the Court placed emphasis on the fact that the statute “gives neither parents nor judges veto power over the minor’s abortion decision.”<sup>98</sup> The concurring opinion, citing *Planned Parenthood of Central Missouri v. Danforth*, maintained that “a pregnant minor’s right to make the decision to obtain an abortion may not be conditioned on parental consent.”<sup>99</sup> The statute at issue in this case, like the one in *Frazier*, has an “impact upon a minor’s exercise of his or her rights;” Justice Powell identified that fact as the beginning of the constitutional inquiry:—“[o]nce the statute’s impact is identified, it must be evaluated in light of the state interests underlying the

90. *Id.* (quoting *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)).

91. *Id.*

92. *Id.* at 434 (Marshall, J., dissenting).

93. *Id.* at 434–35 (internal quotations and citations omitted).

94. *Id.* at 436 (quoting *Bellotti v. Baird*, 443 U.S. 622, 642 (1979)).

95. *Id.* at 435 n.19 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74–75 (1976)).

96. *Id.* (quoting *Danforth*, 428 U.S. at 74–75).

97. *Id.* at 442 n.32.

98. *Id.* at 411 (majority opinion).

99. *Id.* at 421 (Powell, J., concurring).

statute.”<sup>100</sup>

The State’s interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State’s interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible.<sup>101</sup>

Justice Powell’s concurrence also stated that even if abortion “is the most important kind of decision a young person may ever make, that assumption merely enhances the quality of the State’s interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative.”<sup>102</sup> The Court found that the statute, when applied to immature and dependent minors, “plainly serves the important considerations of family integrity and protecting adolescents.”<sup>103</sup> The Court explicitly pointed out that the statute only requires notice to be given to the parent and does not require a minor to obtain parental consent; the Court “expressly declined to equate notice requirements with consent requirements.”<sup>104</sup>

While the Court acknowledged that a parental notice requirement “may inhibit some minors from seeking abortions,”<sup>105</sup> the Court did not see this as a basis to find notice requirements unconstitutional; “the Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions.”<sup>106</sup> The Court held that “the statute plainly serves important state interests, is narrowly drawn to protect only those interests, and does not violate any guarantees of the Constitution.”<sup>107</sup>

In *Bellotti v. Baird*, the Supreme Court considered a statute that required minor girls to obtain parental consent before an abortion could be performed.<sup>108</sup> The Supreme Court reviewed the district court’s opinion that had found that the constitutional right to an abortion was not limited to

100. *Id.*

101. *Id.* at 421–22 (quoting *Danforth*, 428 U.S. at 102–03).

102. *Id.* at 422 (quoting *Danforth*, 428 U.S. at 103).

103. *Id.* at 411 (majority opinion) (internal footnote omitted).

104. *Id.* at n.17.

105. *Id.* at 413.

106. *Id.*

107. *Id.*

108. 443 U.S. 622, 625 (1979).

women who had reached majority.<sup>109</sup> The district court held that since the state passed the statute merely to protect the rights of the parents, not to protect the minor, there was no justification for requiring parental consent.<sup>110</sup> In its analysis of the case, the Supreme Court considered the special circumstances involved in a case when a minor's rights conflicts with parental rights.

The *Bellotti* Court pointed out that while children are “not beyond the protection of the Constitution,”<sup>111</sup> they are treated uniquely under the law.<sup>112</sup> The Court found that the special circumstances of the familial relationship “require[d] that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.”<sup>113</sup> The Court reiterated that children's constitutional rights are not coextensive with adult constitutional rights, and gave three justifications for that position: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”<sup>114</sup> Due to these peculiarities of children's constitutional rights, the State is permitted to “adjust its legal system.”<sup>115</sup>

The *Bellotti* Court explained that States were permitted to limit children's constitutional rights because “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>116</sup> Even accepting this role of the State, the State “may not arbitrarily deprive them of their freedom of action altogether.”<sup>117</sup> One way the State limits the freedoms of minors is by “requiring parental consent to or involvement in important decisions by minors.”<sup>118</sup> This allows the parent to do something the State cannot: to foster ethical, religious, or political beliefs they agree with in their children.<sup>119</sup> The Supreme Court explained that “[l]egal restrictions on minors, especially those supportive of the parental role, may be important to the child's chances for the full growth and maturity that make eventual participation in a free society meaningful and re-

109. *Id.* at 628.

110. *Id.*

111. *Id.* at 633.

112. *Id.*

113. *Id.* at 634.

114. *Id.*

115. *Id.* at 635.

116. *Id.*

117. *Id.* at 637 n.15.

118. *Id.*

119. *Id.* at 638.

warding.”<sup>120</sup>

The Court pointed out that while the State cannot “lawfully authorize an absolute parental veto over the decision of a minor to terminate her pregnancy,”<sup>121</sup> it may legislate parental consultation “as immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.”<sup>122</sup> The statute under consideration was found to be unconstitutional because it took too much freedom away from the minor girl; it allowed judicial override of a mature and competent minor’s decision and it did not provide the minor with a mechanism to bypass the parental consent requirement.<sup>123</sup>

#### IV. FRAZIER *EX REL.* FRAZIER V. WINN

In *Frazier ex rel. Frazier v. Winn*, the Eleventh Circuit upheld as facially constitutional a Florida statute that requires a student to obtain parental permission before abstaining from the Pledge of Allegiance.<sup>124</sup> The Florida statute states that “[e]ach student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge.”<sup>125</sup> The State’s argument, which was ultimately accepted by the Court of Appeals, placed emphasis on “the fundamental constitutional right of parents to control the upbringing of their minor children and to decide whether a child should participate in the Pledge.”<sup>126</sup> The student argued that the Pledge statute was facially unconstitutional, the district court agreed and held that the parental consent requirement “rob[bed] the student of the right to make an independent decision whether to say the Pledge.”<sup>127</sup>

The Eleventh Circuit considered two challenges to the constitutionality of the Florida statute: a requirement that students stand during the recitation of the Pledge of Allegiance and the requirement of parental consent.<sup>128</sup> When considering the standing requirement, the Eleventh Circuit unequivocally stated that “students have a constitutional right to re-

120. *Id.* at 638–39.

121. *Id.* at 639 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976)).

122. *Id.* at 640.

123. *Id.* at 651.

124. 535 F.3d 1279, 1285 (2008).

125. FLA. STAT. § 1033.44(1) (2003).

126. *Frazier*, 535 F.3d at 1281.

127. *Id.* at 1281–82.

128. *Id.* at 1282.

main seated during the Pledge [that] is well established.”<sup>129</sup> The court held that since the Florida statute did not provide an exemption for those not reciting the Pledge, it was unconstitutional and it was severed from the rest of the statute.<sup>130</sup> The Eleventh Circuit classified the plaintiff’s challenge to the parental consent requirement as an overbreadth challenge; the statute “too broadly deters free speech and is facially unconstitutional.”<sup>131</sup> To determine that a statute is facially unconstitutional, the court must find that “a ‘substantial’ amount of protected free speech” is punished, and it must be “‘substantial’ not only in an absolute sense, but also relative to the scope of the law’s plainly legitimate applications.”<sup>132</sup>

Even though the Eleventh Circuit cited *Barnette*’s First Amendment standard that “freedoms of speech . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect,”<sup>133</sup> it placed primary focus on the *Barnette* Court’s admission that “the sole conflict is between authority and rights of the individual.”<sup>134</sup> The Eleventh Circuit chose to interpret the Florida statute as a parental-rights statute:

Although the statute here generally requires students to recite the Pledge, the statute also requires students to be notified that they might be excused from reciting the Pledge. The statute then spells out how a student may be excused, that is, by getting his parent’s consent. Most important, the statute ultimately leaves it to the parents whether a schoolchild will pledge or not.<sup>135</sup>

This is a flawed interpretation of the statute. The statute does not say to notify students that they “might be excused,” the statute clearly states that the student has the “right not to participate.”<sup>136</sup> However, the statute limits the student’s ability to exercise this right by requiring parental consent. Under the statute, the students cannot simply exercise their First Amendment rights and assert their beliefs; rather they must tell their parents their beliefs and the parents then exercise their right. The Eleventh Circuit finds this law to be one of parental control; however, even accepting that the goal of the statute is to promote parental control, this statute does not erase the student’s pre-existing First Amendment rights.

The Eleventh Circuit recognized that there was a clash of two sets of

129. *Id.*

130. *Id.* at 1283.

131. *Id.*

132. *Id.* at 1284.

133. *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943)).

134. *Id.* (quoting *Barnette*, 319 U.S. at 630).

135. *Id.*

136. FLA. STAT. § 1033.44(1) (2003).

rights in this case, “the State, in restricting the student’s freedom of speech, advances the protection of the constitutional rights of parents: an interest which the State may lawfully protect.”<sup>137</sup> The court framed the issue so that students’ exercise of their First Amendment rights without the consent of their parents interferes with “their parents’ fundamental right to control their children’s upbringing.”<sup>138</sup> While accepting that the government could not directly prevent a student from choosing to abstain from the Pledge ceremony, the Eleventh Circuit stated that parents have a stronger right to control their children’s behavior.<sup>139</sup> The Eleventh Circuit “conclude[d] that the State’s interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some students’ freedom of speech.”<sup>140</sup>

In coming to this conclusion, the court did not engage in any meaningful weighing of the rights involved. Furthermore, the court supported this conclusion by citing that “courts have limited constitutional rights of minors and upheld state support of parental involvement”<sup>141</sup> in cases dealing with abortion and condom distribution. However, reliance on cases in these different contexts is unwarranted. In cases dealing with abortion and condom distribution, those courts weighed the rights of both the minor and the parent and came to the conclusion that there was a justified need for parental involvement in important and potentially life altering choices; here, the court made no attempt to justify lumping a flag salute in with these other contexts. The Eleventh Circuit did explicitly stress that their holding was no indication of how the constitutional analysis of the statute would play out in the context of “a specific student or a specific division of students.”<sup>142</sup>

#### V. JUSTICE BREYER’S BALANCING TEST

Throughout the years, the Supreme Court has developed a systematic way of looking at the First Amendment and ascertaining the rights under it. The cases that have considered the constitutionality of various Pledge statutes have all taken a traditional view of the problem. It is clear under *Barnette* and *Tinker* that, in cases where it is the student’s First Amendment rights against the school’s or State’s interests, the student’s rights

137. *Frazier*, 535 F.3d at 1284.

138. *Id.*

139. *Id.* at 1285.

140. *Id.*

141. *Id.* at 1285 n.7.

142. *Id.* at 1286.

cannot be overcome without showing a clear and present danger to a protected interest—such as maintaining discipline in the school. However, it is not clear that this is the proper approach for cases that involve both student and parental rights. A new and helpful approach to analysis of First Amendment freedom of speech cases in the area of communications has been developed by Justice Breyer. Justice Breyer believes that, when a law regulating speech is implemented and there are two sets of rights involved, the traditional First Amendment analysis is not enough and that there must be a balancing of the competing interests. This section of the note will explain Justice Breyer's approach to First Amendment interpretation, and the following section will apply it to the *Barnette* issue.

Justice Breyer's approach to First Amendment cases is only a small part of his larger philosophy of the Constitution, which he has termed active liberty. In a speech given at New York University, Justice Breyer laid out the underlying views of his approach to constitutional interpretation.<sup>143</sup> Briefly, these are:

[1] the Constitution, considered as a whole, creates a framework for a certain kind of government.<sup>144</sup> . . . [2] the Court, while always respecting language, tradition, and precedent, nonetheless has emphasized different general constitutional objectives at different periods in its history.<sup>145</sup> . . . [3] the real-world consequences of a particular interpretive decision, valued in terms of basic constitutional purposes, play an important role in constitutional decisionmaking [sic].<sup>146</sup>

Justice Breyer's approach rejects the idea of placing “nearly exclusive interpretive weight upon language, history, tradition, and precedent.”<sup>147</sup>

In considering the role of the First Amendment in his view of the Constitution, Justice Breyer uses campaign finance reform as an example. In his opinion, these types of questions should be approached “with the understanding that important First Amendment-related interests lie on both sides of the constitutional equation, and that a First Amendment presumption

143. Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002).

144. *Id.* at 247 (“It’s general objectives can be described abstractly as including: (1) democratic self-government; (2) dispersion of power (avoiding concentration of too much power in too few hands); (3) individual dignity (through protection of individual liberties); (4) equality before the law (through equal protection of the law); and (5) the rule of law itself.”).

145. *Id.* at 248 (“Thus, one can characterize the early nineteenth century as a period during which the Court helped to establish the authority of the federal government . . . . During the late nineteenth and early twentieth centuries, the Court underemphasized the Constitution’s efforts to secure participation by black citizens in representative government . . . . At the same time, it overemphasized protection of property rights . . . . The New Deal Court and the Warren Court reemphasized ‘active liberty.’ The former did so by dismantling various *Lochner*-era distinctions . . . . The latter did so by interpreting the Civil War Amendments in light of their purposes to mean what they say.”).

146. *Id.* at 249.

147. *Id.*

hostile to government regulation, such as ‘strict scrutiny,’ is consequently out of place.”<sup>148</sup> For his analysis of a campaign finance statute, Justice Breyer identifies the competing rights: [1] there is the infringement on the speech of those persons/groups who wish to donate large sums of money to campaigns, and [2] limitations on donations to campaigns helps maintain the democratic process by providing confidence in the system to the public and allowing the public an opportunity to communicate and participate in elections.<sup>149</sup>

In Justice Breyer’s view, the Court’s approach should be one that looks at proportionality:

Do the statutes strike a reasonable balance between their electoral speech-restricting and speech-enhancing consequences? Or do they instead impose restrictions on that speech that are disproportionate when measured against their corresponding electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restrictions in order to secure them?<sup>150</sup>

Under this paradigm, Justice Breyer finds limits on campaign contributions to be constitutional.<sup>151</sup> While the statute at issue certainly limits the speech of some persons/groups, the statute is tailored to maintain a healthy democratic process, and the infringement to some individuals/groups is minimal compared to the gains of the larger society.<sup>152</sup>

Justice Breyer developed his approach through cases concerning the constitutionality of statutes in the area of communications. Justice Breyer’s reasoning in these cases lays out the approach to be taken for a balancing of rights when a case involves competing interests. First, there is a rejection of traditional approaches, followed by the identification of the involved competing interests/rights, and these interests are then weighed to determine if the statute under consideration has established the “proper fit.”<sup>153</sup>

Justice Breyer rejects the use of categorical standards or strict scrutiny because

[b]oth categorical approaches suffer from the same flaws: They import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free

148. *Id.* at 253.

149. *Id.*

150. *Id.*

151. *Id.*

152. *See Id.*

153. *Id.* at 252–53.

exchange of ideas the First Amendment is designed to protect.<sup>154</sup>

Justice Breyer emphasizes that the Court has throughout its history adapted First Amendment principles so that they can be properly applied to balance competing interests according to the particular circumstances.<sup>155</sup>

Justice Breyer frames the issue in the communication cases as there being at least two competing interests. While there is clearly a First Amendment interest involved in any case restricting communications, Justice Breyer acknowledges that this is not the complete picture.<sup>156</sup> In every case, there is some other interest competing with the First Amendment right. Justice Breyer's approach considers each interest to be valid and attempts to look at the totality of the circumstances in order to ascertain whether a restriction on speech is constitutional.

After identifying the interests, Justice Breyer balances them by considering whether or not the statute has determined the "proper fit."<sup>157</sup> To answer this question, in Justice Breyer's view, requires two considerations: "[1] whether there are significantly less restrictive ways to achieve Congress' . . . objectives, and . . . [2] whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences."<sup>158</sup> To find a statute unconstitutional under Justice Breyer's approach, a restriction on speech must be determined to be disproportionate to the benefits gained by the competing interest "and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits."<sup>159</sup>

This section will now look at a couple of cases where Justice Breyer implemented his balancing approach to First Amendment cases. The first case where Justice Breyer introduces his form of analysis is *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.<sup>160</sup> This case involved "First Amendment challenges to three statutory provisions that [sought] to regulate the broadcasting of 'patently offensive' sex-related material on cable television."<sup>161</sup> In evaluating the challenged provisions, Justice Breyer rejected both the adoption a categorical standard that had been developed for other contexts, as well as an approach which analogizes

154. *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996).

155. *Id.* at 740-41.

156. *Id.* at 743.

157. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997).

158. *Id.*

159. *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001).

160. 518 U.S. 727.

161. *Id.* at 732.

to other contexts so strict scrutiny could be applied.<sup>162</sup>

In his consideration of one of the provisions at issue,<sup>163</sup> Justice Breyer identified all of the interests involved: “[1] protecting children from exposure to patently offensive depictions of sex . . . [2] interests of programmers in maintaining access channels and [3] of cable operators in editing the contents of their channels.”<sup>164</sup> After identifying the interests, Justice Breyer performed a balance analysis. He noted that the Court has previously found the protection of children from sexual material to be a compelling justification for restrictions.<sup>165</sup> He then pointed out that the provision has arose in a “particular context,” Congress granted path of access for local and public channels to be shown by cable operators, and this new provision gave the cable operators authority to regulate the programming.<sup>166</sup>

The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them), and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the cable operator would have assigned the channels devoted to access).<sup>167</sup>

After considering the totality of the circumstances, Justice Breyer found the statute to be constitutional because it protected children from sexual materials “while accommodating both the First Amendment interests served by the access requirements and those served in restoring to cable operators a degree of the editorial control that Congress removed.”<sup>168</sup>

While Justice Breyer was writing for the Court in *Denver Area Educational Telecommunications Consortium*, his mode of interpretation has not been adopted by the other members. In the next case to be considered, Justice Breyer filed a concurring opinion; while he agreed with the Court’s determination as to the constitutionality of the statute, he did not agree with their reasoning. In *Turner Broadcasting System, Inc. v. FCC*,<sup>169</sup> the Court considered must-carry statutes, which provided that cable operators must carry local stations in its broadcasts to homes with cable television.

Justice Breyer agreed with the conclusion of the Court that the statute

162. *Id.* at 739–40.

163. Cable Television Consumer Protection and Competition Act of 1992, 106 STAT. 1486 § 10(a) (*permitting* the operator to decide whether or not to broadcast such programs on *leased* access channels). (emphasis added); *Denver Area Educ. Telecomm. Consortium, Inc.*, 518 U.S. at 733.

164. *Denver Area Educ. Telecomm. Consortium*, 518 U.S. at 728.

165. *Id.* at 743.

166. *Id.*

167. *Id.* at 743–44. (internal citations omitted).

168. *Id.* at 747.

169. 520 U.S. 180, 186 (1997).

was constitutional because “it advances important governmental interests unrelated to the suppression of free speech and [it] does not burden substantially more speech than necessary to further those interests.”<sup>170</sup> However, Justice Breyer based his conclusion upon different considerations than the Court. Justice Breyer cited what the Court stated about the statute’s purpose of “(1) preserving the benefits of free, over-the-air local broadcast television, and (2) promoting the widespread dissemination of information from a multiplicity of sources.”<sup>171</sup> It is from these purposes that Justice Breyer identified one set of First Amendment interests in conflict in this case: to prevent the decline of quality and quantity of television choices for non-cable customers which reflects the “basic tenet of national communications policy, namely, that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”<sup>172</sup> The distribution of this type of information is germane to informed deliberation and discussion, and such debate is essential to the democratic process and is thus a value the First Amendment seeks to promote.<sup>173</sup>

Justice Breyer pitted this interest against those of the cable operators. The cable operators were facing suppression of speech with the implementation of the must-carry statute.<sup>174</sup> The statute interfered with their ability “to choose their own programming; it prevents displaced cable program providers from obtaining an audience; and it will sometimes prevent some cable viewers from watching what, in its absence, would have been their preferred set of programs.”<sup>175</sup> Justice Breyer considered both of these interests to determine what he considers the “key question,” whether or not the statute has determined the “proper fit.”<sup>176</sup>

To answer this question, in Justice Breyer’s view, requires two considerations: “[1] whether there are significantly less restrictive ways to achieve Congress’ over-the-air programming objectives, and . . . [2] whether the statute, in its effort to achieve those objectives, strikes a reasonable balance between potentially speech-restricting and speech-enhancing consequences.”<sup>177</sup> Once again, Justice Breyer concluded that the speech-restricting aspects of the statute are limited and thus, the statute is

170. *Id.* at 225 (Breyer, J., concurring).

171. *Id.* at 226.

172. *Id.* at 226–27 (internal citations omitted).

173. *Id.* at 227.

174. *Id.* at 185.

175. *Id.* at 226 (Breyer, J., concurring).

176. *Id.* at 227.

177. *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989)).

constitutional.<sup>178</sup>

## VI. BALANCING PARENTAL AND STUDENT RIGHTS

The Florida flag statute intersects two sets of rights, namely, the rights of parents and the rights of students. In enacting this statute, the Florida legislature asserted what it believes to be the proper balance of these rights. This section will suggest a balance of parental and child rights based upon Justice Breyer's approach to First Amendment interpretation and the cases considered in Section III.

The first step to applying Justice Breyer's approach is to reject the traditional approach of clear and present danger. *Barnette* set out the clear and present danger test as applicable to students being compelled to say the Pledge of Allegiance.<sup>179</sup> Under this, students could not be compelled to perform the Pledge unless refraining from participation in the salute and Pledge "present[ed] a clear and present danger of action of a kind the State is empowered to prevent and punish."<sup>180</sup> This showing was not made in *Barnette* and the statute was found unconstitutional. While this standard may be appropriate in cases, like many of those discussed in Part II, where it is the government infringing the rights of a citizen, it is less appropriate in cases with competing interests of different groups of citizens.

Under this standard, it would have to be shown that there was a clear and present danger to parents' right to control the upbringing of their child in order for the statute to be constitutional. It is unlikely that this standard would be met; a student sitting quietly at her or his desk at school while others are saying the Pledge of Allegiance is not an act that presents a clear and present danger to parents' interests in the upbringing of their children. The child choosing to abstain from participation in the Pledge of Allegiance is not something that could be seen as an act of the school or government which attempts to override the parent's right. Parents' lack of control over this single action would not result in the school or government asserting other infringements on parental control, nor can it be said that allowing the student the freedom to choose in this instance would result in a loss of parental control in other areas.

The clear and present danger test is inappropriate in this context because it is too strict and too narrow. Requiring a clear and present danger indicates that one right is more important than another. Under this standard,

178. *Id.* at 228–29.

179. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).

180. *Id.*

it is assumed that the student's First Amendment Rights are the interest the government should be most concerned about protecting. This is assumed without considering what parental interests are even involved. In order to determine whether the proper balance has been struck in the Florida statute under consideration in *Fraizer*, one must acknowledge that both sets of rights are equally important in the abstract, and then after considering how the purpose of each one is advanced or inhibited by the statute, choosing where the proper balance lies.

The next step in applying Justice Breyer's approach is to identify the rights in competition. As previously stated, on one side of the equation there is the students' right to be free from compelled speech, and on the other there is parents' right to control the upbringing of their children. After the identification of the interests involved, the proper fit must be determined. The goal of this section is to determine whether the speech-restricting aspect of the Florida statute, which prohibits students from asserting their right to be free from compelled speech, is proportionate to the proclaimed remedy/speech-enhancing aspects of the statute, securing parents' say in and control of their child's upbringing.

This note has shown that student rights have been defined rather broadly by the courts. Students have an affirmative right to free speech as well as a right to be free from compelled speech. In establishing these rights, the courts have looked to lofty goals for justification. Students are the future of society, and the school's role is to prepare them to participate fully as citizens when adults. Schools are to be a market place of ideas; there should be few limits on what a student can say, and there is even less tolerance for what a student can be compelled to say. By protecting students' First Amendment rights, it is hoped that young citizens will develop the skills to engage in discourse. It is hoped that students will be able to look at the world critically and be a positive part of the political community. The ability to think freely and promote one's own ideas is one of the foundations of a healthy democracy. This idea would be in line with what Justice Breyer views to be democracy enhancing activities. As described above, Justice Breyer sees one of the main values of the First Amendment to be the promotion of the exchange of ideas.

The parental right to the control the upbringing of one's children also has a long history in the courts. Under the Fourteenth Amendment, parents have a liberty interest in the nature, care, and custody of their children.<sup>181</sup>

181. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

This idea has been considered to have broad implications over the counseling of children on important decisions. This right is also important to the future of the nation; families are the basic building blocks of society. Strong families produce good citizens, and it is the role of parents to guide their children to make correct choices. This need for parental oversight is of utmost importance when the decision to be made has possible life-long implications. Parents will look out for the welfare of their children “whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”<sup>182</sup> Inheriting in the acceptance of the existence of these parental rights is the overriding of minors’ rights in certain instances.

The extent of parental rights over a child’s decisions has been premised on the idea of a minor’s inability to make mature decisions. Parents are allowed to step in and make decisions for children that have potential-life altering effects. It is presumed that parents will take the child’s best interest into consideration and will choose what is best for them. The question in the context of Pledge statutes is whether or not this parental guidance and oversight is justified.

Part III of this note looked at the balance struck between minor and parental rights in the context of abortion notification laws, a balance that is inappropriate to the context of Pledge statutes. The courts in those cases correctly recognized that the choice to have an abortion is different from other choices a minor has to face.<sup>183</sup> An abortion has potential life-long effects, and it requires a mature deliberation process that not every minor possesses. But is a decision of this nature truly analogous to the decision to abstain from participation in the Pledge of Allegiance? Almost certainly not; the choice to not say the Pledge is radically different from that of having an abortion. The permanence, time limits, and impact of the two decisions are striking differences, to name a few.

First, the choice is not permanent. A child could reverse her or his decision not to participate in the Pledge. Secondly, there is no time limit on making the decision. While there is only a limited window in which a minor can choose to have an abortion, there are no such limitations on participation in the Pledge of Allegiance. The Pledge is recited daily in public schools by children in kindergarten to twelfth grade. The lack of urgency permits time for discussion, that is, time to convince a minor of the virtue of saying the Pledge so the minor can voluntarily change her or his mind.

182. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326 (2006) (quoting *Hodgson v. Minnesota*, 497 U.S. 417, 444–45 (1990)).

183. *See supra* Part III.

Lastly, a child's choice to not say the Pledge of Allegiance does not have the potential impact that an abortion does. An abortion could have serious implications on a minor's psychological and physical health. These implications are not present when abstaining from the Pledge of Allegiance; while it is conceivable that a child who chooses not to say the Pledge may be teased or ridiculed by other students, the potential psychological trauma would not be of the same magnitude. Further, since the child was exercising her or his own choice to not say the Pledge, she or he could also choose whether not saying it was worth the trouble.

As demonstrated in Section III, even in the case of abortion, the courts only give parents the right to be informed as to what is going on with the minor; it does not give the parent absolute control over what the minor will do.<sup>184</sup> While parents can refuse to consent to the abortion of a minor's child, the minor is entitled to judicial review.<sup>185</sup> It is feasible that this same form of judicial review could be set up in the context of Pledge statutes. A minor could petition a court to grant her or him the right to abstain from participating in the Pledge of Allegiance over her or his parents' objections. However, before this type of system can be sanctioned, it must first be determined that the exercise of parental veto is proper in this context. And, as argued in the previous paragraph, this is not the type of decision that warrants parental interference.

Under Justice Breyer's approach, the requirement of parental consent in the context of excusing a child from reciting the Pledge of Allegiance should be found to be unconstitutional. The general justifications for parental intervention are not present in this context. A student's choice to abstain from reciting the Pledge of Allegiance is unlikely to have a significant life-long impact, nor is it clear that allowing a student to abstain from saying the Pledge of Allegiance at school would result in disruption of the parent/child relationship in the home. Given the substantial interference parental consent would have on a student's First Amendment rights and the minimal interference allowing a student to choose for herself or himself whether or not to pledge would have on parental control, the statute restricts free speech in a way disproportionate to the harm caused.

184. *See supra* Part III.

185. *See supra* Part III, and the cases cited therein.