

COMMENTS

UNEXCUSED ABSENCE: WHY PUBLIC SCHOOLS IN RELIGIOUSLY PLURAL SOCIETY MUST SAVE A SEAT FOR RELIGION IN THE CURRICULUM

INTRODUCTION

Conventional wisdom counsels against introducing religion into dinner table conversation because it is a volatile subject about which no one ever seems to agree. Now picture a mandatory dinner hosted by the government, attended by America's children while their parents are elsewhere. This is the public school system. In this context, a discussion of religion triggers concerns not about manners, but about the U.S. Constitution. Yet, is a classroom not the appropriate place for students to develop a practical sense of the meaning and consequences of religious freedom—the very first guarantee of the First Amendment? At this time in history and in this nation, do school systems not have the obligation to provide an opportunity for their students to speak about religion?

As a Georgia federal district court observed in reviewing a case on the constitutionality of a school district's marking school science textbooks with stickers commenting on the theory of evolution, "the 'discussion' of religious theories is fraught with danger that the constitutionally impermissible 'teaching' of religious theories could result."¹ This language suggests that a safer choice would be to leave religion out of public school curricula entirely. The greater risk, however, is that by expunging all religious subject matter from lesson plans, students determine that religious liberty is either unimportant or so difficult to manage in a vastly plural society that it is best to

¹ Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286, 1310 n.9 (N.D. Ga. 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006).

ignore it. Students and parents might also conclude that the federal and local governments are hostile to all faiths or prefer a particular sect.²

The United States is a society of myriad religious practices and perspectives, all of which are protected by a commitment to religious liberty that is as old as the nation. But in a religiously diverse society, religious freedom has never meant religious harmony. Collisions between different religious viewpoints are pervasive in courtrooms, Congress, and local communities. Because First Amendment protections do not restrict individuals to exercising their religious lives and convictions in private, the United States hosts all sorts of dialogues and debates among people with different concepts of faith. Given that as of 2001, approximately 81% of U.S. citizens described themselves as religious adherents,³ it is almost impossible for citizens not to encounter religion on a daily basis. Communities are expected to discuss and even agree on policies that may implicate religious principles, such as abortion, embryonic stem cell research, end-of-life issues, and same-sex marriage. Such conversations are a virtually unavoidable aspect of active political life in the United States. But how do religious perspectives shape public life and policy—and how *should* they, if at all?

This Comment does not purport to resolve these questions, which for the most part properly belong in the political process to be sorted out by the governed. Rather, this Comment argues that public schools should be preparing students to engage productively issues with religious dimensions in public policy debate so that they have the tools with which to work within communities of diverse religious interests to discern responses to difficult questions of public concern.

The religious diversity and density of the United States demands that public schools, in preparing students to be active American citizens, provide a space

² See WARREN A. NORD & CHARLES C. HAYNES, *TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM* 16 (1998) (Parents might determine “fairly or unfairly, that public schools are hostile to their faith and values.”).

³ BARRY A. KOSMIN ET AL., *AMERICAN RELIGIOUS IDENTIFICATION SURVEY 2001* (2001), http://www.gc.cuny.edu/faculty/research_studies.htm. According to this survey, conducted by a team of sociologists at the Graduate School of the City University of New York, the top ten religions with which Americans identified themselves were Christianity (all denominations) at 76.5%, Judaism at 1.3%, Islam at 0.5%, Buddhism at 0.5%, Hinduism at 0.4%, Unitarian/Universalist at 0.3%, Wiccan/Pagan/Druid at 0.1%, Spiritualist at 0.5%, Native American Traditions at 0.05%, and Baha’i at 0.04%. 14.1% of those polled did not identify themselves with any religion. The sample population included over 50,000 people. Except for Judaism, each of these religious traditions has increased in its number of followers since 1990; the number of people claiming no religion similarly increased.

for young people to learn how religion plays a part in U.S. politics, policies, and public life in general. Public schools, which are tightly interrelated with federal, state, and local governments and funded by taxpayers, uniquely represent public priorities.⁴ Ideally, public schools will model how an education system prepares young people to be adult Americans. Otherwise, students will come of age to vote, to run for public office, to sign up or be drafted to go to war, without understanding the dimensions of this country's fundamental commitment to religious liberty and the consequent reality of a religiously diverse community. A student who has learned only the words of the First Amendment without exploring the meaning and language of different religious traditions, how religion might initiate or contribute to public action, or how to encourage useful discussions of topics that tend to instigate religious arguments, may be intimidated by how powerful and multifaceted a force religion is in the United States. Such a student is ill-equipped to participate in a nation that values religious difference. As one professor has observed, "'God talk' at least as much as 'rights talk' is the way Americans speak."⁵ Religion infuses American public life, and artificially shielding students from this fails not only the students, but also ultimately the nation that looks to its youth for its future governance.⁶

There is a more hopeful and helpful alternative: Public schools may choose to educate their students about religion. Part I of this Comment explores whether public schools can bring religious material into the classroom without violating the First Amendment. Part II looks to the democratic philosophy of political liberalism, which has been influential in the U.S. public school movement,⁷ to explain why teaching about religion in a nondevotional academic setting is necessary in a religiously plural society, particularly one that encourages open religious expression. This Part discusses how, given that people are free to bring their ultimate religious beliefs into public policy debates, a community of diverse perspectives on religion can respectfully consider these convictions and yet avoid government establishment of religion.

⁴ See MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 857 (4th ed. 2002) (discussing legislative control of educational decision making).

⁵ Jean Bethke Elshtain, *Faith of Our Fathers and Mothers: Religious Belief and American Democracy*, in *RELIGION IN AMERICAN PUBLIC LIFE: LIVING WITH OUR DEEPEST DIFFERENCES* 39, 39 (2001).

⁶ NORD & HAYNES, *supra* note 2, at 17. *But see* Steven Pinker, Opinion, *Less Faith, More Reason*, HARV. CRIMSON, Oct. 27, 2006, <http://www.thecrimson.com/article.aspx?ref=515314>. Dr. Pinker argued against a suggested core curriculum course for Harvard undergraduates entitled "Reason and Faith," asserting that "to magnify the significance of religion as a topic equivalent in scope to all of science, all of culture, or all of world history and current affairs, is to give it far too much prominence." *Id.*

⁷ See *infra* Part II.

Part III analyzes how, should a school choose to teach about religion, various curricula in subjects such as evolutionary biology, history, civics, and literature might satisfy or violate the federal Constitution.

In a nation in which the “freedom to differ is not limited to things that do not matter much,”⁸ students deserve the opportunity to consider how to engage productively in public and political life where citizens often differ in the things that matter *most*. This Comment explores why and how such an education belongs in public schools.

I. OPEN ENROLLMENT: THE LONGSTANDING TRADITION OF ADMITTING RELIGION INTO PUBLIC SCHOOLS

This Part opens with a review of the historical and legal frameworks for the relationship between religion and public schools as a starting point for addressing controlled integration between the two. It is true that religion in U.S. public schools has a history of signifying devotional instruction in the Protestant Christian tradition for all students.⁹ However, this history includes a position of resistance to sectarian public education, one that has been validated by the Supreme Court’s rejection of state-mandated devotional indoctrination as unconstitutional.¹⁰

The Court’s view of the role of public schools in instilling national mores in young citizens is then presented. In its First Amendment jurisprudence, the Court has sought to exercise scrupulous care in addressing how school programs and policies reflect First Amendment religious freedoms because schools may well be the first place students encounter these freedoms in relationship to government. Finally, the discussion on Establishment Clause jurisprudence in the public school context shows that the Court has never moved to eliminate religion from schools. Even where the Court has relied heavily on the language of separation of church and state in keeping particular religious activities out of public schools, it has never suggested that religion has *no* acceptable place therein.¹¹ Through shifts in establishment clause interpretation, the Court has clarified a variety of circumstances in which

⁸ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

⁹ *See infra* Part I.A.

¹⁰ *See discussion infra* Part I.C.

¹¹ *See infra* Part I.C.1.

religion is appropriate in the public school classroom,¹² including teaching about religion in a nondevotional manner.¹³

A. *History Class: Religious Public Schools and Resistance*

Most nineteenth-century American public schools,¹⁴ defined as publicly funded and operated schools open to all children in a particular geographic area,¹⁵ were infused with some variation of Protestant teachings.¹⁶ Religious practices such as reading the Bible and daily chapel¹⁷ were integral to school life largely because many Americans considered Protestant worship practices¹⁸ and interpretations of the Bible to be the foundation of morality.¹⁹ Protestant theologies of individual relationships with God dovetailed easily with democratic ideals of personal choice and unmediated power of the people, in particular contrast to hierarchical Catholicism.²⁰ Protestant and Catholic Christianity disagreed fundamentally on the nature and content of Christian teachings, and Catholic discomfort with the Protestant aspects of common schooling concluded in Catholic withdrawal to privately funded parochial schools.²¹ The nineteenth-century fault line between Protestant and Catholic concepts of Christianity reveals that while a majority of U.S. citizens may have identified themselves as Christian, that majority has never shared a set of Christian beliefs such that all Christians supported particular Christian teachings in schools. This fact calls into question contemporary colloquial

¹² See discussion *infra* Part I.C.

¹³ Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963).

¹⁴ STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 49 (2000). The public school movement accelerated during the mid-nineteenth century as the population swelled and diversified with immigration and urban industrialization took more parents out of the home to work in a way the rural agrarian lifestyle had not. *Id.*

¹⁵ *Id.* at 45.

¹⁶ *Id.* at 54–55; see also CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL 146–206 (1988) (noting that many Protestants of specific denominations rejected as heretical the general “Protestantism” taught in schools).

¹⁷ JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 118 (2d ed. 2005).

¹⁸ See *id.*

¹⁹ MACEDO, *supra* note 14, at 65; see GLENN, *supra* note 16, at 158–78 (religious mission of public schools sought in part to redeem society through the teaching of Christian morality).

²⁰ MACEDO, *supra* note 14, at 55, 61. Italian and Irish immigrants, among others, practiced Catholicism. *Id.* at 60–61. Catholicism teaches that supplicants must be taught religion by a religious authority, whereas Protestant traditions teach that each individual learns religion by personally reading scripture. See GLENN, *supra* note 16, at 199.

²¹ MACEDO, *supra* note 14, at 74–76.

references to the United States as a “country . . . founded on Christian beliefs and principles”²² as justification for state sponsoring of “Christian” activity.

Broad-based resistance to Protestantism, or any sectarian influence, in public schools grew out of the longstanding fear of governmental religious coercion that had been codified in the First Amendment and also from “changing conceptions regarding the American democratic society, . . . the functions of State-maintained education in such a society, and . . . the role therein of the free exercise of religion by the people.”²³ Even before the Fourteenth Amendment bound the states to the Bill of Rights, some states had already banished sectarianism from public schools,²⁴ and “every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system free from sectarian control.”²⁵ Despite a general conviction that education should have a religious dimension, devotional religious instruction and practices declined steadily through the nineteenth century because of sectarian disagreements.²⁶

Amidst this tension between religiosity and resistance, the Supreme Court viewed its role as enforcing “[c]onstitutional provisions primarily concerned with the protection of minority groups.”²⁷ The Court observed that “the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people.”²⁸ Because the religious composition of America will be in constant flux,²⁹ the secular public school system, as “the means of reconciling freedom in general with religious freedom,”³⁰ must demonstrate, through example and instruction, a concept of religious freedom that prepares children of different religions or no religious affiliation to participate in a polity that represents and serves a similarly diverse citizenry.

²² Margaret Talbot, *Darwin in the Dock: Intelligent Design Has Its Day in Court*, NEW YORKER, Dec. 5, 2005, at 66, 71 (citing a letter to a local paper written in support of teaching intelligent design in science classes).

²³ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 214 (1948) (Frankfurter, J., concurring).

²⁴ *Id.*

²⁵ *Id.* at 220 (internal quotation omitted).

²⁶ GLENN, *supra* note 16, at 177.

²⁷ *McCullum*, 333 U.S. at 217.

²⁸ *Id.* at 215.

²⁹ *Id.* (“[T]his Court referred to the inevitable conflicts engendered by matters connected with religious polity and particularly in a country composed of such a variety of religious sects as our country. That was more than one hundred years ago.”) (internal quotations omitted).

³⁰ *Id.* at 216.

B. Group Work: The Role of Public Schools in Preparing Students for Participation in Religiously Diverse Community

A democracy both affords the right and creates the duty of self-governance for its citizens. The Supreme Court has observed that “public education must prepare pupils for citizenship in the Republic It must inculcate the habits and manners of civility as values . . . indispensable to the practice of self-government in the community and the nation.”³¹ In a 2003 survey, Americans ranked “prepar[ing] people to become responsible citizens” highest, of equal importance as “help[ing] people to become economically self-sufficient.”³² The Court has also recognized that “[t]he State exerts great authority and coercive power” over students in the public school system, as pupils must respect mandatory attendance requirements and are exposed to faculty as role models.³³

School boards enjoy largely unfettered autonomy in curriculum design.³⁴ Yet, because public schools have a role in preparing young citizens for public life and are highly influential in doing so, the Court requires that school leaders exercise their discretion as to school operations “in a manner that comports with the transcendent imperatives of the First Amendment.”³⁵ But what are these “transcendent imperatives” with respect to the role of public schools in preparing students for self-governance in a religiously plural U.S. society? There is no ready resource for this inquiry. Guessing at the Framers’ intentions is only minimally helpful, as both public schooling and the nature of religious pluralism in the United States have evolved dramatically since the Constitution was adopted. Today, “a historical approach is not useful in determining the proper roles of church and state in public schools.”³⁶ Justice

³¹ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (1968)); *see also* *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (The objective of public education is development of “fundamental values necessary to the maintenance of a democratic political system.”).

³² JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND PUBLIC SCHOOLS* 11 (2003).

³³ *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

³⁴ *See* *McCullum v. Bd. of Educ.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

³⁵ *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982).

³⁶ *Edwards*, 482 U.S. at 583 n.4. The Court noted that “free public education was virtually nonexistent at the time the Constitution was adopted,” so the Framers could not have contemplated the meaning of the First Amendment in the school context. *Id.* Public schools aside, exclusive utilization of the “historical approach” for interpreting church-state relations in any context is highly debatable. *See, e.g.*, WITTE, *supra* note 17, at 71–100.

Frankfurter opined early in the development of case law addressing religion-state issues in education that public schools must be thoroughly nonsectarian in “recognition of the need of a democratic society to educate its children . . . in an atmosphere free from pressures in a realm . . . where conflicts are most easily and most bitterly engendered.”³⁷ As public schools were “perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, [they] must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts . . . requires strict confinement of the State to [nonreligious] instruction”³⁸

But isolating the school community from *awareness of* divisive conflicts and removing the opportunity for students to learn how to dialogue *across* these divisions detracts from the heterogeneous public’s ability to seek consensus in governance while sustaining individual liberties. In fact, as James Madison recognized before the U.S. Constitution was even drafted, passionate factionalism ought to be encouraged in a pluralistic democracy so that minority interests are not eclipsed by an “unjust” majority.³⁹ Justice Frankfurter, in describing religious conflicts as prevalent and profoundly bitter,⁴⁰ articulates precisely why learning about the norms, habits, and practices of different religions is a necessary aspect of preparing students for self-governance in a plural nation. Schools are prohibited from sectarian teaching of religion but are not foreclosed from engaging the subject at all.

C. Establishment Clause Jurisprudence Goes to School

The Supreme Court has rigorously evaluated Establishment Clause concerns raised in the halls of public schools. While some leeway might be allowed where “mature adults can make informed assessments of the values being transmitted,”⁴¹ the Supreme Court has been “particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools”⁴² because of the impressionability of young students.⁴³ The Court recognizes public schools as an arm of the government that exercises unique “coercive power”⁴⁴ through mandatory attendance⁴⁵ and even

³⁷ *McCullum*, 333 U.S. at 216 (Frankfurter, J., concurring).

³⁸ *Id.* at 216–17.

³⁹ James Madison, *The Federalist No. 51*, in *THE FEDERALIST* 335, 339 (Modern Library 2000) (1788).

⁴⁰ See *McCullum*, 333 U.S. at 216–17.

⁴¹ WITTE, *supra* note 17, at 203.

⁴² *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

⁴³ *Id.*

⁴⁴ *Id.* at 584.

peer pressure,⁴⁶ and as a result “has been required often to invalidate statutes which advance religion in public elementary and secondary schools.”⁴⁷

Yet, the Constitution does not require public schools to be hermetically sealed from religion. Students are allowed to participate in voluntary religious activity, even in the devotional sense, on public school grounds. First Amendment jurisprudence mandates that religious and nonreligious voluntary student groups alike have equal access to public spaces, such as classrooms, for meetings and activities.⁴⁸ Students may be permitted to miss some class time for voluntary devotional activities.⁴⁹ Students may engage in voluntary religious speech as “schools cannot, constitutionally, disfavor religious speech in comparison with all other forms of speech.”⁵⁰ And teachers, while precluded from indoctrinating students in religion, are free to educate about religion in a nondevotional manner.⁵¹

The Court has cycled through a variety of logics, analyzed below, to determine which aspects of religion are and are not permissible in public schools. Separationism, or strict isolation of government from religion, has been tempered by a judicial trend toward upholding government accommodations of religion, particularly in recent years. To evaluate whether a governmental action constitutes an establishment of religion, the Court formulated the *Lemon* test and its variants, which check for a secular purpose and the effect of a government action in a given social context, and has regularly applied these to evaluate establishment questions in public schools. Presented in detail below, these approaches demonstrate that religion has a proper place in public schools as long as constitutional limits on advancing or denigrating religion are respected.

⁴⁵ *Id.* The Court observed that “the potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses.” *Id.* at 584 n.5. A primary or secondary school course might be offered as an elective to boost its constitutionality, but the Court does not require such a result. However, this logic may require that students have the ability to opt out of coursework that is perceived as advancing or denigrating particular religious traditions. For more on opting out, see Heather M. Good, Comment, *The Forgotten Child of Our Constitution: The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641 (2005).

⁴⁶ *Edwards*, 482 U.S. at 584.

⁴⁷ *Id.*

⁴⁸ *E.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107–08 (2001).

⁴⁹ *Zorach v. Clauson*, 343 U.S. 306 (1952).

⁵⁰ KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 164 (2005); see *Rosenberger v. Rector*, 515 U.S. 819 (1995). *But see Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (School officials may limit expression where it would substantially interfere with school operations and discipline.).

⁵¹ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

1. *Mythology: The Wall of Separation Between Church and State*

Justice Black dramatically concluded the Supreme Court's first school-related disestablishment opinion, the 1947 case of *Everson v. Board of Education*, with the separationist mantra, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."⁵² Justice Frankfurter echoed the principle with his concurrence in *McCullum v. Board of Education*, which denied release time for students to participate in on-campus religious classes.⁵³ "If nowhere else, in the relation between Church and State, 'good fences make good neighbors.'"⁵⁴ In *Everson* dicta, Justice Black observed, with respect to sectarian teachings in public schools, "the difficulty in drawing the line"⁵⁵ between public programs for general welfare and those "designed to support institutions which teach religion."⁵⁶ Despite the strident separation language, Black acknowledged that establishment clause jurisprudence would not sustain as simple an approach as eliminating all vestiges of religion from public schools.

The Court has repeatedly banned certain religious exercises from public schools under separationist principles. In *McCullum*, it rejected a school program that permitted classrooms to be used for religious instruction and released students from class to attend such courses;⁵⁷ in *Wallace v. Jaffree*, nearly forty years later, it invalidated a state law permitting moments of silence for prayer or meditation in public schools;⁵⁸ and in *Edwards v. Aguillard* in 1987, it struck down a state statute that required public schools that taught the evolutionary theory of the origin of species to allow equal time for teaching biblical creationism.⁵⁹ But even these strict separationist opinions left legal space, in which the Court has moved freely, for public schools to

⁵² 330 U.S. 1, 18 (1947) (upholding state program of apportioning tax dollars to reimburse parents for transportation of students to nonprofit schools, including parochial schools); *see also* *McCullum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (discussing Elihu Root's phrase, "[t]he great American principle of eternal separation").

⁵³ 333 U.S. at 212.

⁵⁴ *Id.* at 232. Justice Frankfurter's quote comes from Robert Frost's poem, *Mending Wall*. Frankfurter failed to note, however, that the poet used the line *ironically*; rather than improving the neighbors' relationship, the fence in the poem forces an unnatural separation and thus exacerbates the tension between them.

⁵⁵ 330 U.S. at 14.

⁵⁶ *Id.*

⁵⁷ 333 U.S. at 212.

⁵⁸ 472 U.S. 38, 60–61 (1985).

⁵⁹ 482 U.S. 578, 596–97 (1987).

accommodate religion in contexts such as accommodation of voluntary religious practices⁶⁰ and nonsectarian teaching of religious content.⁶¹

Five years after *Everson*, in *Zorach v. Clauson*, the Court reined in the separationism by validating the constitutionality of public school accommodation of student religious activity where the school permitted students release time during school hours to attend off-campus religious instruction or devotions.⁶² Because the release-time arrangement used neither public school facilities nor public funds for advertising or conducting the religious instruction, the Court held that the school, as an arm of the state, was respecting “the religious nature of our people and *accommodates* the public service to their spiritual needs.”⁶³ To find otherwise “would be preferring those who believe in no religion over those who do believe.”⁶⁴ This opinion articulated the contours of the “difficulty” at which Justice Black had hinted in the Court’s first pass at disestablishment:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.⁶⁵

As complete separation of religion and state does not exist in practice or judicial precedent, the Court has experimented with other tests for establishment violations.

2. *No Playing Favorites: Neutrality and Equal Access Rationales for Accommodating Religion in Schools*

Neutrality first surfaced as a Supreme Court test to discern whether school policies satisfied the Establishment Clause in *School District of Abington*

⁶⁰ See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (school policy allowing students to vote to lead invocations at public high school football games violated Establishment Clause). *But see* *Lee v. Weisman*, 505 U.S. 577 (1992) (ecumenical prayer by Jewish rabbi at public middle school graduation violated the Establishment Clause).

⁶¹ See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

⁶² 343 U.S. 306, 308 (1952).

⁶³ *Id.* at 314 (emphasis added).

⁶⁴ *Id.*

⁶⁵ *Id.* at 312.

Township v. Schempp,⁶⁶ where the Court mandated that “the State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion.”⁶⁷ The *Schempp* Court encouraged accommodation of religion in public schools by clarifying that a posture of neutrality toward religion need not deny that “today, as in the beginning, our national life reflects a religious people.”⁶⁸ In dicta that has shaped establishment jurisprudence regarding religion in public school instruction,⁶⁹ Justice Clark asserted that education about religion is constitutionally permissible and perhaps even intellectually necessary:

It might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program, may not be effected consistently with the First Amendment.⁷⁰

Neutrality toward religion does not permit the government to leave religious establishment determinations to the will of the majority.⁷¹ The *Schempp* Court held that a state could not mandate Bible reading over the public address system “even with the consent of the majority of those affected.”⁷² The Court asserted that “the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . .

⁶⁶ 374 U.S. at 203; *see, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 683–84 (2002) (program allowing school tuition vouchers for underprivileged children to be utilized in public schools, private secular schools, or private religious schools at the parents’ discretion did not violate Establishment Clause); *Mitchell v. Helms*, 530 U.S. 793 (2000) (no establishment violation where federal loans of secular educational materials are equally available to private religious and public schools).

⁶⁷ *Schempp*, 374 U.S. at 225; *see also Zorach*, 343 U.S. at 314 (The state may not prefer “those who believe in no religion over those who do believe.”).

⁶⁸ 374 U.S. at 213.

⁶⁹ *See, e.g.*, *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98, 127 n.3 (2001) (Scalia, J., concurring).

⁷⁰ *Schempp*, 374 U.S. at 225; *see also Edwards v. Aguillard*, 482 U.S. 578, 607 (1987) (Powell, J., concurring) (“Courses in comparative religion of course are customary and constitutionally appropriate. In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events.”).

⁷¹ *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000) (holding that student-led nonsectarian prayer conducted for the spectators at high-school football games constituted an impermissible establishment of religion, despite the fact that the student body had voted in favor of it).

⁷² *Schempp*, 374 U.S. at 225–26.

[F]undamental rights may not be submitted to vote; they depend on the outcome of no election.”⁷³

Over the past two decades, the Court has expanded its accommodation of religion in schools, particularly voluntary student religious activities,⁷⁴ by asserting that religious activities deserve access to public fora equal to that of their nonreligious counterparts.⁷⁵ The state may not force or endorse religion, but the Court will not presume such a violation simply because students engage in devotional practices on public school grounds. In fact, if a school chooses to open itself to community use, “an open forum policy, including nondiscrimination against religious speech” is assumed *not* to be a governmental establishment of religion.⁷⁶ As the Court permits schools to accommodate devotional religious life, it is unlikely to condemn a school for nondevotional teaching about the religious viewpoints invited into public life by the First Amendment.

Highlighting the trend toward protection of religion in public life, the Court held in 2001 that a school could not bar a private Christian organization, the Good News Club, from leading a voluntary group of elementary-aged students in “a fun time of singing songs, hearing a Bible lesson and memorizing scripture.”⁷⁷ The group met after school hours, and participation required parental consent.⁷⁸ Justice Thomas, writing for the court, relied on the First Amendment freedom of speech guarantee in holding that the state could not restrict the Good News Club’s speech on the basis of viewpoint discrimination.⁷⁹ In dissent, Justice Stevens noted that although the Club’s activities could also be characterized as worship or even proselytism,⁸⁰ “we see no reason to treat the Club’s use of religion as something other than a viewpoint merely because of any evangelical message it conveys.”⁸¹ The Court explicitly rejected contentions that “high school students are likely to confuse an equal access policy with state sponsorship of religion.”⁸²

⁷³ *Id.* at 226 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

⁷⁴ *E.g.*, *Good News Club*, 533 U.S. 98; *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

⁷⁵ *E.g.*, *Mergens*, 496 U.S. 226.

⁷⁶ *Id.* at 248 (O’Conner, J., plurality) (quoting *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)) (Where a state university creates a limited public forum, equal access is required for religious and nonreligious parties.).

⁷⁷ *Good News Club*, 533 U.S. at 103.

⁷⁸ *Id.* at 114–15.

⁷⁹ *Id.* at 107.

⁸⁰ *Id.* at 130 (Stevens, J., dissenting).

⁸¹ *Id.* at 112 n.4.

⁸² *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (O’Conner, J., plurality).

The Court clarified in *Zelman v. Simmons-Harris* that students and parents must be free from coercion and able to exercise choice where access to religious and nonreligious options with respect to public schools is offered.⁸³ The *Zelman* Court found no establishment violation where the state, in an effort to provide an adequate education to low-income students in a failing inner-city school district, funded school vouchers redeemable at public or private schools, including parochial schools, in accordance with the choice of the students' parents.⁸⁴ Because the program permitted "such individuals to exercise genuine choice among options public and private, secular and religious[, it] is therefore a program of true private choice."⁸⁵ Without government coercion favoring religion, students' use of the vouchers to attend parochial schools was not considered an establishment of religion.

The Court has remained visibly committed to a constitutional principle of accommodationism and an understanding that the "wall of separation," perceived as an impregnable "barrier between church and state," "is a metaphor based on bad history."⁸⁶ The 2005 dissent in *McCreary County v. ACLU of Kentucky* may well be a harbinger of even broader government accommodations of religion, as its authors challenged neutrality precedent by asserting that government can permissibly favor religion over nonreligion⁸⁷ if it so chooses.⁸⁸ Of the dissenters in this case, Justice Kennedy, Justice Scalia, and Justice Thomas are still Supreme Court Justices as of 2007.

The Court's potential move away from requiring government neutrality toward religion does not affect the legality of teaching about religion in public schools; rather, it highlights a practical reason for such education. In the context of teaching about religion in the classroom, the *Schempp* objectivity and secularity requirements still require that the government cannot prefer religion. However, as the Court heightens protection of religious devotional life in the public square, students' need to learn about religious plurality as practiced in the United States increases.

⁸³ 536 U.S. 639, 655–56 (2002).

⁸⁴ *Id.* at 662–63.

⁸⁵ *Id.* at 662.

⁸⁶ *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

⁸⁷ 545 U.S. 844, 885 (2005) (Scalia, J. dissenting). Nonreligion refers to the state of neither practicing a religion nor adhering to a particular way of thinking about religion. This is in contrast to modes of thought such as atheism, which affirmatively rejects the existence of God, or agnosticism, which leaves the question of the existence of God open. THE OXFORD DICTIONARY OF WORLD RELIGIONS 105 (John Bowker ed., 1997).

⁸⁸ *Id.* at 885 (Scalia, J., dissenting).

3. *Passing the Lemon Test: Does a Particular Instance of Religion in School Violate the Establishment Clause?*

The Court has regularly used variations of a test devised in 1971 in *Lemon v. Kurtzman*⁸⁹ to identify Establishment Clause violations.⁹⁰ The *Lemon* test states that a law (1) must have a secular purpose, (2) must have a primary effect that neither advances nor inhibits religion, and (3) must not result in excessive entanglement between church and state.⁹¹ A later case, *Agostini v. Felton*,⁹² condensed *Lemon* to a two-prong inquiry, asking (1) whether the government *acted with the purpose* of advancing or prohibiting religion and (2) whether the government action *had the effect* of advancing or prohibiting religion.⁹³ If the government action fails any one of these elements, it violates the Establishment Clause.⁹⁴

In determining the secularity of the state's purpose, the Court has often analyzed the text in light of its legislative history.⁹⁵ Historically, "regardless of what 'legislative purpose' may mean in other contexts, for the purpose of the *Lemon* test it means the 'actual' motives of those responsible,"⁹⁶ which can be inscrutable unless clearly identified by "discoverable fact."⁹⁷ The 2005 opinion for *McCreary County v. ACLU of Kentucky* may have marked a shift away from actual purpose, as the Court analyzed "the purpose apparent from government action."⁹⁸

An equally permissible reading, and one that may gain more traction with the altered composition of the court, asserts that a law satisfies the *Lemon* "purpose" prong where the text of the law sets out a secular purpose, even if the legislative history contradicts or is silent as to such a purpose.⁹⁹ For example, in seeking to require teachers to read an evolution disclaimer

⁸⁹ 403 U.S. 602 (1971).

⁹⁰ For example, the *Lemon* test was recently applied in *McCreary County*, 545 U.S. 844.

⁹¹ 403 U.S. at 612–13.

⁹² 521 U.S. 203 (1997).

⁹³ *Id.* at 231–32. Even with the availability of the *Agostini* interpretation, courts may continue to apply the original *Lemon* formulation. *E.g.*, *McCreary County*, 545 U.S. at 863–865; *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

⁹⁴ *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (Powell, J., concurring).

⁹⁵ *E.g.*, *id.*; *McCreary County*, 545 U.S. 844; *Wallace v. Jaffree*, 472 U.S. 38, 64–66 (1985).

⁹⁶ *Edwards*, 482 U.S. at 613 (Scalia, J., dissenting).

⁹⁷ 545 U.S. at 862; *e.g.*, *Wallace*, 472 U.S. at 73–74 (O'Connor, J., concurring).

⁹⁸ *Id.* at 860–61.

⁹⁹ *See Mueller v. Allen*, 463 U.S. 388, 394–95 (1983) (expressing the Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute").

statement in science classes and to offer an intelligent design text as a resource for interested students, a school board member reportedly argued, “[Two thousand] years ago, someone died on a cross. Can’t someone take a stand for him?”¹⁰⁰ This blatant statement of religious intent may be insufficient to prove an impermissible purpose of endorsing religion. As long as the legislative body can articulate a secular purpose for a practice,¹⁰¹ and any religious intent motivating the practice is neither the entire reason for the law’s existence nor its primary purpose,¹⁰² a Court may find the purpose acceptable under the Establishment Clause.

While the Court may determine the purportedly secular purpose is a “sham,”¹⁰³ at least one current justice has expressed reluctance to do so.¹⁰⁴ Even a Court characterized by Justice Scalia as “hostil[e] to religion”¹⁰⁵ has noted that the dominant religious purpose test has rarely proved fatal to government activity and that in most cases the Court would defer to the government’s characterization of its purpose.¹⁰⁶ While a recent decision finding that where a county legislative order requiring the posting of an abridged King James Bible version of the Ten Commandments in “‘a very high-traffic area’ of the courthouse,”¹⁰⁷ the *Lemon* test would be violated because an objective observer would be aware of the government’s predominant purpose to promote a particular religion. However, this decision barely eked out a 5 to 4 majority.¹⁰⁸ In the foreseeable future, the Court seems likely to maintain a deferential posture toward legislative statements of secular purpose.¹⁰⁹ This deference raises the concern that legislatures or school officials may develop curricula that are plausibly nonproselytizing, but are actually intended to promote a particular faith or theology. The purpose prong

¹⁰⁰ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 752 (M.D. Pa. 2005).

¹⁰¹ *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 105 (1968).

¹⁰² *Id.* at 108–09.

¹⁰³ *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987).

¹⁰⁴ *Id.* at 621 (Scalia, J., dissenting) (“[W]hat is crucial is not [the government actors’] *wisdom* in believing that [secular] purpose would be achieved by the bill, but their *sincerity* in believing it would be.”).

¹⁰⁵ 545 U.S. 844, 900 (2005) (Scalia, J., dissenting).

¹⁰⁶ *Id.* at 863. The Court did not defer to the legislature’s stated purpose here because the original purpose had been to express religious commitment and later iterations of purpose were presented only in litigation, not in further county legislative action. *Id.* at 871. The Court found the secular purpose statements to be implausible in this context. *Id.*

¹⁰⁷ *Id.* at 851.

¹⁰⁸ *Id.* at 848. Justice Souter delivered the opinion of the Court, in which Justices Stevens, O’Connor, Ginsburg, and Breyer concurred. Justice Scalia filed a dissenting opinion, in which Justices Rehnquist and Thomas joined, and in which Justice Kennedy partially joined. *Id.*

¹⁰⁹ *See supra* notes 101–04 and accompanying text.

of the *Lemon* test alone does not preclude such activity. In such a case, the constitutionality of the curriculum turns on its effect.

The primary effect of a government action is somewhat entangled with the purpose analysis, since an impermissible primary effect may simply be the observer's perception of a state purpose to endorse religion.¹¹⁰ Even if a plaintiff claims offense on religious grounds, the Establishment Clause forbids "the prohibition of theory which is deemed antagonistic to a particular dogma" if the sole justification for such prohibition is the offense to members of a given tradition.¹¹¹ For curriculum development purposes, this precedent requires that where a school proposes to teach religious information, the curricula cannot include or omit particular information in order "to conform with a particular religious viewpoint."¹¹²

4. *Social Studies: The Relevance of Social Context in Evaluating Establishment Concerns in Schools*

Courts do not evaluate a state action's purpose, effects, or other establishment considerations in a vacuum.¹¹³ In finding an establishment of religion where a state statute outlawed the teaching of evolution, the Supreme Court noted the "historical and contemporary antagonisms between the theory of evolution and religious movements,"¹¹⁴ and included in its opinion its assessment that "the statute was a product of the upsurge of 'fundamentalist' religious fervor."¹¹⁵ Religious and political contexts aid courts in assessing whether a curriculum is properly tailored to the desires of any particular religion or nonreligion.¹¹⁶

¹¹⁰ See, e.g., *McCreary County*, 545 U.S. 844. But see *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–80 (1995) (O'Connor, J., concurring) (stating that the inquiry as to whether the government is endorsing a position on religion "is not about the perceptions of individuals or saving isolated nonadherents from . . . discomfort").

¹¹¹ *Epperson v. Arkansas*, 393 U.S. 97, 106–07 (1968).

¹¹² *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (White, J., concurring) (rejecting "balanced treatment" of evolutionary theory and creationism in science courses as tailoring the curriculum to the demands of one religious tradition).

¹¹³ See *Lynch v. Donnelly*, 465 U.S. 668, 709–12, 721–24 (1984) (Brennan, J., dissenting); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006) (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 614 n.60 (1989)).

¹¹⁴ *Edwards*, 482 U.S. at 524 n.9 (citing *McLean v. Ark. Bd. of Ed.*, 529 F. Supp. 1255, 1258–64 (E.D. Ark. 1982)).

¹¹⁵ *Id.* at 590 (quoting *Epperson*, 393 U.S. at 98, 106–07).

¹¹⁶ *Id.* at 593 (finding a legislative purpose "to restructure the science curriculum to conform with a particular religious viewpoint" unconstitutional).

Courts also consider social context in determining whether a similarity between government and religious postures is merely coincidental. Case law is clear that “a governmental action or message that coincides with the beliefs of certain religions does not, without more, invalidate the action or message.”¹¹⁷ For example, a curriculum design question may be raised by a syllabus that prescribes teaching about multiple religions. Such a course may dovetail more readily with faith traditions that encourage exposure to varied religions than with those that seek isolation from difference.¹¹⁸ A court must find this parallel to be mere coincidence to uphold the curriculum.

In *Selman v. Cobb County Board of Education*, a Georgia federal district court examined social facts¹¹⁹ as part of its determination that a sticker on biology textbooks describing Darwinian evolution as a theory had the impermissible primary effect of endorsing a particular theology while politically marginalizing those who believed otherwise.¹²⁰ The Board of Education placed a sticker on high school science textbooks that read: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.”¹²¹ The court perused law review articles and discovered that “encouraging the teaching of evolution as a theory rather than as a fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations.”¹²² The court then interpreted specific facts in light of these social patterns.¹²³ For example, the court observed that the sticker trivialized evolution as one theory among many, just as the religiously motivated antievolution movement did, although the scientific community recognizes evolution as the dominant theory of origin.¹²⁴ Similarly, the sticker targeted

¹¹⁷ *Selman*, 390 F. Supp. 2d at 308; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (Court will not assume a law has the impermissible purpose of advancing religion simply because it “happens to coincide or harmonize with the tenets of some or all religions”).

¹¹⁸ See, e.g., JOHN DEWEY, *Fundamentals*, in *THE ESSENTIAL DEWEY: PRAGMATISM, EDUCATION, DEMOCRACY* 347–50 (Larry A. Hickman & Thomas M. Alexander eds., 1998) (criticizing religious fundamentalists’ avoidance of intellectual inquiry into topics on which fundamentalism has taken a position).

¹¹⁹ *Selman*, 390 F. Supp. 2d at 1308.

¹²⁰ Unfortunately, this court failed to maintain a sufficient record of the evidence on which it based its ruling, thus frustrating the appeal. The Eleventh Circuit Court of Appeals vacated and remanded the case to the district court for new evidentiary proceedings. *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1321 (11th Cir. 2006).

¹²¹ 390 F. Supp. 2d at 1292.

¹²² *Id.* at 1308.

¹²³ See *id.* at 1309.

¹²⁴ *Id.*

evolution alone as the topic which ought to be “approached with an open mind,”¹²⁵ mirroring the antievolutionists’ narrow range of concern.¹²⁶

Even though the Court found no evidence that the Board had acted with the purpose of advancing a religion, the sociopolitical climate in which the Board had made its decision suggested that the “informed, reasonable observer would perceive the School Board to be aligning itself with proponents of religious theories of origin.”¹²⁷ This “reasonable observer” is aware of both prevailing attitudes regarding the establishment issue at bar as well as the specific history of the conflict;¹²⁸ therefore, a court must educate itself similarly to determine the primary effect of a government practice on such an observer. The *Selman* court found that an observer aware of “the sequence of events that led to the Sticker’s adoption”¹²⁹ as well as the broader social dialogue regarding the teaching of evolution would observe that “the Sticker communicates to those who endorse evolution that they are political outsiders, while [it] communicates to the Christian fundamentalists and creationists who pushed for a disclaimer that they are political insiders.”¹³⁰ The sticker alone may have seemed innocuous, but in the context of a religious antievolution movement, that sticker assumed the power to favor a particular Christian tradition and alienate all others from the political system. Under *Lemon*, this is an impermissible effect.

5. *Lemon Interpretive Lenses: Coercion and Endorsement Tests*

Although the *Lemon* test remains the dominant analytical tool in establishment clause cases, members of the Court have questioned its utility.¹³¹ Rather than abandon the *Lemon* test outright, however, the Justices have experimented with alternative establishment tests that tend to function as *Lemon* interpretive lenses, rather than entirely ceasing to scrutinize religious establishment through *Lemon*-colored glasses.¹³² One such approach to *Lemon*

¹²⁵ *Id.*

¹²⁶ *See id.*

¹²⁷ *Id.* at 1308.

¹²⁸ *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 779–81 (1995) (O’Connor, J., concurring); McCreary County v. ACLU of Ky., 545 U.S. 844, 866 (2005).

¹²⁹ 390 F. Supp. 2d at 1308.

¹³⁰ *Id.*; *see infra* note 138 and accompanying text.

¹³¹ GREENAWALT, *supra* note 50, at 20. “By now, most of the justices sitting on the Court have either rejected the *Lemon* test outright or have remarked that it should not be applied in its full form in every establishment case.” *Id.*

¹³² *See, e.g.,* McCreary County, 545 U.S. at 866 (importing the endorsement test “objective observer” into an application of the *Lemon* purpose prong).

designates coercion as the evil the Establishment Clause seeks to prevent.¹³³ Justice Kennedy, the author of this analysis, explained that disestablishment was not aimed at eradicating religion from the public square, but rather at insulating the religious freedom of citizens and faith groups from government intrusion.¹³⁴ Justice Kennedy asserted that the United States has a tradition of accommodating multiple faiths and religious or nonreligious positions, thereby embracing religious pluralism and resisting the banishment of religion from public dialogue.¹³⁵ The coercion test maximizes accommodation of nonreligion and multiple religions, but sets a boundary where government accommodation has the practical impact of coercing the public to participate in a given religious policy or practice. Should the Court favor the coercion analysis, this test might prove useful in evaluating whether a curriculum that purports to teach about religion actually coerces the students into validating a particular religious perspective.

The endorsement test offers an alternative application of *Lemon*. This analysis defines an establishment violation as any government practice that either endorses or disapproves of religion.¹³⁶ The endorsement test was created in recognition that “[w]e live in a pluralistic society. Our citizens come from diverse religious traditions or from no particular religious beliefs at all.”¹³⁷ In such a community, government endorsement of any religion or nonreligion is unconstitutional because it “sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the community.”¹³⁸ This test was framed by Justice O’Connor, but is unlikely to have retired with her, as the Supreme Court and lower courts have used the language of endorsement in discussing other establishment analyses in several recent opinions.¹³⁹

¹³³ WITTE, *supra* note 17, at 198; *Lee v. Weisman*, 505 U.S. 577, 587–88 (1992).

¹³⁴ WITTE, *supra* note 17, at 198; *see Lee*, 505 U.S. at 587.

¹³⁵ *See* RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE* (2d ed. 1984).

¹³⁶ *See Bd. of Educ. v. Grumet*, 512 U.S. 687, 714–15 (1994) (O’Connor, J., concurring).

¹³⁷ *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring).

¹³⁸ *Wallace v. Jaffree*, 472 U.S. 38, 69 (1984) (O’Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

¹³⁹ *E.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a school policy permitting student-led prayer over the public address system before football games impermissibly endorsed religion); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (debating the definition of the endorsement test, but using endorsement principles in holding that the government cannot exclude religious symbols from a public forum as a means of avoiding endorsement of religion); *Mitchell v. Helms*, 530 U.S. 793, 835 (2000) (holding that a provision of sign-language interpreter to deaf parochial school student as part of a generally available government program did not endorse religion); *Selman v. Cobb County Sch. Dist.*, 390

The language used to describe the *Lemon* test may vary, but the Court does not yet appear prepared to replace the test.¹⁴⁰ Even if the impact of the Establishment Clause is “limited” to prohibiting discrimination by government between religious sects or designating a particular religion as the state or national tradition,¹⁴¹ courts will still be compelled to apply some variation of the *Lemon* logic to determine whether in intent or effect a body of government is partaking in the forbidden activity.

Establishment Clause jurisprudence is in constant flux, but nothing in its history suggests that the Court would prohibit the objective presentation of religious materials in public school classrooms. Given that schools may teach about religion within *Schempp* limits, the question remains: why *should* they?

II. DO WE NEED TO KNOW THIS FOR THE TEST? PHILOSOPHICAL RATIONALES FOR TEACHING ABOUT RELIGION

While establishment precedent explains the *permissibility* of various manifestations of religion in public schools and allows for teaching about religion in accordance with the *Schempp* standards of secular purpose and objectivity,¹⁴² the law does not articulate the *necessity* of teaching students about religion in order to adequately prepare them for their roles as U.S. citizens. It is the foundational principles of American democracy and the place of religion among them that demonstrate why developing citizens will benefit from an education about religion that is shaped by the interests of a religiously plural society. Increased religious literacy will better equip citizens to integrate the nation’s basic commitment to religious freedom into domestic and foreign policies. As one scholar stated in his argument for teaching about religion in public schools, “Given a political environment where religion is increasingly important, it’s increasingly important to know something about religion The payoff is a more involved political conversation.”¹⁴³ In a country that values religious diversity, discussion about religion is an

F. Supp. 2d 1286 (N.D. Ga. 2005) (applying an endorsement-flavored *Lemon* test to find that evolution disclaimer stickers on science textbooks constituted an impermissible establishment of religion), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

¹⁴⁰ See *supra* note 89 and accompanying text.

¹⁴¹ *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O’Connor, J., concurring).

¹⁴² See discussion *supra* Part I.C.

¹⁴³ Lisa Miller, *The Gospel of Prothero*, NEWSWEEK, Mar. 12, 2007, at 50 (quoting Boston University professor Steve Prothero in an interview about his book entitled *Religious Literacy*).

indispensable element of the political dialogue through which citizens make governance decisions.

Democratic political philosophy offers a resource for the rationale for teaching about religion by taking a step back from the specific intensity of the conflicts that develop between varying viewpoints in a society governed by its citizens. This mode of thought is grounded in “the fundamental ideas implicit in the public political culture,”¹⁴⁴ and “seek[s] to uncover how citizens themselves might . . . want to conceive of their society as a fair system of cooperation over time.”¹⁴⁵ With respect to the integration of religious freedom into democratic principles, some political philosophies reveal how complicated religious liberty becomes in practice, especially in a religiously diverse nation.¹⁴⁶ Students will one day be expected, as voting members of society, to find ways to work across fundamental differences to shape and sustain a shared civic order.¹⁴⁷ Schools are the obvious and appropriate place in which to prepare students to meet the demands they will face as citizens.

This Part begins with a discussion of the philosophy of political liberalism and its perspective on religious freedom and diversity in the U.S. liberal¹⁴⁸ democratic polity. Political liberalism’s respect for diversity and confidence in the potential for cooperation among people of divergent beliefs undergird some of the major principles of modern public education. Critiques of some versions of political liberalism are outlined, including concerns that this philosophy might favor or denigrate particular religious traditions by promoting civil religion or requiring religious adherents to set aside their religious convictions upon entering into political debate. Finally, given a general politically liberal understanding of where and how religion fits into public life,¹⁴⁹ the need for

¹⁴⁴ JOHN RAWLS, *POLITICAL LIBERALISM* 46 (expanded ed. 2005).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 4. (“We should find it remarkable that . . . just cooperation among free and equal citizens is possible at all.”).

¹⁴⁷ *See id.*

¹⁴⁸ A “liberal” system is one that preserves two basic commitments: (1) to the complete, inviolable humanity of all persons and (2) to “certain basic human freedoms.” MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 36 (2003).

¹⁴⁹ Other democratic philosophies may foster Establishment Clause violations if used as a framework for curriculum development. For example, comprehensive liberalism values autonomy and personal choice as the highest good. Amy Gutmann, *Civic Education and Social Diversity*, 105 *ETHICS* 557, 558 (1995). Personal choice as a rationale for teaching about religion puts public schools in the impermissible position of seeking to influence students’ private religious decisions. It is an impermissible government intrusion into private religious affairs to rationalize that “after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.” *Everson v. Bd. of Educ.*, 330 U.S. 1, 24 (1947) (Jackson, J., dissenting).

and role of public education on religion in the United States is briefly presented.

A. *Philosophy Class: Defining Political Liberalism*

According to the modern prophet of political liberal philosophy, John Rawls, a society governed by free and equal citizens who differ in fundamental commitments, such as religion, requires citizens to come to a shared concept of justice based on “an overlapping consensus of reasonable comprehensive doctrines”¹⁵⁰ and to let this shared principle inform all political debate.¹⁵¹ Political liberalism anticipates “a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines,”¹⁵² yet “holds out the hope of politics as a shared moral order without depending on unrealistic expectations of agreement on the most difficult questions of life.”¹⁵³ Political liberalism is grounded in “a robust but less than fully comprehensive civic life,”¹⁵⁴ meaning it acknowledges the priority of religion in the lives of citizens yet presumes citizens of a pluralistic society are willing to work in community to maintain a shared, nontheocratic political order.¹⁵⁵

Political liberal principles have informed U.S. public education through the work of John Dewey, a twentieth-century multidisciplinary philosopher credited with initiating “everything that is associated with the transformation of education from mere passive learning . . . [to] the emphasis on education as social and as an experience of shared life.”¹⁵⁶ Dewey, described as “America’s Philosopher”¹⁵⁷ because of his close attention to peculiarly American norms and mores, recognized that “the American nation is itself complex and compound,” comprised of “a multitude of peoples . . . inheriting diverse traditions, cherishing varying ideals of life.”¹⁵⁸ Dewey argued that in a

¹⁵⁰ RAWLS, *supra* note 144, at 44.

¹⁵¹ *Id.*

¹⁵² *Id.* at 3–4.

¹⁵³ Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468 (1995).

¹⁵⁴ MACEDO, *supra* note 14, at 151.

¹⁵⁵ See John Rawls, *A Well-Ordered Society*, in IN DEFENSE OF HUMAN DIGNITY 193, 194 (Robert P. Kraynak & Glenn Tinder eds., 2003).

¹⁵⁶ Irwin Edman, *Introduction to JOHN DEWEY: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 21, 22 (Irwin Edman ed., 1955). Dewey’s influence on education, beginning in the early twentieth century, is described as “epidemic.” *Id.* at 27.

¹⁵⁷ Larry A. Hickman & Thomas M. Alexander, *Introduction to THE ESSENTIAL DEWEY*, *supra* note 118, at ix.

¹⁵⁸ JOHN DEWEY, *Nationalizing Education*, in THE ESSENTIAL DEWEY, *supra* note 118, at 266.

variegated democratic society, “our public schools [should] teach each factor to respect every other”¹⁵⁹ as a means of lending effect to the ideal of basic freedoms for all citizens despite deep differences among them.¹⁶⁰ Dewey’s educational philosophy was consistent with the political liberal understanding that members of a community who disagree as to ultimate convictions can learn to develop unity through “personal contact, cooperative intercourse and sharing in common tasks and hopes.”¹⁶¹

B. School Rules: Constitutional Questions Raised by Political Liberalism as a Rationale for Religion in Schools

Political liberalism can be commended to public schools as a framework for understanding the intersections between religion and politics that might inform the development of constitutionally appropriate curricula for teaching about religion. However, political liberalism must be checked where its understanding of the place of religion in the polity runs afoul of Establishment Clause restrictions on endorsing or devaluing any religion or nonreligion.

First, curriculum developers must avoid elevating the political community to the extent of establishing a civil religion and, consequently, trivializing all religion. Dewey, for example, rejected religion as a path to any valid form of knowledge, favoring observable scientific methods for seeking truth.¹⁶² He described democracy as the highest good and viewed the “high church of this civil religion . . . [as] the public school.”¹⁶³ Once the values of a political system—in this case, democracy—are touted as the utmost good for all people, religious statements of ultimate truth are automatically subordinated.

A constitutional problem manifests, for example, when a pedagogy of civil religion teaches that all religious tenets point to democratic principles: “The canons of rationalism and rational government and the canons of religious doctrine and theocracy are couched in the language of peace and justice for

¹⁵⁹ *Id.* at 267.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* Dewey observed that while politicians encouraged factionalism as a means of attaining votes, teachers nurtured cooperation and respectful dialogue as a way of preserving the “united” in the United States.

¹⁶² JOHN DEWEY, *Christianity and Democracy*, in 4 THE EARLY WORKS, 1882–1898, at 3, 9 (Jo Ann Boydston ed., 1971). Dewey categorized religion as “supernatural” and therefore subordinate to the scientific method as grounded in and limited to the observable world. See JOHN DEWEY, *What I Believe*, in THE ESSENTIAL DEWEY, *supra* note 118, at 22.

¹⁶³ MACEDO, *supra* note 14, at 141.

all;”¹⁶⁴ or, that religious and secular pursuits of ultimate truths are essentially interchangeable: “[I]n true religion the ultimate reality is a transcendental being, power, or principle. But . . . the same search for final meaning can be pursued in much the same way by secular religions or ideologies”¹⁶⁵ Perhaps both are seeking ultimate truth, but one approach is wholly shaped by a concept of human relationship to the divine and the other is not. This is not a semantic distinction, but an essential one, from the perspective of religious adherents. Public schools teaching civil religion are violating the Establishment Clause either by favoring faith traditions that align with democratic principles or by marginalizing all religions in the face of the same.

A second constitutional critique challenges political liberalism’s demand that citizens bracket their religious convictions when debating public policy, a move the Constitution does not require. Rawls’ concept of “public reason”¹⁶⁶ implies a “*reasonable pluralism*”¹⁶⁷ that presumes citizens will set aside their fundamental convictions in order to agree on public policies.¹⁶⁸ One proponent of Rawls’ position states that “[a]s a public matter . . . people need not invoke their religious or deeper philosophical ideals, because there are adequate reasons available that can be shared by *reasonable people* who disagree about their ultimate ideals.”¹⁶⁹ Rawls allowed that religious principles could enter into public reasoning, but merely as a placeholder until nonreligious rationales that might be approved by all reasonable persons are provided.¹⁷⁰ However, this formulation of public reason creates two constitutional problems. First, it tends to favor political participation of persons whose religious beliefs mimic secular public values.¹⁷¹ Second, it implies that citizens who do not commit to

¹⁶⁴ John I. Goodlad, *Democracy, Education, and Community*, in DEMOCRACY, EDUCATION, AND THE SCHOOLS 87, 99 (Roger Soder ed., 1996). The canons of religious doctrine and theocracy are just as often expressed in self-righteous intolerance, war, and genocide. We may in fact rely on rational government to restrain ostensibly theological impulses for domination and forced conformity, a function served in part by the First Amendment.

¹⁶⁵ *Id.*

¹⁶⁶ RAWLS, *supra* note 144, at 212–14 (Public reason includes concepts of justice and public good shared by all citizens; in contrast, principles developed in churches are an example of “nonpublic” reason.).

¹⁶⁷ *E.g.*, MACEDO, *supra* note 14, at 171.

¹⁶⁸ Jeffrey Stout, *Religious Reasons in Political Argument*, in RELIGION IN THE LIBERAL POLITY 157, 160 (Terence Cuneo ed., 2005).

¹⁶⁹ MACEDO, *supra* note 14, at 179 (emphasis added).

¹⁷⁰ Stout, *supra* note 168, at 161.

¹⁷¹ *E.g.*, MACEDO, *supra* note 14, at 196–97 (“[W]hy should we apologize if disparate burdens fall on proponents of totalistic religious or moral views who refuse to concede the political authority of public reason? We need to remember how such people would behave if they had political power.”); *see also* DEWEY, *supra* note 118.

identifying mutually held policy justifications are *unreasonable* in the context of public discourse, and therefore unwelcome in it.¹⁷² Like the constitutional difficulty presented by civil religion, this notion of public reason might unnecessarily subordinate the place of religion in the political process.

Members of different faith traditions or no such tradition may be unable to engage one another as “reasonable” if they define reasonableness in accordance with their religions instead of with the theories of John Rawls, and the Constitution does not demand they accept the latter. As one parent stated in objecting to a school textbook on religious grounds, she was unable to “accept other religious views on an equal basis with [her own].”¹⁷³ Political liberalism handles this tension by artificially relegating religious liberty to the private domain. It effectively silences the faithful who pursue public policy grounded in their religious allegiances, such as Reverend Martin Luther King, Jr.¹⁷⁴ But Establishment Clause jurisprudence is not quite so stringent about excluding religion from public policy debate, and students will be misled if they are not exposed to the law’s more inclusive treatment of religion in politics.

The Constitution does not compel citizens and lawmakers to abandon ultimate beliefs as bases for legislation, even where nonreligious reasons may readily be invoked. In fact, both citizens’ and lawmakers’ motivations for political action are permitted to be religious in nature.¹⁷⁵ The Supreme Court has stated that legislators’ religious motives do not result in a presumptively unconstitutional law.¹⁷⁶ Such a position would “deprive religious men and women of their right to participate in the political process,”¹⁷⁷ and could prevent positive social developments in civic life.¹⁷⁸ The Establishment Clause

¹⁷² Stout, *supra* note 168, at 160.

¹⁷³ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1069 (6th Cir. 1987).

¹⁷⁴ Stout, *supra* note 168, at 161.

¹⁷⁵ See *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) (“Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. . . . [P]olitical activism by the religiously motivated is part of our heritage.”).

¹⁷⁶ *Id.*; see also *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 670 (1970).

¹⁷⁷ *Edwards*, 482 U.S. at 615 (Scalia, J., dissenting).

¹⁷⁸ *Id.*

We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. . . . [Y]esterday’s [religious activism] resulted in the abolition of slavery, and tomorrow’s may bring relief for famine victims.

Id.

prohibits only a narrow range of state actions with the sole specific purpose of advancing or denigrating a particular religion, religion in general, or nonreligion,¹⁷⁹ and with no legitimate,¹⁸⁰ secular purpose.¹⁸¹ According to the Court, religious voices are invited into the public policy chorus but should be restrained from drowning out all the harmonies. Government lawmaking, whether rooted in religious reasoning or not, is subject to the checking function of the court system and the various legal protections for minority interests with respect to religion.¹⁸²

There is a more individualistic political liberal concept, one that minimizes establishment concerns in the classroom by acknowledging that religious rationales in public discourse can be reasonable. Teaching in accordance with this underlying principle serves to make students aware that they will not be compelled, in school or in the public square, to yield their ultimate convictions as they pursue policy goals. They will not need to buy into comprehensive, nonreligious, “least-common-denominator” public commitments as a fee for being recognized as reasonable.¹⁸³

First Amendment jurisprudential patterns of protecting majority and minority religious expressions in the public square¹⁸⁴ suggest that respect for individuals in their religious particularity¹⁸⁵ vis-à-vis policy discussions may be more important to cultivate in citizens than a notion of “public reason.” Given that “[i]t belongs to the *religious convictions* of a good many religious people in our society *that they ought to base* their decisions concerning fundamental issues of justice *on their religious convictions*,”¹⁸⁶ persons arguing political issues from a religious platform may still be considered “reasonable” in the public forum if they demonstrate respect for the unique

¹⁷⁹ See discussion *supra* Part I.C; see also *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (“[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.”).

¹⁸⁰ *Edwards*, 482 U.S. at 587 (rejecting as a “sham” the stated secular purpose of providing a comprehensive science curriculum for state law requiring creationism to be taught in schools that taught evolution).

¹⁸¹ *E.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (Legislative purpose is inappropriate where “there [is] no question that the statute or activity was motivated wholly by religious considerations.”).

¹⁸² See discussion *supra* Part I.C.

¹⁸³ See ROBERT AUDI & NICHOLAS WOLTERSTORFF, *RELIGION IN THE PUBLIC SQUARE: THE PLACE OF RELIGIOUS CONVICTIONS IN POLITICAL DEBATE* 96–114 (1997).

¹⁸⁴ *E.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995) (holding that a city, having created an open public forum, may not ban the display of a Ku Klux Klan cross).

¹⁸⁵ See *Stout*, *supra* note 168, at 163–67.

¹⁸⁶ AUDI & WOLTERSTORFF, *supra* note 183, at 105.

perspectives of their conversation partners.¹⁸⁷ Rather than appealing to assumed common commitments or to “reasons that no reasonable person could reasonably reject,”¹⁸⁸ which may or may not exist, a reasonable citizen working with others to develop policy may (1) acknowledge the basis for his or her own convictions, religious or otherwise; (2) determine the bases for the positions of others with whom he is in dialogue; and (3) seek justifications from this place of acknowledged difference that all might find acceptable, even if not in complete accord with each person’s ultimate convictions.¹⁸⁹

C. Education for Life: How Learning About Religion in School Prepares Students for Life as Adult Citizens

Schools offer a “laboratory for engagement” in which students may be exposed to religion in various subject areas¹⁹⁰ and where they have the opportunity to practice respectful dialogue with one another about an inevitably volatile topic. John Dewey’s basic premise of education, which has shaped U.S. educational philosophy for almost a century,¹⁹¹ is that learning is meaningful only when it is grounded in student experience, particularly the student’s experience within a social community.¹⁹² As expressions of diverse religious beliefs and beliefs about religion in the public square are ubiquitous in U.S. society, and religion even has a circumscribed but protected place in the formulation of public policy, students will inevitably have experiences with religious differences in their lives *as public citizens*.¹⁹³

If students do not have the opportunity in school to experiment with how they might encounter religion in the American context of religious liberty and

¹⁸⁷ Stout, *supra* note 168, at 165.

¹⁸⁸ *Id.* (restating a Rawlsian premise).

¹⁸⁹ *Id.*

¹⁹⁰ See *infra* Part III.

¹⁹¹ Edman, *supra* note 156, at 27.

¹⁹² JOHN DEWEY, *My Pedagogic Creed*, in THE ESSENTIAL DEWEY, *supra* note 118, at 229, 229 [hereinafter DEWEY, *My Pedagogic Creed*].

[T]he only true education comes through the stimulation of the child’s powers by the demands of the social situation in which he finds himself. . . . [H]e is stimulated to act as a member of a unity, to emerge from his original narrowness of action and feeling and to conceive of himself from the standpoint of the welfare of the group to which he belongs.

Id. See generally JOHN DEWEY, EXPERIENCE AND EDUCATION (1998) [hereinafter DEWEY, EXPERIENCE AND EDUCATION].

¹⁹³ Even if every person the student encounters shares the same religious beliefs, the student will run up against the impact of protected religious plurality when, for example, there is no longer an opening prayer at school football games. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

plurality, then their education is profoundly disconnected from their lives as members of American society. Dewey observed that laws, policy debate, and political activism sporadically shape society; but public education, as the gateway through which the majority of young citizens proceed, is a primary and constant locus of social progress.¹⁹⁴ The nation's education system risks losing its capacity to contribute to such progress if it refuses to engage the practical realities of religious freedom, which include students' actual experiences of religion in U.S. public life. However, as Part I explained, religion need not be excised from public schools; Part III will address several proper and improper options for bringing religion into the public school classroom.

III. TEACHING AIDS: PRACTICAL ASPECTS OF INCORPORATING RELIGION INTO THE PUBLIC SCHOOL CURRICULUM

Having established the permissibility and desirability of teaching about religion in public schools as part of preparing students for full participation in U.S. public life, the remaining challenge lies in how a public school may teach religion-related content without actually, or even apparently, endorsing, denigrating, or otherwise communicating a position on religion. The touchstone for assessing the constitutionality of curricula referencing religious materials and topics is the *Schempp* test, which requires that such information be objectively presented as part of a secular program.¹⁹⁵ Beyond *Schempp* limits, "[t]o what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not."¹⁹⁶ This federalist approach to curriculum design leaves the door open for local school officials to draw religion into classrooms, but fear of community conflict and lawsuits may temper such movement.¹⁹⁷

This Part seeks to mitigate some potential concerns of curriculum developers by presenting examples of controversies surrounding teaching

¹⁹⁴ See DEWEY, *My Pedagogic Creed*, *supra* note 192, at 234.

¹⁹⁵ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

¹⁹⁶ *Id.* at 300.

¹⁹⁷ Charles C. Haynes, *From Battleground to Common Ground: Religion in the Public Square of 21st Century America*, in RELIGION IN AMERICAN PUBLIC LIFE: LIVING WITH OUR DEEPEST DIFFERENCES, *supra* note 5, at 96, 98.

about religion in various public school courses and by clarifying where Establishment Clause violations may or may not exist. First, establishment issues may be raised if a school is perceived to be teaching “truth.” This is illustrated by the 2005 controversy surrounding intelligent design in a Pennsylvania school district’s biology classes. Second, two broad areas of curriculum options are analyzed for *Schempp* compliance: courses that lend themselves to teaching about religion in politics (such as history and civics courses), and those useful to teaching about religion in the wider public culture (such as study of the Bible as literature). Finally, to minimize community fears about use of religious materials in the classroom, schools are encouraged to avoid deception and facilitate questions and conversation about the curriculum among students, parents, and other concerned citizens.

As a preliminary note, nationwide interest in teaching about religion is evident. In 1999, the U.S. Department of Education distributed a guide on religion in schools, including information on permissible incorporations of religious material into the curriculum, to every public school in the country.¹⁹⁸ The following year, the First Amendment Center and the Council on Islamic Education completed a survey entitled *Teaching About Religion in National and State Social Studies Standards*.¹⁹⁹ This survey, which assessed quantity and quality of educational standards relating to teaching about religion as published by the fifty states²⁰⁰ and national education councils,²⁰¹ found that “[c]onsiderable evidence from across the United States demonstrates widespread acceptance of teaching about religion in the social studies, including expanded coverage of religions in American and world history textbooks and curriculum. (Some content also appears in literature and arts standards.)”²⁰² Although the study acknowledged that as recently as the 1990s, “instructional guidelines issued by state departments of education often had little impact on what was taught in the classrooms,”²⁰³ the turn-of-the-millennium trend toward state standardized testing and other measures of

¹⁹⁸ *Id.* at 99.

¹⁹⁹ SUSAN L. DOUGLASS, COUNCIL ON ISLAMIC EDUC. & FIRST AMENDMENT CTR., EXECUTIVE SUMMARY: TEACHING ABOUT RELIGION IN NATIONAL AND STATE SOCIAL STUDIES STANDARDS (2000).

²⁰⁰ *Id.* at 14–15. These standards are usually produced by state education departments with support from the state legislature. According to this study, state standards tend to be influenced by nationally published guidelines despite the fact that there are no nationally mandated social studies curricula. *Id.*

²⁰¹ These include institutions such as the National Council for Social Studies and the National Standards for Civics and Government, both promulgating guidelines for grades K to 12. *Id.* at 10–13.

²⁰² *Id.* at 8.

²⁰³ *Id.* at 7–8.

accountability suggests that if teaching about religion appears in state curricula, it will eventually appear in the schoolhouse.²⁰⁴

A. *Rarely Pure and Never Simple*:²⁰⁵ *The Difficulty of Teaching “Truth” and the Intelligent Design Controversy*

Some individuals and traditions believe there is no truth outside of religion. Others may believe there can be no truth in religion.²⁰⁶ Such absolutists may be offended by any curricula including religion, but a school may not tailor courses to convey either of these precise attitudes toward the topic.²⁰⁷ For example, the Sixth Circuit faced this problem where parents objected to the use of an anthology that exposed their children to any religions, feelings, or values that differed from those sanctioned by their own religion,²⁰⁸ unless the material was prefaced by “a statement that the other views are incorrect and that the plaintiff’s views are the correct ones.”²⁰⁹ The Court held that the state “may not teach as truth that the religions of others are just as correct *as religions* as plaintiff’s own,” but it could appropriately “teach that all religions have the same civil and political rights, and must be dealt with civilly in civil society.”²¹⁰

Concerns about apparent religious messages in schools are not always so polarized. For many, the primary fear seems to be that the school will directly

²⁰⁴ See *id.* at 20.

²⁰⁵ OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST*, Act I, scene 1 (1895) (“The truth is rarely pure and never simple.”).

²⁰⁶ From one Catholic perspective:

We greatly deplore the fact that, where the ravings of human reason extend, there is somebody who studies new things and strives to know more than is necessary There you will find someone who is overconfident in seeking the truth outside the Catholic church, in which it can be found without even a light tarnish of error.

MACEDO, *supra* note 14, at 61 (quoting Pope Gregory XVI).

Contrast atheist philosopher Daniel C. Dennett, who proposes that all aspects of human experience are biologically explicable:

Belief can be explained in much the way that cancer can Certainly the idea of a God that can answer prayers . . . and who intervenes in the world—that’s a hopeless idea. There is no such thing It may be that we don’t need [God], and it is left over from something that we used to be. There are lots of biological possibilities.

The Nonbeliever, N.Y. TIMES, Jan. 22, 2006, § 6 (Magazine), at 21.

²⁰⁷ *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987).

²⁰⁸ *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1062 (6th Cir. 1987).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1080 (Boggs, J., concurring).

or impliedly communicate to students how they are to *prioritize* different ways of formulating truth.²¹¹ The *Schempp* test, in recognizing that a sectarian text can have value in the secular realms of history and literature, implicitly acknowledges that individuals recognize different categories of truth and that only some of these fall within state educational authority.²¹²

In subject areas for which secular academic standards are established, a school can more easily demonstrate that it is not taking a position on religion if it designs curricula in accordance with these guidelines. This approach is particularly helpful where questions about truth claims arise in empirical studies, such as biological science. For example, in *Kitzmiller v. Dover Area School District*, decided in 2005, a Pennsylvania federal district court heard the debate surrounding the constitutionality of introducing the “intelligent design” theory of origin into a high school science curriculum.²¹³ The court affirmed that scientific information can be presented accurately without conveying any priority of truth with respect to religion.²¹⁴ A student may, of course, maintain the personal belief that science is untrue under particular religious authority.

The court turned to the National Academy of Sciences (NAS), a group respected in the field of science by both parties,²¹⁵ to locate standards for defining science. NAS explained, “Science is a particular way of knowing about the world,”²¹⁶ affirming that science does not purport to be the only way of knowing. Science is limited to empirical, observable, and testable data that is confirmable by multiple scientists.²¹⁷ The court noted that scientific propositions include quantitative criteria and are vetted by a peer-review process, but intelligent design (“ID”) is not.²¹⁸ ID, in contrast, openly engages nonscientific realms in asserting that the nature of the intelligent designer cannot be ascertained by traditional science but rather by “religion and

²¹¹ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968) (public feared teaching evolution would subvert Christianity).

²¹² *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 276 (1963) (Brennan, J., concurring) (“The truths of the Bible are the truths of religion, which do not come within the province of the public school . . .”) (quoting *Ring v. Bd. of Educ.*, 92 N.E. 251, 256 (1910)).

²¹³ 400 F. Supp. 2d 707 (M.D. Pa. 2005). The theory of intelligent design postulates that where complex design exists, as in nature, there must necessarily be an entity that acts as the designer. *Id.* at 738.

²¹⁴ *Id.* at 765 (“[T]he theory of evolution . . . in no way conflicts with, nor does it deny, the existence of a divine creator.”).

²¹⁵ *Id.* at 735–36.

²¹⁶ *Id.* at 735.

²¹⁷ *Id.* at 736.

²¹⁸ *Id.* at 744–45.

philosophy.”²¹⁹ Proponents of ID are seeking to reframe the field of science to include “supernatural causation,”²²⁰ but until and unless such change occurs, ID does not satisfy the scientific method. By secular scientific standards, therefore, ID cannot be taught as science. As the court stated, “we find that while ID arguments may be *true*, a proposition on which the Court takes no position, ID is not *science*.”²²¹ The exclusion of religious material from a science context is not a government statement against religion but is simply a requirement of the established standards of the field of science. In *Schempp* terms, the secularity and objectivity of the science program are shaped by the explicit secularity and objectivity of scientific standards. Teaching topics in accordance with secular criteria does not, in itself, make any impermissible claims about religious truth.

As a practical matter, if students are to participate in local, national, and global communities, they need to work with secular methods of evaluating and organizing information. After all, persons from different religions may not share a concept of a deity, but they are likely to have a common understanding of gravity. A student is free to personally value different ways of accessing “truth” in accordance with his or her religion, but a school does not denigrate religion when it insists that students learn how to apply the secular standards of a discipline to information relevant to that discipline. Students may not be comfortable working with different concepts of “truth,” but this tension reflects the reality of the multiple interpretive methods that individuals apply to everything they encounter.²²²

²¹⁹ *Id.* at 719.

²²⁰ *Id.* at 735. ID proponents described their ultimate goal as replacing the field currently recognized as science with “theistic and Christian science.” *Id.* at 737 (citing the Wedge Document developed by the Discovery Institute).

²²¹ *Id.* at 735 (emphasis added).

²²² *But see* Pinker, *supra* note 6. Dr. Pinker argued against a suggested core curriculum course for Harvard undergraduates entitled “Reason and Faith,” asserting that the course title “makes it sound like ‘faith’ and ‘reason’ are equivalent ways of knowing, and we have to help students navigate between them Faith—believing something without good reasons to do so—has no place in anything but a religious institution.” *Id.* He continues,

[T]o magnify the significance of religion as a topic equivalent in scope to all of science, all of culture, or all of world history and current affairs, is to give it far too much prominence. It is an American anachronism, I think, in an era in which the rest of the West is moving beyond it.

Id. Even if Dr. Pinker’s definition of faith (“believing something without good reasons to do so”) were either complete or correct, it would not justify his fear of permitting an academic institution to encourage critical thinking about the nature of faith and the interplays of faith and reason. For good or ill, attitudes and behaviors attributed to faith influence science, culture, world history, and current affairs. Yet faith does not exclude reason; these coexist within many individual persons, as well as in the larger human community. A

B. Multiple Choice: Options for Incorporating Religion into the Public School Curriculum

Perhaps the most practical approach, particularly in financially strapped school districts, to adding religious studies to the curriculum is by “natural inclusion,”²²³ in existing courses. This means that “teachers should discuss religion wherever it ‘naturally’ comes up.”²²⁴ Many schools already include religious information in literature and history courses, but religious materials *may* be appropriate in any subject in which “religious ideas, ideals, and influences in our culture shape the public discussion.”²²⁵ While the relationship between religion and politics is an important element of the American public square, it need not be the exclusive focus of teaching about religion; apolitical citizens engage religion and religious difference as well.²²⁶ Dedicated courses covering religious topics are also appropriate, but such programs tend to be offered as electives taken by a minority of students.²²⁷ Elective courses in religion, therefore, do not adequately address the need for all students to be competent to enter into public dialogue in a religiously active society.

School boards or teachers developing a curriculum that includes religious topics must consider certain factors relevant to all religion-related curricula, regardless of subject area. First, curriculum developers must consider the age-appropriateness of various syllabi. For example, elementary school students are able to process general religious and cultural topics,²²⁸ while adolescent students have the cognitive critical thought capacity to address more

school need not teach students how to “navigate between” faith and reason. Rather, a school might provide a space for students to consider how to interact with the reality that many people navigate human life under the guidance of faith and reason together. Perhaps the priority of religion in public life is “an American anachronism,” but this does not necessarily render it undesirable. In fact, it indicates that United States schools may be predisposed to these critical conversations. But Dr. Pinker and his colleagues were successful—Harvard dropped the course. Thomas Bartlett, *Harvard Drops Religion Requirement from Proposed New Curriculum*, CHRON. HIGHER EDUC., Dec. 14, 2006, <http://chronicle.com/daily/2006/12/2006121405n.htm>.

²²³ NORD & HAYNES, *supra* note 2, at 44.

²²⁴ *Id.*

²²⁵ *Id.* The authors propose discussing religious influences in courses such as economics, biology, sex education, and art, among others. Such discussion is better limited to courses in which religious influence is significant within the academic field itself; this is true of art and philosophy, for example, but not of biology.

²²⁶ Martin E. Marty, *Introduction to RELIGION IN AMERICAN PUBLIC LIFE: LIVING WITH OUR DEEPEST DIFFERENCES*, *supra* note 5, at 15, 17 (“Public” and “political” are not equivalent terms.).

²²⁷ NORD & HAYNES, *supra* note 2, at 45.

²²⁸ *Id.* at 177.

controversial materials and issues.²²⁹ Second, First Amendment “[n]eutrality requires that educators not convey the sense that the major traditions are ‘normative,’”²³⁰ or that traditions with fewer adherents or less prominence are not equally deserving of respect. *Schempp* objectivity and First Amendment neutrality do not require exhaustive representation of every religious tradition or perspective, but teachers are more likely to appear unbiased where both majority and minority religious traditions are addressed.²³¹ For example, in a course where natural inclusion of multiple traditions is appropriate, teachers might include locally practiced traditions “to give all children the sense that their traditions are taken seriously.”²³² Finally, teachers must be trained and competent in presenting sensitive religious topics in accordance with *Schempp* standards.

1. *Subject Areas Addressing Religion and Politics*

Courses that include discussion of how religious interests influence the political structures of public life, such as civics, history, and social studies, are well suited to teaching students about religion. In particular, study of religion in those courses serves the goal of preparing students for political participation in a society in which multiple religious perspectives are included in the political dialogue. Where course materials present religious cultures, practices, or actions by religious groups in history, curriculum developers must keep the *Schempp* requirements in sight by ensuring that teaching materials are as free from bias as possible.

History, for example, may be in the past, but the manner in which its religious aspects are recounted impacts public perception of religious traditions in the present. In 2006, the Hindu American Foundation sued the California State Board of Education, claiming a sixth-grade social studies text negatively portrayed the Hindu religion.²³³ Concerned Hindu groups pointed out blatant

²²⁹ See, e.g., DOROTHY G. SINGER & TRACEY A. REVENSON, *A PIAGET PRIMER: HOW A CHILD THINKS* 24–25 (1978) (explaining psychologist Jean Piaget’s extensive research on the stages of children’s intellectual development).

²³⁰ NORD & HAYNES, *supra* note 2, at 48.

²³¹ See *id.*

²³² *Id.* For example, a teacher in Salt Lake City, Utah, might discuss Mormonism, or classes in particular Southwestern or Northern regions might cover Native American traditions.

²³³ Hindu Am. Found. v. Cal. State. Bd. of Educ., No. 06 CS 00386 (Cal. Super. Ct. Sept. 1, 2006), <http://www.saccourt.ca.gov/courtrooms/trulings/d19archives/Sep1D19-06CS00386.doc>; see also Sue Fishkoff, *Calif. Textbooks Remove Anti-Jewish Claims*, JEWISH TIMES (Baltimore, Md.), Nov. 17, 2005, <http://www.jewishtimes.com/scripts/edition.pl?now=11/17/2005&stay=1&SubSectionID=31&ID=5186>. Jewish and Sikh groups also proposed textbook changes, which were accepted without contest. *Id.*

errors, such as a statement that the Hindi language is written in Arabic script, which were corrected without question.²³⁴ However, proposed changes regarding the date at which Indian civilization began and the origins of Hinduism in India were, and remain, highly contested within the Hindu community.²³⁵ Although drafted by Hindu groups, one prominent Sanskrit scholar says some of the proposed changes render the text “completely incorrect” as an historical resource.²³⁶ Outside of alleged inaccuracies in the text, the petitioners also challenged the text’s descriptions of the caste system and the status of women in Indian history as derogatory toward the Hindu religion.²³⁷

Applying a variation of the *Schempp* test, as codified in the *Standards for Evaluating the Social Content of Instructional Materials* incorporated in the California Code of Regulations,²³⁸ the California Superior Court held that the textbooks did not describe Hinduism in an unconstitutional manner.²³⁹ To comply with the Establishment Clause, the school must demonstrate neutrality toward all sects of Hinduism, as it must toward all religions.²⁴⁰

One historian argues, however, “There is no such thing as an objective history. So when we write a textbook, we should make students aware of the status of current research of leading scholars in the field.”²⁴¹ In selecting a text, curriculum designers should seek materials that reflect an ongoing reexamination of history and the perspectives from which that history is constructed, especially with respect to religions and cultures that are not thoroughly represented in American classrooms. Teachers can then explain that the information in the text was largely vetted by standards appropriate to

²³⁴ Scott Baldauf, *India History Spat Hits U.S.*, CHRISTIAN SCI. MONITOR, Jan. 24, 2006, at 11.

²³⁵ *Id.* “[M]ost established historical research contends that the cornerstone of Indian civilization—the practice of Hindu religion—was codified by people who came from outside India, specifically Aryan language speakers” *Id.* Hindu groups who argue against including this information in the textbook share a nationalist concern that Hinduism is not portrayed as a religion with “foreign roots.” *Id.*

²³⁶ *Id.* (quoting Michael Witzel, a Harvard University Sanskrit scholar and Indologist).

²³⁷ *Hindu Am. Found.*, ¶ 41.

²³⁸ CAL. CODE REGS. tit. 5, § 9511 (2006).

²³⁹ *Hindu Am. Found.*, ¶ 41.

[T]he applicable standard states that materials on religious subject matter must remain neutral, must not advocate one religion over another, and must not include derogatory language about a religion or use examples from sacred texts or other religious literature that are derogatory, accusatory, or instill prejudice against other religions or those who believe in other religions.

Id.

²⁴⁰ See discussion *supra* Part I.C.

²⁴¹ Baldauf, *supra* note 234 (quoting Indian historian Meenakshi Jain).

the academic field of history and social studies, as opposed to religious standards.²⁴² Airing the debate behind the choice of text reminds students, first, of the complexity that accompanies any discussion of religious influence on historical events, and second, of the importance of the historical narrative of religious traditions to the personal sense of identity of its adherents.

This case highlights a more delicate classroom concern: Even a neutral mention of an aspect of a religious tradition may result in judgment on the part of students. As the Superior Court stated, “The law does not insure against negative reactions or prejudices, it merely requires that the textbooks not instill them.”²⁴³ The task will likely fall to the classroom teacher to demonstrate that the school, as proxy for the government, does not favor or disfavor any religion. This may be accomplished by controlling the scope and tone of classroom discussion. For example, the contested California textbooks indicated “that Hindu religion generally accepted the caste system.”²⁴⁴ The books also took “pains to describe the origins of the caste system in terms of a social construct . . . rather than as primarily a Hindu religious belief.”²⁴⁵ A teacher might stress this distinction in class. Discussing this distinction may support a general educational goal of developing students’ capacity for critical thought. Even the more difficult case, where social or political norms generate opinions and are grounded in religion as religion, creates an opportunity to practice critical dialogue in a context of respect for difference.

Civics courses provide an ideal opportunity for discussing religious liberty as articulated and protected by U.S. civil society and the impact of active religious pluralism on politics in a representative democracy. This subject engages highly contentious and vitally relevant topics including “the meaning of America; the separation of church and state; the wisdom of court rulings [interpreting the First Amendment]; the moral grounds of public policy; and the relative authority of state and religion.”²⁴⁶ Responsible teaching of civics in anticipation of students’ future participation in community politics includes not only objective information, such as the text of the Constitution and recorded history of the U.S. government and court cases, but also the

²⁴² See discussion *supra* Part III.A.

²⁴³ *Hindu Am. Found.*, ¶ 44. “[T]he possibility, or even probability, that some students might react negatively, based on their own religious, political, or social beliefs, to what they read in these books does not make the books legally invalid.” *Id.*

²⁴⁴ *Id.* at ¶ 43.

²⁴⁵ *Id.*

²⁴⁶ NORD & HAYNES, *supra* note 2, at 104.

inculcation of the civic virtues that allow students to recognize differences, disagree respectfully, and seek agreement around those political commitments articulated in the U.S. Constitution.²⁴⁷ Students may reflect on legislative and jurisprudential boundaries on religion in politics by, for example, examining historical and contemporary political debates that engage religious concerns. *Schempp* objectivity and secularity are maintained as long as teachers do not advocate a position on a particular religious worldview or on religion in general.²⁴⁸

2. *Subject Areas Addressing Religion and Public Culture*

Religion in an openly plural society enters the public square in numerous nonpolitical ways,²⁴⁹ such as literature and the arts, and a public school might legitimately choose to teach about religion in these areas. While several school systems already offer such courses,²⁵⁰ the State of Georgia has attracted particular attention to this sort of program because it is the first state to require that its Department of Education develop a statewide curriculum for a course on a devotional religious text as literature: the “history and literature of the Bible.”²⁵¹ The Board developed standards for elective high school courses covering the history and literature of the Old Testament era or history and literature of the New Testament era.²⁵² If a particular school chooses to adopt one or both curricula, the state will provide partial funding for the course.²⁵³

²⁴⁷ See *id.* at 105; CHARLES C. HAYNES & OLIVER THOMAS, FINDING COMMON GROUND: A GUIDE TO RELIGIOUS LIBERTY IN PUBLIC EDUCATION 61–66 (Charles C. Haynes & Oliver Thomas eds., 2001). School systems in California and Utah structure their civics programs around “the three R’s”—rights, responsibilities, and respect. HAYNES & THOMAS, *supra*, at 62–63.

²⁴⁸ See discussion *supra* Part I.C.

²⁴⁹ Marty, *supra* note 226.

²⁵⁰ See, e.g., Richard N. Ostling, *Bible Text Hits Schools’ Shelves*, DENVER POST, Oct. 3, 2006 (stating that seventy-eight U.S. school districts in twenty-six states adopted a textbook entitled *The Bible and Its Influence* for use in elective high school courses on the Bible as literature).

²⁵¹ Patrick Jonsson, *Georgia May OK Bible as Textbook*, CHRISTIAN SCI. MONITOR, Mar. 27, 2006, at 2. The relevant statute is “Elective Course in History and Literature of the Old and New Testament Eras.” GA. CODE ANN. § 20-2-148 (2006).

²⁵² GA. DEP’T OF EDUC., GEORGIA PERFORMANCE STANDARDS FOR LITERATURE AND HISTORY OF THE OLD TESTAMENT ERA (2007), http://public.doe.k12.ga.us/ci_services.aspx; GA. DEP’T OF EDUC., GEORGIA PERFORMANCE STANDARDS FOR LITERATURE AND HISTORY OF THE NEW TESTAMENT ERA (2007), http://public.doe.k12.ga.us/ci_services.aspx. For a discussion of these standards, see Bridget Gutierrez, *Bible Study OK’d for Schools*, ATLANTA J.-CONST., Jan. 12, 2007, at D3.

²⁵³ Gutierrez, *supra* note 252.

The Court in *Schempp* specifically stated that “[i]t certainly may be said that the Bible is worthy of study for its literary and historic qualities.”²⁵⁴ Teaching a text with devotional significance, however, is more complex than literary analysis of purely secular works. First, it is misleading to refer to “the Bible” as if there were only one edition. The National Council on Bible Curriculum in Public Schools has recommended the King James translation of the Bible and has stated that it must be read without reference to external commentaries in order to preserve it from sectarian bias.²⁵⁵ This recommendation suggests that the text itself is free from sectarian bias. However, the King James Bible reflects a theological and political agenda.²⁵⁶ More modern translations, such as the New Revised Standard Version, may lack the particular motives of the King James translation and are less likely to be misinterpreted as a result of dated language,²⁵⁷ but no version of the Bible is without any translational ambiguity. And while it may be true that commentaries present particular theological perspectives—even identifying different parts of the Bible as different literary genres has theological implications²⁵⁸—reading the Bible without any commentary does not ensure objectivity. Such a mandate recalls the Dover School Board’s moratorium on discussion of intelligent design despite the fact that the topic was introduced in the classroom.²⁵⁹ Paradoxically, in presenting a translated text such as the Bible, a teacher can only approach objective presentation by explaining to the students that no translation, no commentary, and no reader is perfectly objective.

Second, in order to maintain a secular focus and theologically objective posture toward the Bible, teachers must acknowledge the devotional nature of the text and differentiate this use from study of the Bible as literature. To talk about the Bible exclusively as literature “would be a little like reading poetry

²⁵⁴ Sch. Dist. of Abingdon Twp. v. Schempp, 374 U.S. 203, 225 (1963).

²⁵⁵ NORD & HAYNES, *supra* note 2, at 169.

²⁵⁶ ALISTER E. MCGRATH, IN THE BEGINNING: THE STORY OF THE KING JAMES BIBLE AND HOW IT CHANGED A NATION, A LANGUAGE, AND A CULTURE 161–62 (2001).

²⁵⁷ Consider student editions of William Shakespeare’s plays, written in the sixteenth century, that include numerous “translations” of terms and phrases into modern English since their meaning would otherwise be missed. See NORD & HAYNES, *supra* note 2, at 167.

²⁵⁸ For example, identifying the Book of Revelations as an example of the apocalyptic literary genre rejects the notion that the text is written as a prediction of the future. See CARL R. HOLLADAY, A CRITICAL INTRODUCTION TO THE NEW TESTAMENT: INTERPRETING THE MESSAGE AND MEANING OF JESUS CHRIST 536–41 (2005).

²⁵⁹ See *supra* Part III.A.

as if it were no more than prose.”²⁶⁰ Much of the Bible’s influence on later writings draws on its significance as religious scripture.²⁶¹ Also, a school that overlooks the primary relevance of the Bible as a revered religious text suggests that the school does not respect devotional use of the Bible, just as ignoring religion entirely in a curriculum hints that it lacks importance in the public realm. By discussing the scriptural use of the Bible at least by way of introduction to a literature course, the teacher might articulate that the class will be examining the text by identifying different genres within the work or by considering the characters in the narrative, and he or she might state that analyzing the Bible using literary techniques makes no theological claims about whether the Bible can or should be read “literally” or treated as “inerrant.”²⁶² The course then proceeds as a literature course, applying appropriate secular techniques such as historical and literary criticism.²⁶³

Teaching a course exclusively about the Bible, while satisfying the letter of the *Schempp* test, may test the underlying standard of government objectivity.²⁶⁴ Perhaps the requisite neutrality is best demonstrated by teaching a curriculum including the literary analysis of multiple sacred works, so as not to privilege Jewish and Christian traditions.²⁶⁵ If excerpts from the Bible are taught in a mandatory literature course, selections from other sacred texts must be presented to avoid the impression that the school only acknowledges the Judeo-Christian Bible as sacred.²⁶⁶ Even if religious texts from other traditions are not included in an elective Bible-as-literature course, the teacher might name other faith traditions that rely on different scriptures.²⁶⁷ In this way, the

²⁶⁰ NORD & HAYNES, *supra* note 2, at 167.

²⁶¹ *See id.*

²⁶² *See id.* at 170.

²⁶³ *See id.* Just as the scientific method is acceptable in science courses, techniques commonly employed by academics in the study of literature are appropriate in a literature class. Application of these standards limits the analysis of a religious subject to the secular. *See supra* Part III.A.

²⁶⁴ *See* Jane Lampman, *A Bible Course Without Lawsuits?*, CHRISTIAN SCI. MONITOR, Sept. 29, 2005, at 12. Even if there is no constitutional impediment to academic study of the Bible, policy may favor a less narrow syllabus. Barry Lynn, executive director of Americans United for the Separation of Church and State, stated,

I don’t think the Constitution prohibits the use of this textbook, but I have real doubts about the wisdom of this approach. . . . At this time in America, it’s better to simply talk about religious influences when they come up during the study of literature, art, and history, and not take the text of one religious tradition and treat it with special deference.

Id.

²⁶⁵ *See* NORD & HAYNES, *supra* note 2, at 171.

²⁶⁶ *Id.*

²⁶⁷ *See id.*

school avoids the appearance of religious favoritism, and students are exposed to religious pluralism, even if the course primarily focuses on a text associated with only a few faith communities.

C. Campus Security: Protecting Against Deception by Encouraging Community Conversation

The exposure of the intelligent design movement's motive of remaking science in a purportedly Christian image highlights the pervasive concern that presenting any religion-related materials serves to proselytize religion or reinforce hidden religious agendas.²⁶⁸ Where school officials have disguised one framework for understanding the world as another, such as teaching religious tenets under the guise of science, parents and students may feel threatened.²⁶⁹

Using secular language to teach religious concepts as universal truth does not satisfy *Schempp* and has been rejected by the Supreme Court as an impermissible establishment of religion.²⁷⁰ In *Edwards v. Aguillard*, where the Supreme Court held that a state could not require teachers who lectured on evolution to spend equal time on creation science,²⁷¹ two Justices observed that the major creation science institutions in the United States were developing creation science curricula for public schools to serve the goal of "a revival of belief in special creation as the true explanation of the origin of the world."²⁷² Regardless of the use of the language of science, the religious purpose behind the curriculum change indicated that creation science was "thinly veiled religious doctrine."²⁷³

Lower courts have more directly renounced biased presentations of material as a means of covertly inserting religion into secular courses.²⁷⁴ In *Kitzmiller*, the Court found the School Board's claim that introducing ID to students as a means of promoting critical thinking was "at best disingenuous, and at worst a canard," given that the motive behind the ID movement itself

²⁶⁸ See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 762–63 (M.D. Pa. 2005).

²⁶⁹ See *Edwards v. Aguillard*, 482 U.S. 578, 590–96 (1986).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 596–97 (Creation science claimed to present scientific evidence that supported a theory of instantaneous creation of the world from nothing.).

²⁷² *Id.* at 602 (Powell, J., concurring) (quoting the Institute for Creation Research).

²⁷³ *Id.* at 611 (Scalia, J., dissenting).

²⁷⁴ E.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), *Selman v. Cobb Co. Bd. of Educ.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006).

was not to encourage critical thinking but to frame scientific inquiry in accordance with a particular notion of religious truth.²⁷⁵ The Court pointed out examples of the Board's manipulation of secular language for religious ends. For example, teachers were ordered to read a statement to students that referred to Darwinian evolution as a "view" instead of as a theory, alluding to the colloquial definition of "theory" rather than the appropriate scientific definition.²⁷⁶ The statement offered ID as an alternative "explanation," suggesting it lacked the ambiguity of a "theory."²⁷⁷ Finally, students were directed to a text for information on ID that "systematically distort[ed] and misrepresent[ed]"²⁷⁸ biological concepts that have been extensively tested and relied on a "contrived dualism" in which any questions left unanswered by the theory of evolution were necessarily arguments in support of ID.²⁷⁹

The Dover School Board aggravated its appearance of disingenuousness by including a commission to silence in the evolution disclaimer to be read to the science classes: "There will be no other discussion of the issue and your teachers will answer no questions on the issue."²⁸⁰ A reasonable student might conclude that ID was some sort of "secret science," different from all the other sciences that were open to discussion in class.²⁸¹ Not only is such a gag order pedagogically unsound, but it quells dialogue about whether educational materials serve a religious agenda.²⁸² Communication between teachers, curriculum designers, parents, students, and the general public is crucial to counteracting fears that teaching about religion manipulates or indoctrinates students with respect to a religious belief. Although not constitutionally mandated, allowing people to ask questions and express their views encourages them to challenge themselves to fairly interpret the First Amendment in light of an overarching national commitment to religious liberty. Such open community conversations, in anticipation of including study about religion in public schools, rehearse the precise skills for public discourse across religious

²⁷⁵ *Kitzmiller*, 400 F. Supp. 2d at 745.

²⁷⁶ *Id.* at 708–09, 725; see *Selman*, 390 F. Supp. 2d at 1310 (evolution disclaimer sticker on textbooks suggests that the scientific theory of evolution is merely an opinion or a hunch). The faculty refused to read the statement, stating that if they did so, their students would incorrectly believe that ID was valid science that had been adequately field tested. *Kitzmiller*, 400 F. Supp. 2d at 727, 761.

²⁷⁷ *Kitzmiller*, 400 F. Supp. 2d at 708–09, 725.

²⁷⁸ *Id.* at 743.

²⁷⁹ *Id.* at 738; *McClean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1266–69 (E.D. Ark. 1982).

²⁸⁰ *Kitzmiller*, 400 F. Supp. 2d at 727.

²⁸¹ *Id.*

²⁸² See *id.* at 727.

differences that a school might hope to inculcate in its students by including religion in the curriculum.

CONCLUSION

One scholar and author of a public school curriculum entitled *Living with Our Deepest Differences*²⁸³ stated, “The practical genius of the First Amendment lies in its ability to foster two things that elsewhere in the world have all too often contradicted each other—strong religious convictions and strong political civility.”²⁸⁴ This capacity, a legacy of the “brilliant prudence”²⁸⁵ of the drafters of the Bill of Rights, relies on the citizens of America for its fulfillment. The text of the First Amendment is only ink on centuries-old paper; its power lies in the people who give it practical meaning throughout this religiously diverse nation. Were this an easy task, the Supreme Court would not have heard over ninety cases on religious liberty since 1815.²⁸⁶ Citizens, expected to draft and discharge the laws of the nation, would benefit from an education in the complexities of religious liberty in the shifting sands of the U.S. religious demography.²⁸⁷

Establishment Clause jurisprudence affirms that public schools are an appropriate venue for this education. However, constitutional requirements of objective presentation within a secular curriculum must be rigorously honored. Curriculum drafters must maximize transparency as to their educational goals. Teacher training is crucial, and many teachers may not be comfortable striking the delicate balance between showing respect for the devotional nature of religion while discussing it in a secular manner. Perhaps many school systems may be neither equipped for, nor committed to, teaching about religion. If a school is not genuinely dedicated to a neutral presentation of religion-related teaching materials, then the school should not teach these topics at all. At bottom, children must not be subjected to unconstitutional curricula on religion.

²⁸³ Os Guinness, *A World Safe for Diversity: Religious Liberty and the Rebuilding of the Public Philosophy*, in RELIGION IN AMERICAN PUBLIC LIFE: LIVING WITH OUR DEEPEST DIFFERENCES, *supra* note 5, at 136.

²⁸⁴ *Id.* at 146.

²⁸⁵ *Id.* at 139.

²⁸⁶ WITTE, *supra* note 17, at 272–303.

²⁸⁷ See *McCullum v. Bd. of Educ.*, 333 U.S. 203, 217 (1948) (“[S]ects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.”).

But where a school is committed to adhering to the Constitution in teaching about religion, that school should realize that any perceived requirement that religion must be kept entirely out of public schools is artificial. Thanks in part to the First Amendment, U.S. society is “the most religiously diverse place on earth, and, among developed nations, the most religious.”²⁸⁸ Along with their other academic lessons, America’s students must learn to engage this plurality, whether as political and community participants or simply around the dinner table where this Comment began. As challenging as the endeavor is, America’s public schools can set the standard for facilitating these crucial conversations.

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²⁸⁸ Haynes, *supra* note 197, at 97.

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