RECONCILING RELIGION AND PUBLIC LIFE: ESSAYS ON PLURALISM AND FUNDAMENTALISM IN THE UNITED STATES AND GERMANY

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Patrick J. Deneen
Türkan Karakurt
Charles T. Mathewes
Erik Owens
Rolf Schieder

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RELIGIOUS FREEDOM AND CIVIC EDUCATION IN AMERICAN PUBLIC SCHOOLS

ERIK OWENS

Americans have long struggled to reconcile the national ideal of *e pluribus unum* with the reality of conflict and distrust that often accompanies diversity. Today, the United States is more diverse—in terms of race, ethnicity, and religion, among other characteristics—than ever before, and the pace of this diversification is accelerating. Forging "the one from the many" is now more difficult than ever, in part because of the unique challenges presented by religious diversity, especially in the context of what is often called "public life."

Religious faith is understood by many to be comprehensive, meaning that it sets the terms by which all other aspects of life are to be assessed. In a pluralistic democracy many religious traditions co-exist, each offering different assessments of how and why its adherents should interact with others in the public sphere. This creates obvious challenges to communication and cooperation among citizens in their daily lives. Religion is not only a fundamental source of identity and meaning; it also—at least in the monotheistic traditions which dominate the American religious landscape—explicitly trumps all other allegiances, including those to the state. In an era of nation-states that claim unsurpassable allegiance to their core interests, this creates a profound tension between what has been called "the sacred and the sovereign."[1]

Religious diversity is also uniquely challenging in the United States because of its explicit yet ambiguous protection by the First Amendment to the Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." Determining the contextual meaning of religious "establishment" and "free exercise," the implications of their prohibition/protection, and the scope of the Amendment's authority has vexed legislators, jurists, and ordinary citizens alike for two centuries, but never more so than it does today. American courts are in the midst of reversing two major staples of mid-twentieth century jurisprudence: strict separation of church and state, and federal sovereignty vis-à-vis the states. As the jurisprudential pendulum continues to swing toward greater accommodationism and federalism, the legal boundaries of religious liberty are in flux in many areas of public life.

This shift has been inspired by, even as it has inspired, an expansion of the influence of religion in public life. Judges, politicians, and policymakers at the federal, state, and local levels have expanded the nature and scope of religious accommodation in schools, the workplace, and the public square.[2] Popular culture increasingly explores religious themes in books, music, movies, and television programs. Colleges are scaling up their religious studies programs to accommodate new interest in Islam. The effects of these broader cultural events have also spilled over into the public primary and secondary schools.

Periods of such flux are not unprecedented in American history. From the eighteenth century colonists' worries over religious decline to the nineteenth century expansion of evangelicalism and the twentieth century struggles over modernism and fundamentalism, periods of flux—and the contentious public debates that accompany them—are an

ongoing feature of American life. Indeed, they are a manifestation of the religious freedom that both unites and divides this country. The present trend is neither fixed nor preordained (nor is the opposite trend[3]), and the pendulum may very well swing back toward a more secular or separationist approach to religion in public life. But this may take a very long time; current legal, cultural, and political trends suggest that this is a generation-length cycle that has yet to reach its peak.

For policymakers in education and other fields, the proper response is not so much to resist this shift toward more religion in public life as it is to channel it toward positive civic ends. This essay argues for one particular means of doing just that, namely by teaching about religion in American public schools. I argue that in light of the shifting legal and cultural context, citizens and their legislative representatives (rather than judges) are now more responsible than ever for protecting religious freedom in this country. Fulfilling this civic duty—not to mention getting along with fellow citizens in an increasingly pluralistic society—will require much more knowledge of religion than is presently conveyed to students in public schools. In the sections that follow, I present what I see to be compelling reasons why students need to learn about religion, what exactly that entails, why it serves to protect religious freedom, and why it is a properly civic endeavor. We begin with a discussion of the American legal context, since it not only illustrates the shifting tides of religion and education but also reveals the heavy civic responsibility that falls upon all citizens as a result.

Religion and Education in the Supreme Court

The United States Constitution protects religious freedom in this country primarily through two pithy clauses in its First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…." Together, these clauses institutionalize the American conception of religious freedom by prohibiting the government from discriminating on the basis of religious belief or practice. The free exercise clause outlaws government *proscription* of religious belief or practice (meaning the state cannot disfavor an activity simply because it is religious), while the establishment clause outlaws government *prescription* of belief or practice (meaning the state cannot favor an activity simply because it is religious or religious in a certain way).[4] Though the religion clauses are closely related and inextricably joined, they nevertheless remain separate instantiations of religious freedom. In fact they are in constant tension with one another, and an expansive interpretation of one clause often requires a restrained interpretation of the other.[5]

It is widely noted that the Supreme Court's interpretation of the religion clauses has shifted dramatically in the last half-century from a strict separationist position in the 1960s and 1970s to an accommodationist stance in the last two decades. The shift has affected many areas of the law, generating ongoing debate over issues such as federal funding of "faith-based" social services and federal jurisdiction over local zoning laws that affect religious institutions. The accommodationist shift has been especially prominent and controversial, however, in the realm of public education. Schools are filled through the compulsory attendance of young and impressionable students who follow a curriculum that is highly regulated by local, state, and federal authorities. Almost 90 percent of America's fifty-three million school-aged children attend primary or secondary schools funded by the government,[6] and though only a quarter of American voters currently have school-aged children, everyone is connected in some way to the public school system: taxpayers finance it, employers hire its graduates, and more importantly, its effectiveness is widely understood to be a key measure of social and economic justice. When the balance of church and state is seen to be shifting in such an important area of society—and a key site of cultural transmission and civic education—the process is bound to be controversial.[7] A brief examination of recent decisions dealing with religion and education will illustrate the Court's shifts.

Since the early 1980s, the Court has systematically expanded the permissible areas of church-state interaction governed by the establishment clause. Reversing a number of earlier decisions, the Court has ruled that proper interpretation of the establishment clause allows states, for example, to offer parents tuition vouchers to pay for religious education in lieu of public schooling;[8] to loan computers and other equipment to religious schools;[9] to send public

school teachers to provide remedial education for students at religious schools;[10] to pay for sign language interpreters and other services to students at parochial schools and colleges;[11] and to offer tax deductions to parents who pay private school tuition and other educational expenses.[12] In each case, the state program in question was deemed to provide a benefit or service that was neutral with respect to religion, because it was provided to a broad class of citizens defined without reference to religion.[13] Though in effect these laws provide benefits to religious persons or institutions—at times, almost exclusively so—the Court's accommodationist majority found that their intent was not discriminatory, and thus the benefits passed Constitutional muster.

These changes were paralleled by an equally important transformation of free exercise jurisprudence since 1990. Over the preceding century (roughly 1878-1990), the Supreme Court had gradually asserted more authority to review federal and state laws impinging upon free exercise of religion.[14] But in 1990 (in *Employment Division v. Smith*), the Court reversed course and returned to an extremely lenient standard of review, meaning that it would not strike down laws which only incidentally burdened religion.[15] Led by Justice Antonin Scalia, the *Smith* Court ruled that a state employee who ingested peyote as part of a religious ritual was not exempt from Oregon's drug laws, and thus his firing (for that drug use) and subsequent loss of unemployment benefits did not violate his free exercise rights. The landmark decision made it nearly impossible for religious minorities to win a judicial exemption from generally applicable laws; they are now forced to seek redress in the legislatures, not the courts.[16]

The Court maintained its deference toward legislative authority in the important 2004 case *Locke v. Davey*. In a 7-2 majority opinion written by Chief Justice William Rehnquist, the Court held that when a state provides college scholarships for secular instruction, the federal free exercise clause does not require it to fund religious instruction—what I will call "teaching religion"—as well. Many observers had speculated that the Court would go the other way, mandating a broad interpretation of free exercise rights by the states that would eliminate the last major obstacles to funding private school vouchers and "faith-based" social service initiatives. Instead, by rejecting the argument that states must treat religious and secular education equally in this respect, the Court cleared a space for what legal scholars have called "permissive accommodation," an area of state action permitted by the establishment clause but not required by the free exercise clause.[17] "If any room exists between the two Religion Clauses, it must be here," wrote Rehnquist. "This case involves the 'play in the joints' between the Establishment and Free Exercise clauses."[18]

Like the proverbial elephant in the room, federalism is never explicitly mentioned in *Locke v. Davey*, despite it being a central issue in the case. Federalism is the division of sovereignty between a central government and state or provincial governments; in contemporary parlance, "federalists" support greater autonomy for states in areas of the law not expressly claimed in the federal constitution. The conservatives on the Rehnquist Court tended to be ardent federalists,[19] so it was surprising that its most conservative members, Scalia and Thomas, were the only dissenters from a majority opinion in *Locke v. Davey* that furthered federalist ends (by granting more leeway to state legislators).

Taking a step back, then, we can see two trends at work in the Supreme Court. First, its establishment clause decisions have substantially expanded the areas in which the government may accommodate religion in the context of education.[20] Second, its free exercise rulings provide more discretion to the states to determine how much of that expanded area they wish to occupy. Put another way, the Court has baked a bigger (i.e. more accommodating) pie, and has given the states more choice as to the size of the piece they want to eat.

The important civic upshot of these legal trends is that more of the details of church-state relations will be set by citizens and their state representatives, rather than the courts. [21] Some might argue that, as a result, our precious right to religious liberty will be dangerously dependent on the whims of mercurial state legislators; others might invoke the Constitution's preamble to say that "We the People" (rather than a few judges) will finally, and rightly, control the process once again. Whatever the merits of these views, it is clear that all citizens need to be prepared to shoulder the added burden of responsibility for protecting religious

freedom.[22] That requires a kind of civic education for religious freedom that is notably absent in our nation's public schools.

Religious Freedom, Religious Studies, and Civic Education

Religious freedom is the political principle by which an indeterminate plurality of religions is legitimated in a civil polity. In the United States, religious freedom is instantiated in the First Amendment and protected through the broad range of liberties and rights that flow from it by tradition and by jurisprudential interpretation. Whatever else it does, religious freedom protects the active engagement of religion in the public life of our society.[23] As such, it is an integral component of the common good of a pluralistic polity because it protects the full and free discourse about the common good.

Though I will elaborate upon this point in the next section, it bears mention at the outset that "teaching about religion" is to be distinguished from "teaching religion," an activity otherwise known in the United States as "religious education" or, uncharitably, as "indoctrination." The locution is often reversed in English–speaking Europe, where "religious education" or "RE" is understood to be the non-indoctrinating critical study of religion.[24] This distinction—between a critical/descriptive approach and a confessional approach—is pivotal in the context of primary and secondary public education. It was also the centerpiece of the Washington law upheld in *Locke v. Davey*, which allowed the state to fund students majoring in religious studies (where professors teach about religion), but not devotional theology or pastoral ministry (where professors teach religion).[25]

How, then, would teaching about religion serve to protect religious freedom? Teaching about religion, I argue, serves to protect religious freedom by training citizens who can effectively participate in a pluralistic society in which religious reasons are given as justification in public life. We shall return to the matter of religious and public justification, and begin instead by sketching what "teaching about religion" might actually look like, and how it functions as civic education.

Broadly understood, civic education is the formation of future citizens. More specifically, it can be defined as the inculcation of knowledge, skills, and dispositions necessary for effective participation in and commitment to the political community. Each of these three capacities requires further explication.

First, teaching about religion confers many kinds of knowledge relevant to good citizenship. Citizens need adequate education to be effective in the public sphere of our liberal democracy (as decades of empirical research has made abundantly clear[26]), and an adequate liberal education simply cannot ignore the contributions and influence of religious traditions, ideas, people, and institutions. As Martin Marty has noted, religion is too important an aspect of the human experience—and especially the American circumstance—to be left out of public education: "In a culture that is anything but secular," he writes, "religion belongs in the curriculum."[27] Indeed, it is shocking to contemplate the vast gap between the importance that Americans collectively place upon religion in their public and personal lives and the near absence of the study of religion in primary and secondary school curricula. Americans routinely profess in polls that they are faithful and active religious believers, yet with few exceptions, "the [public school] curriculum all but ignores religion," either as a separate field of study or as an important influence on other topics or fields of study.[28]

But in what part of the curriculum does religion belong? This is, of course, a matter of much debate, but a classroom discussion about any of the following topics would be appropriate: religious meanings in art and literature; religious views in the debate over economic priorities, cosmic origins, genetic engineering, environmental regulation and other scientific issues; the global context of religion and religious plurality, including a comparative study of world religions and sacred scriptures; and "the Bible as literature, in literature, as history, in history, and as scripture."[29]

Education about religion should also provide more specific knowledge about the American political context. In order to make fully informed decisions about the merits of laws affecting religion, citizens must understand such things as the role of religion in shaping public debate and decision-making, the civil

rights afforded them by state and federal constitutions and laws, and the history—including the ongoing conflict over interpretations of the First Amendment—that brought these to pass.[30] This is true of any laws affecting religion, whether they regulate school voucher programs, land use, drug use or anything else; the Supreme Court developments outlined in the first section of this paper only make this kind of knowledge more important. Citizens and state legislators ought not be turned loose to "play in the joints" of the First Amendment's Religion Clauses without some education in the subject matter.

Teaching about religion can also enhance the second component of civic education, the teaching of skills relevant to citizenship. The fundamental skill-sets of active citizenship include literacy, numeracy, and reflective judgment; the civically-educated citizen has the ability to consider and articulate the knowledge needed for participation in democratic society. Religious studies can offer unique training in this area. To engage or reckon with religious claims to truth, for example, requires openness to new ideas, critical distance, skills of comparative and constructive criticism, and some measure of epistemological inquiry—all of which contribute to civic education as well as facilitating an understanding of religion in society.[31] (Like all aspects of education, of course, the level of critical engagement with religion ought to be contingent upon age and intellectual development.)

Finally, teaching about religion can also contribute to the inculcation of particular civic dispositions. Civic dispositions are those virtues or habits of character that incline one toward full participation in and support of civil society and government. There are many civic virtues (e.g. civility, patriotism, tolerance, and trust), each of which are emphasized more or less than others in a given political theory, depending upon the kind of *civitas* one seeks to sustain or achieve. One can also speak of civic virtue (singular), as the general inclination to seek the common good. Depending on the specific situation, teaching about religion could influence the development of civic virtue and the various civic virtues in different ways. At one level, simply learning about the history, theology, holidays, and rituals of other religious traditions can help to dispel students' prejudice and fear and lead to more tolerance—even if tolerance itself is not taught as a virtue. Classroom discussion about such important and controversial issues should model the kind of civility students will eventually need to deliberate in the public square as full citizens. As Christopher Eisgruber has noted, the liberal state teaches values mainly—and most effectively—by example.[32] In this case, students internalize the virtues of tolerance and civility by both learning about different religious traditions and viewpoints, and by discussing the topic in a respectful manner.

There is no guarantee, of course, that tolerance and civility will be the upshot of the study of religion. Even a cursory introduction to the history of religion and religious thought should provide examples (and perhaps extended study) of aggressive and violent intolerance; quietism and withdrawal from public life; fundamental challenges to the concept of state sovereignty as well as to patriotism, tolerance, and mutual respect. As Charles Taylor has noted, religion has been a "poisoned chalice" in human history, and coming to terms with the possible tensions between religious and political life will have an uncertain impact.

But this discussion about the relationship between religious and political life is happening all around us in public culture, and teaching about religion is one of the best ways to prepare students to enter that discussion. To some degree, religious studies classes in schools could model the discursive practices of religious freedom by fostering the capacity to hold informed, respectful discourse across ethical and religious divides. This kind of classroom discussion about deep-seated ethical norms is what educational philosopher Robert Kunzman calls "ethical dialogue." It is premised on the notion that genuine respect for persons requires exploration of and engagement with competing moral visions. "The civic virtue that ethical dialogue seeks to foster," he writes, "cannot be detached from the study of religion or other important ethical frameworks."[33]

Here we can return to the question of justification in public discourse. I asserted earlier that teaching about religion serves to protect religious freedom by training citizens who can effectively participate in a pluralistic society in which religious reasons are given as justification in public life. While John Rawls and many other "justificatory liberals" are quick to admit that religious reasons are indeed offered in public

discourse all the time (e.g. when citizens or legislators argue for poverty relief on the basis of Christian charity, or for the death penalty as an instrument of divine justice on earth), they believe such reasons are inherently inaccessible to those who do not share those religious principles. Therefore, citizens should speak in the public realm, or on public issues, or on matters requiring coercive legal action, using secular, public reasons. The logic of public reason is compelling—to find a language all can agree upon, out of respect for others—and it is accurate that religious justifications are not universally accessible. But as Charles Mathewes has noted, it misses the fact that there is no such neutral language, no moral and political Esperanto that can serve the ends of public reason. All language combines both the particular and the universal, so the search for a purely public language is a fruitless endeavor.[34]

Rather than attempt to circumvent this fact, we ought instead to recognize that religious believers can be good citizens in a liberal democracy. They can, as Chris Eberle has argued, express themselves and support legislation based solely on religious reasons, though they should believe that any such legislation conduces to the common good and they should try to articulate a plausible secular rationale. This is a process he calls "conscientious justification."[35] The principle of conscientious justification extends into the classroom: students need to be prepared to engage with others who do not share their beliefs and who do not deign to follow a Rawlsian prescription for public justification. One of the biggest challenges of life in a deeply pluralistic society is that we lose the ability to talk to one another about the things that matter to us most. These are, not coincidentally, also the source of our deepest differences.[36]

Although teaching about religion is an important form of civic education that can serve to protect religious freedom, doing so in public schools presents special challenges, to which we now turn.

Teaching About Religion in Public Schools

One may accept the argument that teaching about religion is an important aspect of civic education and still ask why it must be undertaken in public schools rather than, say, religious communities or homes. At least three responses to this question come to mind. First, the state—meaning, in this case, the government and the nation as a whole—has an interest in forming good citizens that may differ from the interests of individual parents or religious leaders. Eamonn Callan frames this point by arguing that children must be respected as having equal value in the family as parents, and therefore the society has an obligation to protect the prospective rights of children to personal sovereignty. This entails the right to avoid the "ethical servility" that could be inculcated by insufficient exposure to diverse moral perspectives. This argument, and others like it, which are based on autonomy as a fundamental goal of education, go a long way toward justifying a civic educational mission in schools.

Second, irrespective of its civic educational value, religion is a proper part of the academic curriculum that has been consciously ignored for many decades in the United States, though not in many other nations.[37] We essentially have left it up to parents and religious leaders, and the resulting collective knowledge about religion is unimpressive; we can do better.[38] Third, a more practical, if prosaic, response is that public schools are where the kids are: if we want every citizen to be well-informed about religion and able to effectively navigate the discursive practices of a religiously plural society, it makes sense to provide this education in the place where nine out of ten American schoolchildren spend more than a decade of their lives.

Once we begin to consider the details of teaching about religion in public schools, however, a number of further objections come into play, which may be broadly clustered into three groups: constitutional, philosophical, and pedagogical. Constitutional concerns are often among the first to be raised—wouldn't teaching about religion in public schools invariably mingle church with state?—but they are the easiest to answer. Although the Supreme Court has never directly addressed this question, several Justices have written commentary about the topic amidst discussion of another case, and these dicta clearly authorize public education about religion under certain circumstances. In *Abington School District v. Schempp*, which in 1963 struck down a Pennsylvania law requiring teachers to lead daily Bible-reading exercises in public schools, three separate opinions noted that teaching about religion in the public schools was not only permissible but advisable. "It

might well be said," wrote Justice Tom Clark for the Court, 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. . . . Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[39]

The view was reaffirmed by Justice Powell in 1987, and "it has never been challenged by a Justice in any opinion of the Court."[40]

So long as religion is "presented objectively as part of a secular program of education," the endeavor is clearly permissible under the Constitution. But therein lies the philosophical rub: can religion ever be presented "objectively"? If so, what would be the theological implications? Many parents worry that in an attempt to portray all religions as worthy of study, teachers will inculcate relativism instead of respect. Whether that relativism is inculcated directly (by teaching that religious claims cannot be adjudicated, that all religions "are essentially the same" or "are all equally true") or indirectly (by teaching about all religious traditions with equal respect, thereby implying that all are equal), these parents claim the outcome is the same: their children leave school with values opposed to the religious teachings delivered in their homes and houses of worship. Combine this fear—that teaching about religion inculcates relativism—with the oft-stated complaint that not teaching about religion inculcates secularism, and it seems we are destined to mistreat religion whatever we do. It is obvious why school administrators often run for cover when the topic is broached.

Thankfully, the situation is not so grim, because relativism is not a necessary upshot of teaching about religion. It is certainly true that exposure to religious and intellectual diversity raises questions that students might not face if they were home-schooled or if they attended homogeneous schools that did not teach about religion. But, as Eamonn Callan has argued, this is an important step in the movement from moral innocence to moral virtue. It is also the case that every aspect of schooling—from the curriculum to the classroom dynamics to the school administration—transmits values of some sort to students. Education is inherently value-laden, so it would be foolish to suggest that students can learn about religion without absorbing some value or perspective in the process. Total neutrality as to competing conceptions of the good life—precisely the sort of stance that is likely to lead to relativism—is inimical to liberal education; some views (such as racism) are inimical to liberal democracy and will be cast in a negative light. In fact, neither pedagogical fairness nor the First Amendment requires us to embrace relativism when teaching about religion.

To suggest that well-informed and conscientious teachers can avoid relativizing students' religious beliefs raises a third set of concerns and objections, namely those related to specific curricular and pedagogical strategies. The curricular difficulty is easily stated: when and where should public school students learn about religion? Should they be required (or encouraged) to take a single religious studies course that covers a wide range of topics? Or should they learn about religion as it impacts the subjects they study in other classes?[41] Neither approach is self-evidently better than the other. Creating a separate religious studies course would allow more time to take on complex issues, but it would require at least one qualified teacher in each of the nation's 27,000 public secondary schools,[42] not to mention a shuffling of the curriculum. Some other class would be lost as a result; what should it be? On the other hand, teaching about religion in courses such as history, geography, biology, economics, literature, civics, etc. would properly illustrate the historical and contemporary influence of religion, but this approach would require nearly every teacher to address the subject, despite it being outside their realm of expertise.

Given the vast amount of teacher training that apparently needs to occur, pedagogical concerns must take center stage when considering how to teach about religion in public schools. Indeed, these concerns led the representatives of seventeen prominent religious and educational organizations to meet under the auspices of the First Amendment Foundation in 1997 to develop a joint set of pedagogical principles. Participating groups included the

American Academy of Religion, American Federation of Teachers, American Jewish Congress, Baptist Joint Committee on Public Affairs, Islamic Society of North America, National Association of Evangelicals, and the National School Boards Association, among others. This is not a group of organizations often found in the same room. Following the Supreme Court's (albeit indirect) guidance, and informed by their disparate theological and philosophical values, the educational principles they agreed upon distinguished between the objective study of religion (i.e., teaching about religion) and the subjective teaching of religion (i.e., religious education). Teaching about religion in public schools is welcome, they wrote, when:

- The school's approach to religion is academic, not devotional.
- The school strives for student awareness of religions, but does not press for student acceptance of any religion.
- The school sponsors study about religion, not the practice of religion.
- The school may expose students to a diversity of religious views, but may not impose any particular view.
- The school educates about all religions; it does not promote or denigrate religion.
- The school informs students about various beliefs; it does not seek to conform students to any particular belief.[43]

As difficult as it was for the group to agree upon these guidelines, they are even more difficult to follow in the classroom. The line between informing and conforming students is razor thin, if it exists at all, and teachers may not recognize (or care) when they have crossed the line. Most educators were not trained to teach about religion, and most textbooks ignore the subject—often at the request of state school boards. Yet avoiding the topic of religion is no way to "solve" the issue or avoid controversy. The result of avoidance is not simply the subtle conformation of students to the belief that religion was and is irrelevant in history, politics, literature, and science. It is also a crippling of future citizens' capacities to participate in the full and free discourse about the common good.

Indeed the civic costs of not teaching about religion will continue to rise until changes are made in the way teachers are trained, curricula are developed, and textbooks are written. These are not easy solutions, but the civic health of our country demands no less.

NOTES

1 John D. Carlson and Erik C. Owens, "Introduction: Reconsidering Westphalia's Legacy for Religion and International Politics," in *The Sacred and the Sovereign: Religion and International Politics,* ed. Carlson and Owens (Georgetown University Press, 2003). See also Paul J. Griffiths, "Religious Allegiance and Political Sovereignty: An Irreconcilable Tension?" in ibid.

2 As Jeffrey Rosen and others have noted, the Supreme Court's decisions generally trail public opinion rather than lead it, despite its reputation as being a counter-majoritarian institution. This is true of the European high courts as well. See Jeffrey Rosen, "One Eye on Principle, the Other on the People's Will," *The New York Times*, 4 July 2004. Indeed, many political scientists argue that the Court was designed to follow settled popular opinion, rather than lead it. See Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, "Searching for the Soul of Judicial Decision-making: An Empirical Study of Religious Freedom Decisions," *Ohio State Law Journal* 65 (2004): 491.

3 To the extent that proponents of the "secularization thesis" link the differentiation of religious and nonreligious institutions to the decline of religion in the modern world, they were clearly wrong. Societal differentiation has indeed challenged religious traditions to recontextualize their claims, but not to the detriment of their relevance or authority in public life. See Talal Asad, "Religion, Nation-State, Secularism," in *Nation and Religion: Perspectives on Europe and Asia*, ed. Peter van der Veer & Hartmut Lehmann (Princeton, NJ: Princeton University Press, 1999), 178–196; and José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago, Press, 1994).

4 Michael J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford: Oxford University Press, 1997), 13, 15; John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, CO: Westview Press, 2000), 1-6.

5 As Justice Lewis Powell noted in 1973, "[T]his Court repeatedly has recognized that tension inevitably exists between the free exercise and the establishment clauses…and that it may often not be possible to promote the former without offending the latter." *Committee for Public Education and Religious Liberty (CPERL) v. Nyquist*, 413 U.S. 756, 788 (1973). For example, those who are especially adamant that the government not favor one or more religions (meaning they take an expansive view of the establishment clause) are often on opposite sides of issues as those who are especially adamant that government not disfavor one or more religions (meaning they take an expansive view of the free exercise clause). This latter position is commonly called "accommodationism," because its proponents would have the state specially accommodate religious believers whose practices are burdened by otherwise neutral state laws. The former position is known as "neutrality" when its proponents argue that the state must be neutral in its posture toward religion, favoring neither religion or nonreligion as such, nor one religion over other religions. "Separationists" also tend to favor an expansive view of the establishment clause, though in seeking to separate religion from the state as much as possible, they are often accused of favoring nonreligion over religion. There are also accommodationist and separationist readings of each religion clause. For example, separationists interpret the establishment clause as prohibiting discrimination in favor of both religion over non-religion, and one religion over other religions. In other words, they seek to separate religion from the state as much as possible without unduly burdening free exercise rights. Accommodationists, on the other hand, interpret the establishment clause as prohibiting only discrimination in favor of one religion over other religions; they argue that strict separation amounts to discrimination against religion as such, in favor of non-religion.

6 *Digest of Education Statistics 2000,* National Center for Education Statistics (Washington, DC: United States Department of Education), Table 3, p.12.

7 On schools as "intermediate spaces of social reproduction," see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: BasicBooks, 1983), 197; as sites of "democratic deliberation," see Amy Gutmann, *Democratic Education* (Princeton, NJ: Princeton University Press, 1987).

8 *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

9 *Mitchell v. Helms*, 530 U.S. 793 (2000), overruling *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 433 U.S. 229 (1977).

10 *Agostini v. Felton* 521 U.S. 203 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985).

11 *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993); *Witters v. Washington Department of Social Services*, 474 U.S. 481 (1986).

12 *Mueller v. Allen*, 463 U.S. 388 (1983).

13 Programs that single out religious groups or institutions for special benefit or harm are still prohibited as discriminatory. It is noteworthy that a single principle of "separation of church and state" dominated mid-twentieth century establishment clause rulings, but since the mid-1980s, individual justices have brought to bear differing principles of religious equality (including "endorsement," "coercion," and "equal treatment"), which the court is "struggling mightily to integrate." (Witte, 149-63.) [*Zelman* marked a point of some integration on the concept of neutrality as equal treatment of religion and nonreligion, but *Locke* pulled away from its logical conclusion.]

14 The Court applied increasingly strict scrutiny tests during this period. In *Reynolds v. United States*, 98 U.S. 145 (1878), the Court applied a lenient "rational basis test" that deferred a great deal of authority to legislatures. By this standard, if a law is properly "authorized," "reasonable," and "general," and it meets a legitimate interest in restricting the action in question, it is likely to be upheld. This standard prevailed until the "intermediate scrutiny test" of *Cantwell v. Connecticut*, 310 U.S. 296 (1940), which protected certain areas of non-criminal religious activity from government interference. The standard of review was tightened further in *Sherbert v. Verner*, 374 U.S. 398 (1963), namesake of the Sherbert Test by which a state must demonstrate a "compelling interest" in limiting a person or group's free exercise of religion and prove that the law in question was the least intrusive means of achieving that interest. This strict standard prevailed until 1990. (Witte, 118-25.)

15 *Employment Division, Dep't of Human Res. v. Smith* (1990) 494 U.S. 872.

16 Wexler, "Clothed Public Square," 1211; Witte, 140. It also bears mention that the Court often (unfortunately) defends religious liberty through the use of the free speech clause of the First Amendment, rather than the religion clauses.

17 The *Locke* decision presented the justices the opportunity to define the outer limits of an integrated jurisprudence of neutrality as equal treatment of religion. Its seven-member majority balked at the idea of following the concept of equal treatment to its logical conclusion, which would have required states to fund religious education if they funded any education at all. This conclusion seemed to depart dramatically from the constitutional protection of religious liberty, not to mention states' rights, and the Court was unwilling to take things that far. This kind of conservatism (in the apolitical meaning of the term) is normal for the Supreme Court; as Jeffrey Rosen and others have noted, the Court's decisions generally trail public opinion rather than lead it, despite its reputation as being a counter–majoritarian institution. Indeed, many political scientists argue that the Court was designed to follow settled popular opinion, rather than lead it. At any rate, the implications of affirming the lower court ruling in *Locke* were great enough to scare Rehnquist, O'Connor, and Kennedy from their usual accommodationist perch. [Frederick Mark Gedicks called this the "Establishment clause gag reflex."]

18 *Locke v. Davey*, 000 U.S. 02-1315 (2004), citing *Walz v. Tax Comm'n of City of New York*, 397 U. S. 664, 669 (1969).

19 The Rehnquist Court limited the federal government's power over the states in part by reducing the ability of lower courts to review state laws under the First and Fourteenth Amendments to the U.S. Constitution, as noted above. Equally important is the Court's narrow interpretation of the Constitution's "commerce clause" (Art. I, §8, cl.3) in *U.S. v. Lopez* (1995) and *U.S. v. Morrison* (2000), which have considerably restricted Congressional authority to regulate actions in the states not directly related to interstate commerce.

20 Put another way, the majority opinions in *Mitchell*, *Zelman* and *Locke* show an increasingly consistent constitutional justification—viz. neutrality as equal treatment of religion & nonreligion—for greater accommodation of religion in American public life. For nearly twenty years the Court has labored to integrate the multiple principles (including "endorsement," "coercion," and "equal treatment") that its individual justices used to adjudicate religion

cases. [See Witte, p. 149-63.] Though there were still some disputes among the majority in *Mitchell* (as well as vigorous objections from the dissenters, of course), in *Zelman* they largely coalesced around the concept of neutrality as "equal treatment" for religion and non–religion. Establishment clause jurisprudence was, by most accounts, a complete mess in the 1980s and into the 1990s. (Leonard Levy marveled in 1986 that "the Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Court would not recognize establishment of religion if it took life and bit the Justices." [Quoted in Witte, 182.]) By 2004, the systematic effort by Rehnquist and his conservative colleagues to streamline the Court's reasoning seemed to be having its effect, and some commentators suggested that *Zelman* would prove to be the watershed case that provides stability to the Court's future religion clause jurisprudence.

21 The courts, of course, will always play a role—and rightfully so. As Stephen Macedo writes, "To leave accommodations and exceptions to the democratic branches is virtually to insure that complaints advanced by minority religious communities will often be slighted, so the courts must play a role." ("Liberal Civic Education and Religious Fundamentalism: The Case of God vs. John Rawls?" *Ethics* 105 (April 1995): 487.)

22 Citizens will of course disagree about the nature and extent of these rights and liberties; the point is that citizens now have wider range of options as to how they choose to promote or protect those rights at the state level. For the purposes of this paper, I do not address the metaphysical question of whether we are free to choose our religious beliefs, or whether the fact of religious plurality has any meaning for the truth of one or another religious tradition. Rather, my focus is on the lived experience of religion within a diverse polity.

23 The right to free exercise (within limits) is deeply ingrained in the American political and cultural consciousness, notwithstanding the challenges that have been made to the concept of religious freedom as a coherent philosophical, legal or theological principle.

24 See, e.g., Robert Jackson, *Rethinking Religious Education and Plurality: Issues in Diversity and Pedagogy* (Falmer, 2004).

25 That the distinction between education and religious indoctrination is blurred in this case (because the plaintiff attended an evangelical "Bible college") does not imply a similar blurring in the context of public education at the primary and secondary levels.

26 "The notion that formal educational attainment is the primary mechanism behind citizenship characteristics is basically uncontested. A half-century of empirical evidence in American politics points to the consistent and overwhelming influence of 'the education variable' on various aspects of democratic citizenship [including civic knowledge, tolerance, and activity such as voting]." Norman H. Nie, Jane Junn, Kenneth Stehlik-Barry, *Education and Democratic Citizenship in America* (Chicago: University of Chicago Press, 1996), 2.

27 Martin E. Marty with Jonathan Moore, *Education, Religion, & the Common Good* (San Francisco: Jossey-Bass, 2000), 64.

28 Warren A. Nord and Charles C. Haynes, *Taking Religion Seriously Across the Curriculum* (Alexandria, VA: ASCD; Nashville: First Amendment Center, 1998), 2. A useful bibliography of surveys that document the inadequacy of education about religion in public schools can be found in Wexler, "Clothed Public Square," 1164-66 notes 23-27.

29 Wexler, "Clothed Public Square," 1168-69. For additional specific curricular recommendations, see Nord and Haynes, *Taking Religion Seriously…*; and Warren A. Nord, *Religion and American Education: Rethinking a National Dilemma* (Chapel Hill, NC: University of North Carolina Press, 1995), chapters 6, 9 and 10.

30 Wexler, "Clothed Public Square," 1203-13.

31 Jackson, *Rethinking Religious Education and Plurality*, 141; Nord, 220-25.

32 Christopher L. Eisgruber, "How do Liberal Democracies Teach Values?" in *Moral and Political Education*, ed. Stephen Macedo and Yael Tamir, NOMOS XLIII (New York: NYU Press, 2002), 75.

33 Robert Kunzman, *Grappling with the Good: Talking about Religion and Morality in Public Schools* (Albany : State University of New York Press, 2006).

34 Charles Mathewes, *A Theology of Public Life During the World* (Cambridge, UK: Cambridge University Press, 2007).

35 Re: the threat of religious warfare in the United States: "Effective legal/constitutional protection of religious freedom is the proper prophylactic for religiously-generated strife."

36 Though Kunzman subscribes to the concept of public reason in discourse about coercive political activities, he doesn't include the public school classroom in the political realm. I think he is wrong about this, but I agree with his conclusion that ethical dialogue is a key to civic education in pluralistic societies such as ours.

37 For assessments of European and North American citizenship education vis-à-vis religion, see Kevin McDonough and Walter Feinberg, *Education and Citizenship in Liberal-Democratic Societies: Teaching for Cosmopolitan Values and Collective Identities* (Oxford: Oxford University Press, 2003).

38 Americans are poorly informed about many of the topics discussed in this paper, including the legal grounds and extent of religious freedom itself in the United States. (Nord, 206.) The so-called "culture wars" of the 1980s and the post-9/11 national discussion of Islam are other examples of times when broader public education about religion would have helped considerably.

39 *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963).

40 *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Powell, J., concurring); Wexler, "Clothed Public Square," 1172-75, provides a detailed survey of dicta on the question.

41 This strategy is sometimes called "natural inclusion" because it takes up religion whenever it "naturally" relates to understanding the subject at hand. Nord, 203ff., 316. This way of making the point—to speak of religion as a "natural" key to understanding—is more problematic than the curricular issue itself, so I have avoided the term.

42 In 2001, there were approximately 93,000 public elementary and secondary schools in the United States, including about 27,000 high schools. *Digest of Education Statistics 2002,* National Center for Education Statistics (Washington, DC: Department of Education, 2002), Table 87.

43 These guidelines are published in Charles C. Haynes and Oliver Thomas, *Finding Common Ground: A Guide to Religious Liberty in Public Schools* (Nashville: First Amendment Center, 2001), 75-6.

AICGS

1755 Massachusetts Ave., NW
Suite 700
Washington, D.C. 20036 – USA
T: (+1-202) 332-9312
F: (+1-202) 265-9531
E: info@aicgs.org
www.aicgs.org

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