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SHAMING KINDERGARTENERS? CHANNELING *DRED SCOTT*? FREEDOM OF EXPRESSION RIGHTS IN PUBLIC SCHOOLS

Harry G. Hutchison[+]

I. INTRODUCTION

We live in a "contemporary moment [that] is marked by profound cultural division."[1] Cultural separation may be sparked by an attempt to restore religion and religious expression to their once prominent place in American discourse,[2] or by countervailing root and branch efforts aimed at removing all discomforting religious references from the public square. In Kentucky, the state school board recently tackled a dispute over historical date references initiated by a proposal to substitute "C.E. (Common Era) for A.D. and B.C.E. (Before Common Era) for B.C."[3] This proposal was aimed at eliminating religious dates from classrooms. Given the semiotics of this issue for disputants, the school board is expected to broker an inclusive solution that embraces both systems.[4] In another case, a federal district court denied a preliminary injunction sought by a student organization that asserted a violation of its First Amendment rights to freedom of expressive association and free speech because the student organization insisted on enforcing a provision requir-

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1. Andy Crouch, *The Phone Book Test*, CHRISTIANITY TODAY, June 2006, at 44, 44 (interviewing Robert P. George). *See generally* ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS (2001). Consistent with George's intuition, San Francisco, a city long considered a beacon of tolerance and inclusion, condemned 25,000 Christian teens rallying against pop culture's terrorism against virtue. Joe Garofoli, *Christian Youth Rally in S.F.*, S.F. CHRON., Mar. 25, 2006, at A1. The demonstrators were, in the words of the resolution passed by the San Francisco Board of Supervisors, engaged in an "'act of provocation'" aimed at "'negatively influence[ing] the politics of America's most tolerant and progressive city.'" *Id.*; *see also* Steven D. Smith, *Conciliating Hatred*, FIRST THINGS, June-July 2004, at 17, 17-22.

2. James R. Stoner, Jr., *Theology as Knowledge*, FIRST THINGS, May 2006, at 21, 21.

3. Michael Jennings, *Kentucky Asks What Year Is It?*, CHRISTIANITY TODAY, May 31, 2006, http://www.christianitytoday.com/ct/2006/mayweb-only/122-32.0.html.

4. *Id.*

ing voting members to subscribe to its statement of faith, which the university deemed exclusionary.[5] In still another case, the United States Court of Appeals for the Third Circuit allowed a lawyer to strike jurors from the jury pool on the basis of their religious beliefs.[6] The disputed practices included teaching Sunday school, singing in the church choir, and reading the Bible and related literature.[7] This exclusionary maneuver amounts to "another victory for the liberalism of personal autonomy" as part of America's emerging constitutional jurisprudence.[8]

Consistent with this move, Daniel Dennett maintains that the evolution of religion reflects the stubborn persistence of a bad meme from which inoculation and isolation are required.[9] Accordingly, "parental teaching of religion [should] be closely monitored and treated as a potential form of child abuse."[10] As thus understood, children under the influence of parents who are infected with a religious meme are unlikely to live consistently with John Dewey's worldview, wherein the concept of culture is transformed "from a tool of analysis [in]to a resource for [unconstrained] individual liberation"[11] and singularity.[12] This liberal worldview appears to be of a piece with a line of thought wherein "religion is doubly discredited, first by the casual assumption that it is outside the domain of reason, and then by hostility to its unwelcome critiques of and constraints upon 'deep' desires" and cauterized preferences.[13] Consistent with this intuition, religious expression should be seen as a mark of degradation.[14] It follows that individuals and groups that are afflicted with the religious meme should be excluded from discourse with a nation that is character-

5. Christian Legal Soc'y Chapter at S. Ill. Univ. Sch. of Law v. Walker, No. 05-4070-GPM, 2005 U.S. Dist. LEXIS 13881, at *1-4, *10 (S.D. Ill. July 5, 2005) (order denying preliminary injunction), *rev'd*, 453 F.3d 853 (7th Cir. 2006).

6. United States v. DeJesus, 347 F.3d 500, 510-11 (3d Cir. 2003).

7. *Id.* at 502; *see also* Robert T. Miller, *A Jury of One's Godless Peers*, FIRST THINGS, Mar. 2004, at 11, 12-13 (discussing the facts and meaning of the *DeJesus* case).

8. Miller, *supra* note 7, at 13.

9. Charles T. Rubin, *The God Meme*, NEW ATLANTIS, Spring 2006, at 71, 73-74 (reviewing DANIEL C. DENNETT, BREAKING THE SPELL: RELIGION AS A NATURAL PHENOMENON (2006)).

10. *Id.* at 75 (discussing Daniel Dennett's views).

11. *See, e.g.*, CHRISTOPHER SHANNON, CONSPICUOUS CRITICISM: TRADITION, THE INDIVIDUAL, AND CULTURE IN MODERN AMERICAN SOCIAL THOUGHT 65 (rev. ed., Univ. of Scranton Press 2006) (1996) (describing the new individualism and John Dewey's place in the new individualism pantheon).

12. *See* Wilfred McClay, *Foreword* to SHANNON, *supra* note 11, at viii.

13. John Finnis, *Religion and State: Some Main Issues and Sources*, 51 AM. J. JURIS. 107, 113-14 (2006).

14. *See* Rubin, *supra* note 9, at 74.

ized by Justice Taney's conception of civilization that is driven by the exigencies of compromise and the necessity of holding things together.[15]

Since Justice Taney and the Supreme Court took on the slavery question in the *Dred Scott* case, courts have assumed an expanded role in enforcing such values as peace and harmony while compelling national unity.[16] Judges, perhaps driven by their own conception of self-evident truth and the superiority of their own judgment,[17] have accepted society's plea, sua sponte, to become statesmen.[18] In this emerging world, intention (particularly good intention) can often be utilized to trump the plain meaning of words.[19] In a broadly catalytic move, judges enter willingly into compromises that exclude certain individuals and groups when necessary to resolve impending controversies.[20] This is particularly true when disagreements threaten America's putative consensus or alternatively, risk fracturing the nation. Consistent with this paradigm, religious expression has been seen to pose just such a threat.

Why has the public square become so secular and so suspicious of religious expression? Explaining this move implicates the usual suspects. Among the plausible explanations, two options resonate. First, that the "secularization of public discourse necessarily results from increased pluralism in American society";[21] and second, "that it was the deliberate product of a determined faction on the Supreme Court."[22] In reality, any explanation that simply blames "judges leaves unanswered the question of why they interpreted the Constitution in so secularist a manner . . . [and] underestimates the extent to which the decisions of the Warren Court reflected the common wisdom of their time."[23] The explanatory force of the common wisdom may be consistent with the costs of "mud-

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15. *See* Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393, 410 (1856) (describing the exclusion of members of the Negro race from the civilized world). Justice Taney took the view that even free blacks could not be citizens within the meaning of the United States Constitution. *Id.* at 418-19.

16. *See* Smith, *supra* note 1, at 17-18.

17. For a discussion of this possibility, see Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1558-60 (2004).

18. *Id.*; *see also* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 889 (Kermit L. Hall et al. eds., 2d ed. 2005) [hereinafter OXFORD COMPANION].

19. *See* WILLIAM A. EDMUNDSON, AN INTRODUCTION TO RIGHTS 78 (2004) (discussing the *Dred Scott* decision).

20. *See, e.g.*, *Dred Scott*, 60 U.S. at 454-455 (Wayne, J., concurring).

21. Stoner, *supra* note 2, at 21.

22. *Id.*

23. *Id. But see* Harry V. Jaffa, *Original Intent and the American Soul*, CLAREMONT REV. BOOKS, Winter 2005-2006, at 36, 36 ("The struggle for control of the Supreme Court is a profound political struggle, going to the heart of the meaning of our existence as a free people. For more than a half century, liberal judicial activism has been riding roughshod over the Constitution bequeathed to us by the founders.").

dling through," which can be analogized to Larry Alexander's understanding of the right of freedom of expression.[24] As thus understood, secularization signifies "practices that have a rule-consequentialist structure of justification specific to particular kinds of questions and to particular cultures, eras, and technologies."[25] In harmony with that perception, one fruitful hypothesis suggests that the secularized public square mirrors "the prior secularization of the university" grounded in the deduction that pedagogy has stripped theology from the branch of knowledge and mandates that it and religion be understood as "merely an elaboration of [subjective] belief."[26] Another proposition, consistent with the first, intimates that the public square reverberates with a pedagogy that denies there are objective moral truths that reason can disclose without appeals to faith and revelation.[27] Although Larry Alexander argues that attempts to distinguish between faith and reason are tenuous on an epistemological level,[28] these two moves not only anticipate Richard Rorty's various claims about truth[29] and progress,[30] but also may have legal consequence, that place adherents to religiously grounded views at a disadvantage. Whatever its source, the religious-secular divide reflects a clash of orthodoxies in which the terms of the debate may render religious conviction without the defensive cover supplied by rationality that

24. LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 185-93 (2005) (explaining the process of muddling through with respect to freedom of expression concerns in a liberal society).

25. *Id.* at 180-81.

26. Stoner, *supra* note 2, at 21.

27. *See* Response of Hadley Arkes, *Correspondence*, CLAREMONT REV. BOOKS, Winter 2005-2006, at 4, 4 (suggesting that "human beings have reasoned about these matters of moral consequence . . . without appeals to faith and revelation" as a form of natural law and perhaps natural rights). It is also possible that today "bad natural rights teachings have all but forced out good natural rights teachings." Ralph A. Rossum, *A More Dependable Approach*, CLAREMONT REV. BOOKS, Winter 2005-2006, at 37, 37.

28. ALEXANDER, *supra* note 24, at 152 (noting that it may be impossible to make a convincing epistemological distinction between faith and reason).

29. For example, postmodernists contend that there is no such thing as truth "out there." *See, e.g.*, RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 5 (1989); RICHARD RORTY, TRUTH AND PROGRESS: PHILOSOPHICAL PAPERS, VOLUME 3, at 20 (1998) [hereinafter RORTY, TRUTH AND PROGRESS] (raising the postmodern pragmatist possibility that "the difference between true beliefs considered as useful nonrepresentational mental states, and as accurate (and *therefore* useful) representations of reality, seemed a difference that could make no difference to practice"). *But see* J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW 167 (2003) (noting that antifoundationalism may denote the contemporary manifestation of Sophism that appears to deny reality while resisting metanarratives that attempt to make sense out of life).

30. *See* RORTY, TRUTH AND PROGRESS, *supra* note 29, at 185 (suggesting that moral progress largely consists of sad and sentimental stories, which have as their objective, answering this question: "Why should I care about a stranger, a person who is no kin to me?" Evidently, the appropriate answer drives us toward inclusion as a value).

is achieved through contestation[31]—if, of course, rationality and truth can be relied on in a progressively more postmodern world.

Given the clash of orthodoxies, the disputed territory encircled by First Amendment jurisprudence tends to discharge more heat than light. Against this backdrop, the United States Supreme Court's 2006 decision denying a writ of certiorari to the United States Court of Appeals for the Second Circuit, once again, proclaimed a preeminent role for courts in public school governance and freedom of expression disputes.[32] The Supreme Court refused to reconsider a Second Circuit opinion, *Peck v. Baldwinsville Central School District*, which concluded it may be possible for plaintiffs to prevail in a lawsuit to vindicate freedom of expression rights of children.[33] At issue was a school district's censorship of an art poster drawn by Antonio Peck, a kindergartener.[34] The poster, drawn as part of a class assignment, contained a picture of Jesus.[35] In reversing the lower court's opinion in favor of the school district, the Second Circuit concentrated on the plaintiff's freedom of speech claims,[36] despite the fact that the poster was drawn in what has been called a nonpublic forum.[37] The Second Circuit suggested that Antonio Peck's right to display the poster could withstand the school district's motion for summary judgment.[38] Although the court denied Antonio's establishment clause claim,[39] "[t]he Second Circuit joined the Ninth and the Eleventh Circuits in holding that public schools may not censor a student's viewpoint on a permissible subject matter when it is responsive to a school assignment or

31. *See* Stanley Hauerwas, *Theology as Knowledge*, FIRST THINGS, May 2006, at 23, 23.

32. *See* Baldwinsville Cent. Sch. Dist. v. Peck, 126 S. Ct. 1880 (2006).

33. News Release, Liberty Counsel, U.S. Supreme Court Allows Decision to Stand That Says Pub. Sch. May Not Censor Religious Viewpoints of Students in Class Assignments (Apr. 24, 2006), http://lc.org/libertyalert/2006/la042406b.htm.

34. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 620-21 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1880 (2006).

35. *Id.* at 621-22.

36. *Id.* at 625-33.

37. *Id.* at 626-27.

38. *Id.* at 624-25 (noting "that further discovery might uncover a) evidence of animus or hostility by [Baldwinsville Central School District] toward Christianity or toward religion generally, and b) indications as to the accuracy of [the school district's] claim that Antonio's poster was not responsive to the assignment").

39. *Id.* at 620.

program."[40] By contrast, "[t]he First and Tenth [C]ircuits hold that viewpoint discrimination in the curricular context may be permissible."[41]

The question becomes: how did America reach the position where student posters so effectively threaten societal cohesion that bureaucratic or judicial intervention is required? The *Baldwinsville* case may offer an answer. One reading of the facts of the case suggests that school officials are committed to the opinion that society must indoctrinate children so they are capable of autonomy.[42] Apparently, instead of answering one basic question—"*[w]hat is best for man*"—students must answer, and see as important, another—"*what is best for me*"—as part of the liberal and republican focus "that exalts the individual self as a bundle of desires," the fulfillment of which are protected rights.[43] Uniform with this verdict, public school officials as enablers of the "liberal tradition" have been rightly concerned about the necessity to screen out nonhomogenizing viewpoints that might upset members of the public, or otherwise call into question the presumably desirable secular consensus on the meaning of life, the global environment, or the cosmos.[44]

By contrast, for parents of deep religious devotion, liberal principles and educational pedagogy may supply important values but not necessarily sufficient conditions for a life lived in the kind of community that they envision. In agreement with philosopher Alasdair MacIntyre's critique of contemporary intellectual and popular culture,[45] captivated by the impos-

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40. News Release, Liberty Counsel, *supra* note 33; *see also* Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (applying viewpoint neutrality standard to a nonpublic school forum); Searcey v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989) (disallowing viewpoint-based discrimination in a nonpublic forum).

41. News Release, Liberty Counsel, *supra* note 33; *see also* Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918, 926-29 (10th Cir. 2002) (allowing "educators to make viewpoint-based decisions about school-sponsored speech"); Ward v. Hickey, 996 F.2d 448, 450 (1st Cir. 1993) (affirming the district court's judgment sustaining a public school committee's decision to not reappoint a biology teacher who discussed abortion from her perspective in class).

42. *See generally* Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *8-9 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

43. Stephen L. Carter, *Liberal Hegemony and Religious Resistance: An Essay on Legal Theory*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 25, 45-46 (Michael W. McConnell et al. eds., 2001).

44. This viewpoint may operate consistently with the conclusion that public schools should construct children for the benefit of the state. *See id.* at 50.

45. Simply put by Richard John Neuhaus, MacIntyre argues "that not only intellectuals but our popular culture has largely abandoned an understanding of moral truth and virtue, with the result that we are all dog-paddling in the murky sea of 'modern emotivism.'" RICHARD JOHN NEUHAUS, CATHOLIC MATTERS: CONFUSION, CONTROVERSY, AND THE SPLENDOR OF TRUTH 145-46 (2006).

sibility of imagining civilization without "a sense of sacred,"[46] such parents may see their children as something more than a random bundle of preferences cabined solely by subjectivism.[47] If society's consensus holds that everyone should seek fulfillment in atomistic autonomy, it is possible that all sorts of parents (religious and nonreligious) will disagree with that consensus for all sorts of reasons. This development leads inexorably to tension between a liberal state that acts as a creator of meaning, and communities and individuals that are animated by an alternative viewpoint.[48] Tension is not a surprising development. "No state is truly interested in preserving independent communities of meanings. States, historically, have been interested in preserving themselves."[49]

While it could be argued that a "liberal state should be different, because of its supposed neutrality among competing conceptions of the good," in actuality the liberal state may be "just as insistent as any other that everybody should believe the same basic things . . . as long as they are liberal things."[50] Although pluralists contend that judicial protection of diverse opinions can rightly be defended on a countermajoritarian basis,[51] it is likely that countermajoritarianism remains ineffective when courts themselves are captured and captivated by the prevailing dogma, which requires the minority to lose even when the majority is wrong.[52] As an empirical matter, few, if any, adherents to non-Christian faiths have won religious freedom cases before the Supreme Court.[53] Equally true, "[d]issenting Christians have not fared well either, [particularly] in recent years."[54] Indeed, if courts are driven by a calculus that is premised on their extra-constitutional role as our national conciliator, then it is ever more likely that adjudication leads inevitably to minority acquiescence[55] when members of resisting faith communities' practices and motives are

46. *See* George Weigel, *Foreword* to JOSEPH RATZINGER & MARCELLO PERA, WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM, at vii, vii (Michael F. Moore trans., 2006) (asking the question: "[I]s it possible to imagine anything properly called 'civilization' that lacks a sense of the sacred?").

47. *See* NEUHAUS, *supra* note 45, at 145-46.

48. Carter, *supra* note 43, at 31 ("If the state tries to domesticate religion, its most powerful competitor in the creation of meaning, then religion tries simultaneously to subvert the state.").

49. *Id.* at 34.

50. *Id.* (omission in original).

51. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 720 (1985).

52. *Id.* at 719.

53. Carter, *supra* note 43, at 35-36.

54. *Id.* at 36; *see also* Gregory C. Sisk, *How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases*, 76 U. COLO. L. REV. 1021, 1023-24 (2005) (noting that "adherents to traditionalist Christian faiths . . . enter the courthouse doors at a distinct disadvantage").

55. *See* Ackerman, *supra* note 51, at 719.

seen as illiberal by the defenders of the secular consensus. My thesis is that members of what might be called "minority faiths" that hold sincere but "divisive views" are increasingly likely to be placed at risk by language that reifies society's "progressive" interest in suppression through conciliation. This process is likely to expand when school hierarchs transmute judicial language and goals into operational dogma while raising the putatively omnipresent specter of division when they confront adherents to deeply held religious faiths and diverse practices.

In Part II, I consider the *Baldwinsville* case as well as the split among the United States courts of appeal. Although I provide some analysis of the facts, the district court case, and the Second Circuit's holding, the primary purpose of this examination is not to provide extensive legal analysis, but to discover and set forth the terms of the debate. This investigation includes an excursion into the notion of evaluative neutrality, metaphysics, epistemology, and the nature of liberal society. Regardless of the actual outcome of *Baldwinsville* or any similar case, I conclude it is highly doubtful that the prevailing terms of the debate can be seen to favor religious expression that reflects deeply held, as opposed to shallow, beliefs.

In Part III, I build on the claims of Steven Smith, Robert Nagel, and Larry Alexander, coupled with the observation that "[i]t is simply self-congratulatory to suppose that the members of our own persuasion have reached their convictions in a deeply reflective way, whereas those espousing opinions we hate are superficial,"[56] in order to contest the justification offered for shame production in public schools. I conclude that because lower courts and public officials are constrained by Supreme Court precedents and the common wisdom, whether they rule in favor of or against viewpoint discrimination in a given case, the paramount objective of judges and school hierarchs is to achieve conciliation and inclusion, even at the price of vilification. As such, public officials and courts, whatever language they deploy, are merely doing politics.

II. SCHOOL CHILDREN IN THE CROSSHAIRS

A. Background

First Amendment jurisprudence concerning religion is quite cumbersome. This arena can be usefully divided into several categories including free exercise, establishment, and freedom of expression. When free exercise is at issue, it is "widely accepted that religious freedom prohibits the government from directly punishing or regulating religious beliefs."[57] Similarly, "speech with religious content or motivation" has received ro-

56. *Id.* at 739.
57. OXFORD COMPANION, *supra* note 18, at 843.

bust protection under both the Free Exercise Clause and Free Speech Clause.[58] When Establishment Clause questions are raised, it seems clear "that it is unconstitutional for public schools to seek to indoctrinate students to religion,"[59] that "[s]chool prayer and some forms of moments of silence are not permissible,"[60] and that "a state may not require the teaching of creationism or a balanced curriculum."[61] Thus, the Establishment Clause limits the messages that public schools may convey to students.

The rules that illuminate the freedom of expression rights of students, the focus of this Article, are complicated but include a rule "that students may not be compelled . . . to affirm beliefs they do not hold."[62] Any conversation about viewpoint discrimination, content-based regulation, and freedom of expression, particularly religious freedom of expression in public or nonpublic fora, is fraught with difficulties.[63] This conversation is likely to be swollen with elastic words, and crammed with postmodern language. Those who enter this discussion without having their eyes wide open to the countless dynamic moves and roles that courts and commentators are inclined to play risk dyspepsia. "Within this contested terrain, commentators and judges often congratulate themselves about unverifiable insights, including the divisiveness of religious practice, the asserted yet unproven tolerance generated by the common public school, the imaginary wall of separation between church and state,"[64] as well as the

58. *Id.*

59. *Id.* at 283.

60. *Id.* (citing Wallace v. Jaffree, 472 U.S. 38 (1985); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963)).

61. *Id.* (citing Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968)).

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

63. One difficulty is what constitutes religion. Religion may mean a number of things including: "whatever constitutes a person's ultimate concern," "the presence of faith," or alternatively, as "a belief in extra-temporal consequences." Eduardo Peñalver, Note, *The Concept of Religion*, 107 YALE L.J. 791, 794 (1997) (internal quotation marks and citations omitted). Another difficulty concerns how religious liberty is to be protected. One view suggests "the establishment clause protects religious liberty; it safeguards much the same interests as the free exercise clause, but in a slightly different way. The free exercise clause defines the important individual liberty of religious freedom while the establishment addresses the limits of allowable state classification affecting this liberty." Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) (emphasis and footnote omitted).

64. Harry G. Hutchison, *Liberal Hegemony? School Vouchers and the Future of the Race*, 68 MO. L. REV. 559, 563 (2003). Justice O'Connor argues that the appropriate constitutional focus on divisiveness should ultimately concentrate "on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

purported necessity of "the public versus private dichotomy."[65] It is probable that these insights and values are largely aspirational. The premise is clear enough. When, and if, society reaches the proper compromise about intractable issues, foreseeable threats to democracy, societal cohesion, and liberalism as a governing philosophy will be muted. No matter how many times Justice Hugo Black's understanding of neutrality is cited,[66] it is doubtful that America can provide a thoroughly neutral evaluation about views that can be seen as dangerously inconsistent with society's cosmopolitan goals and objectives.

On one account, "liberalism has grown ever more muscular, pressing theories about education and the public square that few religious citizens will ever support."[67] As thus understood, religious citizens and religious expression pose a danger to a liberal society and liberal schools that aim to construct people for the benefit of a state, which is committed to individual liberation and human singularity.[68] In truth, whatever the source of danger to America's public schools and public institutions, it is vital to bear in mind that "[d]angers to a society may be mortal without being immediate. One such danger is the prevailing social vision of our time—and the dogmatism with which the ideas, assumptions, and attitudes behind that vision are held."[69] It should be no surprise that judicial decision-making reflects the prevailing wisdom of our age. When courts mandate consensus premised on assumptions consistent with liberal dogma suggesting that they have attained their pliable convictions about the good in deeply reflective ways (whereas those who hold opposite opinions are superficial),[70] it is possible that the courts themselves jeopardize the nation that they, with the best of intentions, wish to hold together. In harmony with Bruce Ackerman's intuition, courts defend neutrality among competing visions of the good life,[71] while failing to understand that "[t]he liberal values of neutrality, tolerance, and rationality are themselves non-neutral."[72] Often when the terms of the debate are cab-

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65. Hutchison, *supra* note 64, at 563; Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1080 (2000) ("[M]any critical legal studies scholars and feminists targeted the public/private divide as an illusory and mystifying element of liberal legalism.").

66. *See* Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 18 (1947) ("[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.").

67. Carter, *supra* note 43, at 53.

68. *Id.* at 50-51.

69. THOMAS SOWELL, THE VISION OF THE ANOINTED: SELF-CONGRATULATION AS A BASIS FOR SOCIAL POLICY 1 (1995).

70. *See* Ackerman, *supra* note 51, at 739.

71. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 139 (1980).

72. Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 158 (1995).

ined by concepts such as neutrality and tolerance, the debate becomes unintelligible.

Nonetheless, the failure to recognize any "values at all is to deny a difference between ourselves and other particles that tumble in space."[73] Equally possible, "[l]aw is the principal [vehicle] through which" well-socialized Americans can assert their values.[74] A yearning for conciliation as a desirable value can assume many forms as law, or as simple legal argumentation that lubricates the predisposition to exclude certain viewpoints from the realm of "reasonableness."[75] Whatever shape it takes, court-mandated and supervised conciliation as a goal functions reliably with Justice Black's assertion that public schools should be seen as instruments of tranquility wherein "[u]ncontrolled and uncontrollable liberty is an enemy to domestic peace."[76] Although conciliation as a justifying rationale may or may not operate consistently with Justice Black's disavowal of the majority's reasoning[77] in *Tinker v. Des Moines Independent Community School District*, Justice Black contends that "the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations [governing freedom of expression] are 'reasonable.'"[78] In any case, American courts and school hierarchs have been drawn repeatedly to the imprimatur of "no endorsement," conciliation, inclusion, and tolerance ever since Justice Sandra Day O'Connor's remarkable concurrence in *Lynch v. Donnelly*.[79] This imprimatur for all its imprecision can be applied usefully to exclude certain viewpoints from the public square.

The case law confirms that "state-operated schools may not be enclaves of totalitarianism" and "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate."[80] Supreme Court precedents state that permitting school property to be used

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73. ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 5 (1975).

74. *Id.*

75. *See id.*

76. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

77. *See id.* at 516-17.

78. *Id.* at 517.

79. *See* Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (concentrating on whether the government's purpose can be seen as endorsing religion, and finding that a city display that included a crèche, among other symbols, was not intended to convey any message of endorsement of Christianity or disapproval of non-Christian religions). Instead of promoting religion, the city of Pawtucket aimed to celebrate the public holiday through traditional symbols. *See id.* As thus understood, government can neither endorse nor disapprove of religion because "[e]ndorsement sends a message to nonadherents [to a particular religion] that they are outsiders, not full members of the political community," whereas "[d]isapproval sends the opposite message" and excludes adherents from full political community. *Id.* at 688.

80. *Tinker*, 393 U.S. at 511.

for the presentation of all views on a particular issue except those from a religious standpoint constitutes impermissible viewpoint discrimination.[81] These sentiments suggest careful adjudicators ought to avoid entrenching "'undue concentration of power.'"[82] Coherent with that understanding, "[c]hurches, synagogues, and other religious organizations were (and to a great extent still are) the leading institutions for the formation and dissemination of values and opinions."[83] A rich diversity of viewpoints would be undermined if formation and dissemination of ideas were subjected to centralized political and educational control.[84] To be sure, the Supreme Court observes a distinction between speech discrimination because of its subject matter (content) and discrimination because of the speaker's specific motivating ideology or opinion (viewpoint).[85] Although such distinctions are unlikely to be helpful in every case, discrimination tends to be permissible in the former but not the latter. Indeed, ideologically driven efforts to suppress a particular point of view are presumptively unconstitutional in many contexts.[86] Though viewpoint discrimination is properly understood as "an egregious form of content discrimination,"[87] even this claim is not beyond dispute by Justices who fear the State's failure to discriminate against religion constitutes an impermissible "endorsement" of religion and hence violates the Establishment Clause.[88] Nevertheless, Supreme Court adjudication, while protecting the personal expression of students, does not necessarily protect all student speech within a curricular context.[89]

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81. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 393-94 (1993); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 102 (2001) (finding that the exclusion of an admittedly religious club from meeting after hours at a public school constitutes viewpoint discrimination violative of the club's free speech rights, and further ruling that permitting the club to meet does not violate the Establishment Clause).

82. Michael W. McConnell, *Governments, Families, and Power: A Defense of Educational Choice*, 31 CONN. L. REV. 847, 848 (1999) (citation omitted); *see also* Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 811-12 (1999) (arguing that the fundamental purpose of the Establishment Clause is to prevent undue concentration of power).

83. McConnell, *supra* note 82, at 848.

84. *Id.* On one account, "[a]uthority here is to be controlled by public opinion, not public opinion by authority." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

85. *See Good News Club*, 533 U.S. at 106-07 (disallowing discrimination on the basis of viewpoint, but apparently allowing reasonable restrictions with respect to subject matter or content); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829-30 (1995).

86. *See, e.g.*, *Rosenberger*, 515 U.S. at 834-35 (disallowing viewpoint discrimination in a public university funding controversy).

87. *Id.* at 829.

88. *See, e.g.*, *id.* at 863-64 (Souter, J., dissenting).

89. OXFORD COMPANION, *supra* note 18, at 283 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

On one account, before considering the legitimacy of judicial pronouncements that support or undermine student expression in public settings, it is important to ask whether judicial intervention rests on some form of liberalism (pure or impure).[90] In reality, when intervention rests on either form of liberalism, the courts' legitimacy cannot rest simply on empirical claims or on some sort of epistemological divide "between what we can claim justifiably to know secularly . . . and what we can claim justifiably to know religiously" because "[n]o such epistemological divide exists."[91] Contemporary liberal propositions are neither empirical nor nonneutral but metaphysical and normative.[92] Although Larry Alexander provides additional reasons for plausible suspicion concerning liberal propositions, consider the following Supreme Court rules.

Supreme Court precedent notes "that school officials [have] comprehensive authority to set rules in the schools."[93] Students and teachers do not, however, "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[94] Nevertheless, the right of freedom of expression enjoyed by students in public schools must be "applied in light of the special characteristics of the school environment."[95] This statement forecasts that schools have both the power and the right to say what student expression is allowable. The Court, in *Hazelwood School District v. Kuhlmeier*, states, "'[t]he determination of what manner of speech in the classroom or in [a] school assembly is inappropriate properly rests with the school board,' rather than with the federal courts."[96] Adjudication shows that "[t]he extent of one's freedom to speak on government property is largely dependent on the nature of the forum in which the speech is delivered."[97] Within a limited public forum, restrictions on speech based on subject matter are permissible only if "the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[98] Regulation on speech in a limited public forum must not be "an effort to suppress expression merely because public officials oppose the speaker's view."[99]

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90. *See generally* ALEXANDER, *supra* note 24, at 152-54 (defining pure and impure liberalism).

91. *Id.* at 155.

92. *Id.* at 155-56.

93. OXFORD COMPANION, *supra* note 18, at 1023 (citing *Tinker*, 393 U.S. at 506).

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

95. *Id.*

96. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (first alteration in original) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

97. Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *15 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

98. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

99. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

Applying these rules, the *Baldwinsville* federal district court found that the school district created a nonpublic forum.[100] Within a nonpublic forum, the question is "whether the student speech in issue is 'tolerated' or 'promoted' expression."[101] Operationally, educators have "substantially greater control over promoted expression than over tolerated expression."[102] Thus, if Antonio's poster fell within the parameters of promoted expression, this might allow the district court to focus on "whether the school's conduct was reasonably related to a legitimate pedagogical concern."[103]

B. The Case

The plaintiff sought an injunction, declaratory judgment, and damages for the conduct of Susan Weichert, a kindergarten teacher working for the Baldwinsville Central School District.[104] The first poster submitted "bore a depiction of Jesus praying, two children on a rock accompanied by the word 'Savior' . . . . It bore the handwritten words, 'The only way to save our world.'"[105] The teacher rejected the first poster submitted by the plaintiff, a six-year-old kindergarten student enrolled at Catherine McNamara Elementary School.[106] The "plaintiff prepared a second poster which depicted children picking up trash and placing it in a trash can in front of a church, adults placing items in a recycling bin, the earth and clouds, and a kneeling figure with a beard and wearing a robe."[107] The schoolteacher, with Principal Robert Creme's concurrence, "folded the [second] poster so that the kneeling figure could not be seen."[108] The plaintiff claimed that this conduct subjected him to "'ridicule,'" to "'belittling of his religious belief,'" and to "'embarrassment in front of his classmates.'"[109] Plaintiff also asserted "that he 'desires from time to time to engage in First Amendment protected activity by incorporating religious themes within his schoolwork as appropriate.'"[110]

The plaintiff brought four separate causes of action against the school district: (A) the "defendants impermissibly restricted his exercise of his

100. *Baldwinsville*, 2000 U.S. Dist. LEXIS 13362, at *18.
101. *Id.*
102. *Id.* at *19.
103. *Id.* at *21.
104. *Id.* at *1-2.
105. *Id.* at *3.
106. *Id.* at *2. The plaintiff was asked to prepare a poster that would "enhance the student's understanding of his environment." *Id.* The posters were to be displayed on June 4, 1999, and the assignment required the children to use pictures or words "depicting ways to save our environment." *Id.*
107. *Id.* at *3.
108. *Id.* at *3-4.
109. *Id.* at *4.
110. *Id.*

First Amendment right to freedom of speech"; (B) the "defendants impermissibly denied him equal protection of the law by treating him differently from other similarly situated individuals on the basis of [his] religious viewpoint, expression, and the content of his speech"; (C) the "defendants impermissibly deprived him of his First Amendment right to the free exercise of religion"; and finally, (D) the "defendants violated the Establishment Clause of the First Amendment."[111] The plaintiff then sought a number of remedies, including an injunction and a declaration holding defendant's policy unconstitutional.[112] The claims referenced in (C) and (D) were not discussed substantially by the federal district court, and only the freedom of speech claim was eventually reinstated by the Second Circuit.[113] I focus primarily on the claim that the defendants impermissibly restricted the plaintiff's exercise of his First Amendment right to freedom of speech.

Conceding the obvious, Susan Weichert stated that kindergarten students are "extremely impressionable."[114] She also claimed that students cannot be depended on to ascertain what a teacher endorses.[115] That claim cuts both ways—particularly in a case where the plaintiff's work is excluded while other students' work is included. As more fully developed below, Ms. Weichert relied heavily on the Supreme Court's "no endorsement" rationale to assert that the plaintiff's poster must be excluded.[116] Further, Ms. Weichert asserted that "the left side of the poster was . . . unresponsive to the [teaching] assignment," requiring that she "conceal the kneeling figure depicted therein not to 'censor' religious expression but to display only so much of the poster as appeared to be responsive to the assignment given."[117]

C. Analysis

This claim bears analysis. If the defendants' claim that they were not engaged in religious censorship can be taken seriously, the defendants were simply implementing a form of so-called Track Two regulation of expression.[118] That is, the defendants were enforcing a rule "that inciden-

111. *Id.* at *4-5.
112. *Id.* at *6.
113. *See id.* at *24-30; *see also* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 620, 625 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1880 (2006).
114. *Baldwinsville*, 2000 U.S. Dist. LEXIS 13362, at *7.
115. *Id.*
116. *See id.* at *8.
117. *Id.* at *7-8.
118. *See* ALEXANDER, *supra* note 24, at xi-xii (explaining that Track Two laws and regulations are rules "that have 'message effects' but that are not enacted [or enforced] *because* of their message effects"). Alexander concludes that the scope of freedom of expression, if it exists at all, is confined to laws passed with the purpose of affecting messages. *Id.* at xi.

tally affect[s] what gets said, by whom, to whom, and with what effect."[119] Many commentators exclude from freedom of expression claims all laws that have incidental "message effects."[120] By contrast, Track One laws and regulations are largely cabined by purpose to affect the message.[121] More specifically, Larry Alexander contends that the core right of "[f]reedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received."[122]

Deciding whether the poster was excised *because* of how its religious viewpoint might be received, or *because* it failed to respond adequately to an assignment raises complex questions. Answers may be found in the school teacher's affidavit, which stated that religious *content* could not be educationally responsive to her assignment.[123] This form of purportedly content-based regulation[124] seems to require a form of *balancing* that appears difficult, if not impossible, to square with a coherent examination of freedom of expression claims. If balancing is put forward as the correct solution, problems arise since "[t]he entire *corpus juris*, from the general common law of contracts, property, and torts to the most particular tax regulations, affects what gets said, by whom, to whom, and to what effect."[125] If balancing is required, balancing is unlikely to be possible without reference to the truthfulness, correctness, or value of what is being said.[126] Finally, "we must assign a value to the audience's loss of information due to incidental restrictions on speech."[127] For a number of reasons, it appears doubtful that Ms. Weichert's reasoning is either persuasive or workable. One is left with the impression that Antonio's message was

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119. *Id.* at xi.

120. *See, e.g., id.*

121. *See generally id.* at 55-81. On one account, the taxonomy of Track One analysis apparently considers whether to allow government regulation of speech because it is harmful. Thus, "[w]hen receipt of a message is itself directly harmful, and government wishes to regulate the message for that reason, its regulations are either always or never violative of the right of freedom of expression," at least on a tentative basis. *Id.* at 80. As understood, it would be impossible for government "to carve out an intermediate position" because that would require that the government "weigh the value of the messages expressed against the disvalue of the harms they cause." *Id.* Further, "message evaluation by the government seems deeply inconsistent with any conception of freedom of expression." *Id.*

122. *Id.* at 9.

123. *See* Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *7-8 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

124. Keep in mind that on one account, if content regulation becomes sufficiently egregious, it operates as a form of viewpoint discrimination. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

125. ALEXANDER, *supra* note 24, at 21 (emphasis added).

126. *See id.* at 20-21.

127. *Id.* at 20.

suppressed because of its content or viewpoint. Apparently, the school district did not wish his message to be received.

Susan Weichert also provided another rationale for her censorship. She stated, "if displayed, [the poster] would have tended to create a false impression of the District's educational practices and curriculum by implying that the District taught that religion or God would save the environment."[128] If her claim is true, it verifies that certain kinds of speech cannot be allowed, not only because of their content, but because certain *viewpoints* cannot be expressed in certain settings within a liberal society. Directly implicating the Supreme Court's "no endorsement" refrain, the teacher further stated: "[The] false impression would have led the public to believe that the District promotes one particular religion over another . . . [leading] impressionable students and perhaps even their parents [to] have understood the implied message of said poster to carry my approval and endorsement."[129] If the latter claim is true, she excised the poster *because* of its religious content and *because* of its religious viewpoint, implicating *message* effects, and not simply because of pedagogical reasons. Emphasizing that she "was in the best position to" judge the plaintiff's poster, she found that it failed to comply with "accepted pedagogical goals and concerns."[130] One interpretation of her claim is that suppression is necessary because private religious speech has nothing serious to offer in an academic/educational setting.[131]

Another interpretation of Ms. Weichert's statement is that Antonio's poster could not be pedagogically responsive so long as reasonable observers could view his drawing as confirming the school's ostensible concentration on teaching and endorsing religious messages despite the secular messages attached to nearly eighty other posters. As applied, the "no endorsement" rule must mean that allowing *any* religious expression constitutes endorsement, and yet, the other side of the "no endorsement" rule as intuited by Justice Sandra Day O'Connor prohibits the government from *disapproving* of religion.[132] To be sure, "[i]t is commonplace [to assert] that no educational program can be neutral among groups."[133] Coherent with that perspective, rejection of Antonio's poster constitutes something less than evaluative neutrality. Rejection is, after all, rejection. It is doubtlessly true that "[a]ny philosophical account of political morality" or virtually anything else including the environment must "take

128. *Baldwinsville*, 2000 U.S. Dist. LEXIS 13362, at *8.
129. *Id.* at *8-9.
130. *Id.* at *9.
131. I am indebted to Professor Gregory Wallace for bringing this insight to my attention.
132. Smith, *supra* note 1, at 17.
133. ALEXANDER, *supra* note 24, at 168.

a stand on what is true, right, and valuable and what is not."[134] Environmentalism or "concern for the environment" "must be 'partisan' in favor of its own conclusions [and] . . . regard as error and possibly malign those ideas that it rejects."[135] If Ms. Weichert can be properly seen as a defender of liberalism in any of its various renditions—including its "no endorsement" attire—she must reject all positions that are inconsistent with her understanding of liberalism and the environment because "[t]here is no neutral ground in [such] matters."[136] Neither Antonio's claims nor any other claim excepting the truth of liberalism and its progeny—the "proper approach to the environment"—can be accepted as neutrality.[137] Still, properly understood, "messages of endorsement or disapproval of religion are [constitutionally] impermissible because they cause some people to feel like outsiders or 'lesser members of the political community.'"[138] Evidently, the school district's understanding of the "no endorsement" thesis requires that Antonio Peck and his religious expression be removed from full communion with the Baldwinsville educational community. On the school district's account, his views, for the best of "generally acceptable pedagogical goals and concerns," brand him an outsider.[139] The Baldwinsville school district approach is unexceptional and unpersuasive.

If the "no endorsement" rationale is unhelpful, one way out of this quagmire is to accept Thomas Nagel's reasonably rejectable thesis as a legitimizing criteria.[140] It might then be argued that Antonio's poster might be reasonably rejectable in the same sense that Nagel "argues that coercive imposition of norms is unfair (in a morally overriding sense) if such norms are reasonably rejectable," because "[n]orms are reasonably rejectable in [a] disqualifying sense if they rest on grounds that are not publicly accessible."[141] Since it can be argued that "[r]eligious grounds are not publicly accessible to those outside the religion,"[142] Antonio has engaged in a moral wrong by seeking to impose coercively his views about the environment on his classmates. For a number of reasons, Alexander shows that the reasonably rejectable framework is irretrievably unworkable.[143]

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134. *Id.* at 148-49.
135. *Id.* at 149.
136. *Id.* My debt to Alexander should be obvious.
137. *See id.* at 168.
138. Smith, *supra* note 1, at 17.
139. Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *9 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).
140. *See* THOMAS NAGEL, EQUALITY AND PARTIALITY 161-64 (1991).
141. ALEXANDER, *supra* note 24, at 156.
142. *Id.*
143. *Id.* at 156-60 (showing, among other things, that from the perspective of the believer whose norms are at risk, none of her norms can be reasonably rejected; or alterna-

Still, there is at least one more sense in which we might invoke the reasonable rejectability thesis to justify the exclusion of certain kinds of religious expression. Although there is more to be said later on the subject of epistemology, consider the possibility "that the 'truth' of religious propositions rests on an epistemology that is different in kind from the epistemology underlying claims of truth for ordinary factual and moral propositions."[144] If one accepts that religious expression amounts to a statement of belief that has been stripped from its place as a branch of knowledge, then appropriately applied pedagogy deprives religious expression of a place in a nonpublic forum.[145] Either approach leaves the government, in Professor Chemerinsky's view, desirably and "completely secular."[146] That being said:

> [F]or the typical religious adherent, her religious beliefs are *continuous* with her beliefs about other matters, and all her beliefs are mutually reinforcing to the extent they cohere. There is no separate sphere of religious beliefs that is hermetically sealed off from nonreligious beliefs and that rests on a distinctively religious epistemology.[147]

While it is clear that some observers repudiate epistemology and simply "'wish to change the subject'" altogether,[148] shame production in public schools may simply represent the impossibility of making "an epistemological distinction between faith and reason."[149] As such, the exclusion of religious perspectives "from the realm of coercive public policy—for the

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tively, if one argues that the believers norms are only accessible to her and inaccessible to others because she alone has had a unique experience or life, then this focus rules out the imposition of *any* norms whose rejection is understandable in this way).

144. *Id.* at 150.

145. *Cf.* Erwin Chemerinsky, Remarks at Campbell University Law School, The Federalist Society's Student Division Panel: God and Government 3 (Fall 2005).

146. *Id.*

147. ALEXANDER, *supra* note 24, at 150 (emphasis added); *see also* NANCY R. PEARCEY, TOTAL TRUTH: LIBERATING CHRISTIANITY FROM ITS CULTURAL CAPTIVITY 20-22 (2004) (discussing attempts to exclude religious viewpoints through so-called fact/value distinctions).

148. *See, e.g.*, J. JUDD OWEN, RELIGION AND THE DEMISE OF LIBERAL RATIONALISM: THE FOUNDATIONAL CRISIS OF THE SEPARATION OF CHURCH AND STATE 48-51 (2001) (discussing Richard Rorty's repudiation of epistemology); *see also* Paul J. Griffiths, *Offer Declined*, FIRST THINGS, June-July 2005, at 38, 40 (reviewing RICHARD RORTY & GIANNI VATTIMO, THE FUTURE OF RELIGION (2005)) (noting that in no sense should Rorty be understood to make philosophical claims as traditionally understood). Instead, Griffiths finds that Rorty can best be understood as one who identifies a "whole vocabulary—that of truth, reality, objectivity, universality"—which is simply refused. *Id.* Griffiths further contends: "Refusal is not denial. It is, instead, the abandonment of one lexicon and the deployment of another. . . . To refute or rebut would still be to practice philosophy, and this Rorty . . . do[es] not wish to do." *Id.*

149. ALEXANDER, *supra* note 24, at 152.

liberal or anyone else—is because those views are wrong."[150] This creates a problem because contemporary liberals believe it is "wrong to extirpate erroneous views coercively."[151]

Yet this argument should not be controversial because "[i]f liberalism or the set of propositions to which it can be reduced is true, then religious tenets that conflict with the propositions of liberalism are false."[152] "Liberalism is in this respect just one more sectarian position, and those who decry the 'religion' of secularism that they find characteristic of modern liberal societies have surely affixed the correct label to their concern."[153] Consistent with that intuition, liberalism in all of its permutation arose as an outgrowth of "[t]he Enlightenment, which began in the seventeenth century and flourished in the eighteenth [as] one of the great spiritual movements of modern Europe."[154] Against this backdrop, Antonio's poster indicates that his spiritual understanding is other-regarding in nature. His perception of the environment was largely nonindividualistic wherein he suggested that salvation for all in the first poster and salvation for the environment in the second comes from a source that is not solely dependent on individual human behavior. Plausibly following Kant's understanding,[155] or alternatively, following John Finnis' explication of philosophy that bids us to cast about for historical evidence of transcendent revelation,[156] Antonio Peck and his family hew to a faith that is a product of reason just as surely as opposing viewpoints are derived from reason. Yet, the language of "'reasonably related to legitimate pedagogical concerns'"[157] must not only place his views and the reasons behind them at risk, such language must declare his views as impermissibly false, however reasonable they may be. If Antonio's views are impermissibly false, a society must be prepared to incapacitate his efforts to express such views within the political and educational community.

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150. *Id.* at 164.

151. *Id.*

152. *Id.* at 150.

153. *Id.* In Alexander's view, those who object to the religion of secularism should welcome this identification instead of being disturbed by this development. *Id.*

154. Theodore M. Greene, *Introduction* to IMMANUEL KANT, RELIGION WITHIN THE LIMITS OF REASON ALONE, at ix (Theodore M. Greene & Hoyt H. Hudson trans., Harper & Row 1960) (1934).

155. On this possibility, see KANT, *supra* note 154, at 151 ("Every one can convince himself, through his own reason, of the evil which lies in human hearts and from which no one is free; of the impossibility of ever holding himself to be justified before God through his own life-conduct, and, at the same time, of the necessity for such a justification valid in His eyes . . . .").

156. Finnis, *supra* note 13, at 107-10.

157. Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *20 (N.D.N.Y. Feb. 15, 2000) (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

In the absence of an impartial examination of all of the posters, the teacher's thesis that pedagogy mandates the exclusion of a portion of Antonio's poster may or may not be falsifiable. What is clear is that Susan Weichert and similarly situated teachers and the school districts must inevitably take sides in order to ensure that the public school remains secular. In fact, her affidavit, coupled with the affidavit of the plaintiff's mother, may supply evidence that the teacher, principal, and school district engaged in viewpoint discrimination aimed at suppressing expression merely because public school officials opposed Antonio's point of view.[158] Indeed, the plaintiff's affidavit, if true, vitiates most, if not all, of the teacher's justifications. For example, "[t]he poster was a small poster."[159] It "was not displayed only with Antonio's kindergarten, but with several other kindergarten classes."[160] Students would therefore view roughly eighty posters on the cafeteria wall at once.[161] The poster was to be displayed temporarily—only for a part of one day.[162] Antonio's poster also contained his signature, written in crayon.[163] This refutes the possibility that reasonable observers could conclude the school endorsed the poster or that the kindergarten class actually taught religion,[164] unless such observers reasonably believe teachers routinely identify school policy or pedagogy in crayon. In reality, the teacher's conduct indicates that something more than pedagogy is at work. Her conduct reifies the belief that the government violates the Establishment Clause when, in a public school setting, it merely permits students to be exposed to private religious speech of fellow students, which hints at a different meaning of life and hence, translates into a different way of living.[165] Conversely, if the Establishment Clause is understood as preventing the government from speaking about God in a way that does not pressure people to change their religious beliefs or actions,[166] then it is far from obvious that Antonio's drawing implicates the Establishment Clause at all. Certainly, there is scant evidence that he made any effort to impose his views on either the school or the school district in ways that suggest the government is imposing or favoring any one particular religion over another.[167]

That being said, it is of course true that

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158. *See id.* at *7-11.
159. *Id.* at *10.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *See* Carter, *supra* note 43, at 36.
166. Gregory Wallace, Remarks at Campbell University Law School, The Federalist Society's Student Division Panel: God and Government 17-18 (Fall 2005).
167. *See id.*

> as individuals, we cannot be neutral about what is good and what is true. To live is to make choices—to pick A over B because we prefer A, or value A, or believe A to be right. We practice a particular religion and not others. We choose to read some things and not others . . . .[168]

We draw certain posters and not others. Neutrality may simply be a hopelessly null set. While John Finnis shows that "[a]ny discussion of religion and state derails from the outset if it presumes that . . . 'religion is contrasted with reason' . . . . [or] that no religion's claims about God and man, world and society are reasonable," or if we accept some philosophically neutral baseline,[169] it appears that the Catherine McNamara Elementary School's "liberalism" requires it to choose between two interpretations of the good. It could choose "neutrality" about what Antonio is entitled to believe and express, or it could choose cosmopolitanism as its conception of the good. Hence, liberalism is understood in this way as providing Antonio with the tools to choose a life of singularity and liberation that is independent of the baggage provided by religious conviction. Bruce Ackerman shows the way. He contends:

> We have no right to look upon future citizens as if we were master gardeners who can tell the difference between a pernicious weed and a beautiful flower. A system of liberal education provides children with a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.[170]

Ackerman implies a normative claim that appears coherent with the cosmopolitan idea: the State must supply Antonio with the tools that allow him to give himself to his "own" autonomously constructed conception of the good that is assembled independently of the community and traditions that have nourished him. Although the notion of giving oneself to one's "own idea is not to give yourself at all,"[171] it is likely that "[l]iberalism can be neutral only toward those religions and religious views that are compatible with the tenets of liberalism."[172] Antonio's poster may be wrong from some putatively neutral pedagogical perspective, but what makes it wrong from his teacher's and school district's perspective is that the poster conveys the wrong message.

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168. ALEXANDER, *supra* note 24, at 165.
169. Finnis, *supra* note 13, at 111-12 (citation omitted).
170. ACKERMAN, *supra* note 71, at 139.
171. NEUHAUS, *supra* note 45, at 66.
172. ALEXANDER, *supra* note 24, at 164.

D. The District Court's and the Second Circuit's Decisions

Understanding adjudication in this case requires an additional excursion into epistemology, metaphysics, and the distinctions we make between content discrimination and viewpoint discrimination. Understanding these disparate, yet related, issues not only provides illumination of the moves that the federal district court and the Second Circuit have taken, but also provides a preview of how religious expression is likely to be dealt with in the future.

The *Baldwinsville* district court converted a motion for dismissal filed by the school district pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) into a motion for summary judgment to be disposed of as provided in Rule 56.[173] The district court accepted the school district's claim that the restrictions on exhibiting Antonio Peck's poster simply represented "'editorial control over the style and content of student speech in school-sponsored expressive activit[y]'" reasonably related to the particular assignment given.[174] The court found "that the principal or primary effect of the school's conduct neither advance[d] nor inhibit[ed] religion," and hence, denied Antonio's Establishment Clause claim.[175] The court also denied Antonio's Free Exercise Clause claim because the plaintiff failed to develop a "particularization of a central religious belief or practice" that was allegedly burdened by the school district.[176] Finally, the court concluded that the "plaintiff was not denied his First Amendment rights under the Establishment Clause, the Free Speech Clause and the Free Exercise Clause," and therefore, no fundamental right was implicated.[177] In sum, the court concluded "as a matter of law that the complaint, attachments and affidavits present[ed] no issues of material fact and that the facts, viewed in a light most favorable to plaintiff, [did] not state a meritorious claim"; therefore, the defendant school district was "entitled to judgment as a matter of law."[178]

This judgment bears analysis. Based on its inspection of the record, the district court concluded that "[t]he purpose of the poster display was to enhance the children's learning experience and to present the students' schoolwork to their parents to show them what they had learned in the study of the environment."[179] At issue was individuated expression about what was learned, which "occurred in connection with traditional educa-

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173. Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *13 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

174. *Id.* at *22-24 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988)).

175. *Id.* at *26-28.

176. *Id.* at *28-29.

177. *Id.* at *29.

178. *Id.* at *30.

179. *Id.* at *18.

tional activity supervised by faculty members and designed to impart particular knowledge or skills to students"; thus, the school facilities at issue fall within the parameters of a "non-public forum as a matter of law."[180] On the other hand, the United States Court of Appeals for the Second Circuit provided an alternative understanding of the evidence. First, the district court's judgment was overturned on the plaintiffs' first appeal because the plaintiffs were effectively surprised by the district court's decision to convert the defendants' motion to dismiss for failure to state a claim into one of summary judgment.[181] Therefore, the plaintiffs were unable to take discovery, which might have shown that the defendants were motivated by "hostility toward Christianity or toward religion generally" when they censored Antonio's poster.[182]

Responding to the plaintiffs' second appeal, the Second Circuit found:

> [T]he district court overlooked evidence that, if construed in the light most favorable to [the] Pecks, suggested that Antonio's poster was censored *not* because it was unresponsive to the assignment, and not because Weichert and Creme believed that [the student's mother] JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment.[183]

Before considering the question of whether the poster was responsive, or alternatively, provided an impermissible religious perspective, consider the claim that Antonio's mother bore some responsibility for the poster. Rejecting the poster because its content or viewpoint could be imputed to Antonio's mother appears to be consistent with the implication that parents have no role in the education of their children. Parents, as thus described, can be seen as part of a prephilosophic *tabula rasa* that has yet to form sufficient moral and intellectual expertise. Consistent with liberal theory, school hierarchs, by contrast, as members of the philosophic vanguard, act as forerunners of a desirable future destination for children and the nation. In order to reach this destination, teachers compete "actively with families for the privilege of creating meaning in the lives of children."[184] This move requires the subordination of the parents' role in the upbringing of their children to the power of the State. This maneuver disfavors parents who are animated by the analogical imagination that looks for "resemblances, similarities, correspondences, and overlapping truths between apparently disparate realties"—between parenting and faith, between parenting and education, between the environment and

180. *Id.*

181. Peck v. Baldwinsville Sch. Bd. of Educ., 7 F. App'x 74, 75 (2d Cir. 2001).

182. *Id.* at 75-76.

183. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 630 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1880 (2006).

184. Carter, *supra* note 43, at 50.

everything else—as opposed to parents who are animated by the dialectical sensibility wherein there is an emphasis on "either/or," such as either the environment or faith, either schooling or parenting, either faith or reason.[185] Antonio's parents appear to fall into the category characterized by the analogical imagination.

Overlooking the distinction between the analogical imagination and the dialectical sensibility, the district court determined that "[t]he purpose of the poster display was to enhance the children's learning experience and to present the students' schoolwork to their parents to show them what they had learned in the study of the environment."[186] The Second Circuit agreed with the lower court's determination that the individuated expression about what was learned "occurred in connection with [a] traditional educational activity supervised by faculty members and designed to impart particular knowledge or skills to students."[187] Thus, the school facilities fall within the parameters of "a non-public forum as a matter of law."[188] The court of appeals also agreed that a school district focused on content must "regulate the content of Antonio's poster in a reasonable manner."[189] Citing *Hazelwood* with approval, the Second Circuit maintained that the legal standard in a content discrimination case, must be sufficiently

> deferential to the prerogative of educators to "assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school."[190]

Evidently, educators are given wide scope to exercise "'editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns*.'"[191] Content regulation remains permissible. As more fully developed below, viewpoint discrimination remains suspect.

Although the Second Circuit ultimately reinstated Antonio Peck's freedom of speech claim, the court still granted substantial and largely unsupervised discretion to public school officials, which may place adher-

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185. NEUHAUS, *supra* note 45, at 153. My debt to Richard John Neuhaus should be obvious.

186. Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *18 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

187. *Id.*

188. *Id.*

189. Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 627 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1880 (2006).

190. *Id.* at 628 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988)).

191. *Id.* (quoting *Hazelwood*, 484 U.S. at 273).

ents to disfavored beliefs at risk. Evidently, it is not in the nature of liberalism and its progeny, the public school system,[192] to provide neutral evaluations about things with which they disagree. Uniform with that claim, the Second Circuit appears to accept school and teacher as the ultimate arbiters of what gets taught about the environment.[193] Students must learn to "save" the environment as opposed to learning whether there are disparate views on the environment.[194] Apparently, the court of appeals would allow indoctrination about "saving" the environment when, as Larry Alexander shows, such issues (all issues) are matters of partisan concern that are nonneutral and are therefore decided on a normative and metaphysical level.[195]

Whatever the Second Circuit believes about metaphysics, it agrees that there is a factual question concerning whether suspect viewpoint discrimination is in play. The court's examination of the record sustains the plaintiff's claim that it cannot be said as a matter of law that the school district's enforcement of its pedagogical interests was carried out in a non-viewpoint-neutral manner.[196] Further, the court states, "drawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which traditionally has been prohibited even in non-public fora, is, to say the least, a problematic endeavor."[197]

Opposing the plaintiff's appeal, the Baldwinsville school district argued first that its censorship of Antonio was content-related (related to appropriate ways of saving the environment) and therefore permissible.[198] Further, the school district argued that even if "its decision was based on the viewpoint rather than the content," the dismissal of Antonio's suit "would still have been proper because *Hazelwood* permits schools to discriminate on the basis of viewpoint—so long as such discrimination is, itself, reasonably related to a legitimate pedagogical interest."[199] There is some authority for this proposition. Both "[t]he First and Tenth Circuits have expressly held that educators may make viewpoint-based decisions about school-sponsored speech."[200] The Second Circuit, however, saw this contention as a bridge too far. Instead, the court quoted: "'Without

192. For one view of public schools as a form of liberal hegemony, see Hutchison, *supra* note 64, at 577-90.

193. *See Baldwinsville*, 426 F.3d at 630.

194. *Cf. id.*

195. *See* ALEXANDER, *supra* note 24, at 155-56.

196. *Baldwinsville*, 426 F.3d at 630.

197. *Id.* (emphasis omitted).

198. *See id.* at 631; Peck v. Baldwinsville Cent. Sch. Dist., No. 99-CV-1847, 2000 U.S. Dist. LEXIS 13362, at *20-24 (N.D.N.Y. Feb. 15, 2000), *vacated*, 7 F. App'x 74 (2d Cir. 2001).

199. *Baldwinsville*, 426 F.3d at 631 (emphasis omitted).

200. *Id.* at 632 n.9.

more explicit direction [from the Supreme Court], we will continue to require school officials to make decisions relating to speech which are viewpoint neutral.'"[201] Further, the court determined "on the facts and the legal arguments as they are currently developed . . . a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests."[202]

This victory may be short-lived because the court did "not *foreclose* the possibility that certain aspects of the record might be developed in such a manner as to disclose a state interest so overriding as to justify, under the First Amendment, [the Baldwinsville Central School District's] potentially viewpoint discriminatory censorship."[203] It is not difficult to find an interest that might trump Antonio's viewpoint discrimination claim: the state's interest in avoiding the perception of religious endorsement.[204]

Still, on the record before it, the Second Circuit could, without difficulty, understand that Susan Weichert purposed to affect the message of the poster and purposed to keep the audience from viewing it. Track One laws and regulations are intended to suppress messages that cause harm or claim to cause harm.[205] The record shows that the Baldwinsville Central School District's hostility toward Antonio Peck's religious expression drove them to suppress and prevent Antonio's message from being received.[206] If there is any freedom of expression right at all, it is doubtful that the school district had any authority to suppress Antonio's viewpoint. Assuming the persuasiveness of this analysis, Antonio and other similarly situated students, nevertheless, should continue to see the Second Circuit's opinion as an impermanent victory.

The provisional nature of the appellate court's holding is connected to the fact that America sees itself as a liberal society. Coherent with Stanley Fish's insight, for such societies, "'there's no such thing as free speech.'"[207] Alexander explains:

> In liberal societies, free speech is important because it is believed to produce valuable consequences such as more truth, better democratic politics, and more individual self-development. But this means that any freedom of speech principle carries with it a commitment to constrain speech that destroys these things. Al-

201. *Id.* at 633 (quoting Searcey v. Harris, 888 F.2d 1314, 1325 (11th Cir. 1989)).
202. *Id.*
203. *Id.*
204. *Id.* at 633 & n.11.
205. ALEXANDER, *supra* note 24, at 55-56.
206. *See generally Baldwinsville*, 426 F.3d at 629-33.
207. ALEXANDER, *supra* note 24, at 178 (quoting STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING, TOO (1994)).

> ternatively put, a commitment to free speech necessarily carries within it a commitment to censorship.[208]

Thus, "[i]f free speech is only important because of its consequences, those consequences that are valued and disvalued will necessarily reflect partisan positions, not evaluative neutrality."[209] Properly understood, individuals afflicted with the religious meme are likely to lose out in a contest with prevailing liberal ideology. "[A]ll possible curricula . . . will be partisan along some axis or another. Because we are finite beings, with finite minds, finite attention, and finite time, our education must perforce be selective. And the criteria of selection can never be neutral."[210] Despite the imprimatur of, and indeed, because of the imprimatur of Justice O'Connor's remarkable concurrence in *Lynch v. Donnelly*,[211] it is likely that courts could discover grounds to allow "reasonable" *viewpoint* discrimination of disfavored views. This is especially true as they become more fully captivated by progressively more liberal norms and cosmopolitan ideals. Grounds could include purportedly pedagogical values, the possible harm inflicted by Antonio on others, or a possible Establishment Clause violation. Such maneuvers may simply amount to a government practice that communicates a non-incidental message of government disapproval of religion or religious expression, which diminishes the status of religious adherents within our political community. Equally likely, courts and other public officials will be increasingly called upon to weigh the worth of the speech proffered by individuals in light of the presumed harm. Public officials as initial responders to asserted violations of an inclusive consensus may find it necessary to discount the value of individuals and groups who challenge the presumed consensus on the meaning of life or the importance of the environment. Public officials armed with good intentions may place offending individuals and groups outside the political community. As developed more fully below in Part III, the courts have already shown the way.

E. The Road to Conciliation? Liberalism as Neutrality, or Liberalism as Cosmopolitanism?

If America has failed to fully accept "[l]iberalism as a '[n]eutral' [u]mbrella for [i]lliberal [resisting p]ersons, [a]ssociations, and [c]ommunities," it is probable that America has instead accepted or is

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208. *Id.*

209. *Id.*

210. *Id.* at 168.

211. Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.").

beginning to accept "[l]iberalism as [c]osmopolitanism."[212] "On this conception, liberalism is not the above-the-fray values of a neutral umpire but is rather a particular way of life, namely, that of the cosmopolitan."[213] Inevitably, "cosmopolitanism . . . tends to homogenize and shallow out the various ways of life [because i]f there are many paths to truth or salvation, then little is at stake in finding a path."[214] Indeed, it is possible to observe that we live in an era that has witnessed radically new perspectives on human liberty and autonomy, which appear to correspond with "[t]he bourgeois attempt to construct a rational alternative to tradition."[215] "[T]he Supreme Court has confirmed the correctness of this possibility."[216] On its account: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[217] This view provides an escarpment on which to demand and create individual liberation and human singularity, the pursuit of which appears consistent with liberalism as cosmopolitanism. This view may imperil families and groups who, following T.S. Elliot, believe that the creation of an enduring community and an enriching solidarity imply adherence to "'the way of life of a particular people living together in one place.'"[218] J. Budziszewski counsels that a society that allows the notion of radical autonomy to be taken too far will conclude inevitably:

> [M]orality is created, not discovered, [and] then surely different groups and individuals will create *different* moralities, for they will 'care most' about different things. There will be no common standard by which to adjudicate the conflicts among these invented moralities. The clashes among them will be like clashes of clothing styles, with this strange difference—that the stakes are who lives and who dies.[219]

To be fair, "[l]iberal[ism as] cosmopolititanism . . . fits uneasily with the American constitutional tradition, which, [appears to] line [up] with liberalism as neutrality."[220] Liberalism as neutrality appears to provide protective cover for illiberal groups and disallow the exclusion of illiberal

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212. *See* ALEXANDER, *supra* note 24, at 165-70 (emphasis omitted).
213. *Id.* at 169.
214. *Id.*
215. SHANNON, *supra* note 11, at 203.
216. *See* Harry G. Hutchison, *A Clearing in the Forest: Infusing the Labor Union Dues Dispute with First Amendment Values*, 14 WM. & MARY BILL RTS. J. 1309, 1343 (2006).
217. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).
218. TERRY EAGLETON, THE IDEA OF CULTURE 112 (2000) (quoting T.S. ELIOT, NOTES TOWARDS THE DEFINITION OF CULTURE 120 (1948)).
219. BUDZISZEWSKI, *supra* note 29, at 6-7.
220. ALEXANDER, *supra* note 24, at 170.

ways of life.[221] Still, contemporary Americans are captivated by postmodernism[222] and cosmopolitan values that undermine America's constitutional tradition. This move may give rise to problems that limit the likelihood of sustaining real diversity that allows illiberal groups to exist in publicly meaningful ways for two related reasons. First, contemporary liberalism as influenced by postmodernism runs the risk of falling prey "to the 'fraternal conceit': the fanciful notion that community and social solidarity can be secured . . . [by compulsory] association."[223] This move is at peace with Christopher Shannon's understanding of the contrast between classical liberals and contemporary ones.[224] Classical liberals perceived rationality as existing within the individual, whereas contemporary liberals, despite their presumed thirst for individualism, see rationality in the large institutions.[225] In the past, "[c]lassical liberals assumed a world of small communities capable of generating public opinion to which individuals could be held accountable."[226] They "sought the autonomy of different institutional spheres such as religion, politics, and the economy, yet modern America has seen a fusion of these spheres with the rise of vast economic, political and military bureaucracies."[227] Such size inexorably implies compulsion as modern liberalism has replaced deduction with command. "'Thus rights are no longer deduced, either theologically or philosophically. They are proclaimed. Fiat has replaced argument.'"[228] For contemporary or cosmopolitan liberals, operating as paladins of "progress," the desired community and the preferred political association lead inevitably to the necessity of mandating the conditions under which school children can grow in a more or less homogenized fashion. Evidently, growth such as this must be controlled by the state to ensure independence from the traditions of the child's forbearers. Public schools substitute homogeneity for actual diversity, and uniformity for pluralism, to create a form of liberal hegemony that is justifiably frightened by efforts to free public school students from the reach and centralizing power of public school monopolies.[229]

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221. *Id.*

222. *See, e.g.*, Hutchison, *supra* note 216, at 1331-39 (discussing solidarity in the mirror of growing postmodernism).

223. CHANDRAN KUKATHAS, THE FRATERNAL CONCEIT: INDIVIDUALIST VERSUS COLLECTIVIST IDEAS OF COMMUNITY 2 (1991).

224. SHANNON, *supra* note 11, at 147.

225. *Id.*

226. *Id.* at 146.

227. *Id.* at 146-47.

228. PHILLIP E. JOHNSON, THE RIGHT QUESTIONS: TRUTH, MEANING & PUBLIC DEBATE 165 (2002) (quoting Edward Skidelsky, *A Liberal Tragedy*, PROSPECT, Jan. 2002).

229. Hutchison, *supra* note 64, at 643-44 (discussing the centralizing impulse that is connected to the common school movement).

Second, "[r]eal cosmopolitanism is unstable and self-undermining. It must domesticate and mute the diversity it celebrates."[230] Real cosmopolitanism "fosters the instrumentalization of every aspect of [human] life" to serve society's ideal conception of autonomy.[231] Thus, many Americans, and doubtlessly some courts, have been moved to accept "a shallow homogeneity [that] supplants a richer, deeper, but more antagonistic diversity."[232] This move places deeply held religious beliefs at risk and requires suitable liberal language to command the exclusion of such beliefs from certain places under certain conditions. Phrases like "no endorsement" and inclusion, unsurprisingly, may offer constitutional cover to remove purportedly illiberal views from the increasingly secularized and desacralized public square, while allowing the courts and other public officials to do politics in the name of conciliation. In addition, courts have regularly deployed another strategy—name calling—accusing those they wish to silence of evil motives, in order to justify government regulations that they prefer, or to legitimize hostility to diverse practices that they are inclined to disfavor.[233] Taken together, this scenario is unlikely to favor Antonio. Instead, he has reason to see his victory as merely provisional. The next section explores the many dynamic moves that courts have made, the reasons they offer, and the invention of language required to lubricate the exclusions they make.

III. EVOLVING STANDARDS OF CONCILIATION?

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court stated:

> The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.[234]

Then, in a postmodern and highly predictable move, the Court assured us that it was not bound by the plain meaning of it own words. The Court, in responding to the political and social pressures, which it has disavowed, assumed its role as national conciliator by commanding "the contending sides of a national controversy [abortion] to end their national division by accepting a common mandate rooted in the Constitution."[235] In another context, the Court, animated presumably by the need

230. ALEXANDER, *supra* note 24, at 171.
231. SHANNON, *supra* note 11, at 202.
232. ALEXANDER, *supra* note 24, at 170.
233. *See* Smith, *supra* note 1, at 19 (describing the Supreme Court deployment of the "evil motives" strategy to silence those it opposes).
234. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865-66 (1992).
235. *Id.* at 867.

for "political compromises calculated to placate the major interested parties,"[236] engaged in its own peculiar form of politics that threatened to place adherents to certain viewpoints at risk.[237] This maneuver is predicated on the Court's flexible understanding of evil motives that endanger the national consensus.[238] This is not a surprising occurrence. Following a well-known evolutionary pathway, most "[m]odern democratic states have themselves become weapons in the war of all against all, as rival interest groups compete with each other to capture government and use it to seize and redistribute resources among themselves."[239] "These conflicts are not simply economic in origin."[240] Rather, the complete anthology of political goods—including freedom of expression and the sanctity of individual conscience[241]—is at risk. Martin Loughlin delivers a persuasive forecast: "The liberal-legalist order . . . will be founded on self-interested, rights-bearing, adversarial individuals and this will not be sustainable. This type of social order is likely to aggravate precisely those points of tension in society which any vibrant political process should aim at alleviating."[242] Hence, law and politics have been arranged "to shape the relationship between an individual's religious devotion and her participation in the marketplace of essential public goods and services."[243] Conscience, for example, has been "invoked to mandate access to essential goods on terms that maximize consumer autonomy, even at the cost of negating the efficacy of providers' diametrically opposed consciences."[244] The executive and legislative branches of government, as well as the courts, often find it impossible to resist the impulse to take sides and choose whose conscience ought to be favored[245] despite the hopeful possibility that "invoking the sanctity of [an individual's] con-

236. Smith, *supra* note 1, at 18 (discussing the Court's political compromises in the affirmative action arena).

237. *See id.* at 20 (discussing Romer v. Evans, 517 U.S. 620 (1996)).

238. *See id.*

239. JOHN GRAY, POST-LIBERALISM: STUDIES IN POLITICAL THOUGHT 4 (1993).

240. Hutchison, *supra* note 64, at 564.

241. *See, e.g.*, Robert K. Vischer, *The Sanctity of Conscience in an Age of School Choice: Grounds for Skepticism* 1-2 (Univ. of St. Thomas Sch. of Law, Legal Studies Research Paper Series, Working Paper No. 06-21, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899381.

242. MARTIN LOUGHLIN, SWORD AND SCALES: AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS 5 (2000).

243. Vischer, *supra* note 241, at 1.

244. *Id.*

245. *See id.* at 2. *See generally* Williams v. Vidmar, 367 F. Supp. 2d 1265 (N.D. Cal. 2005) (involving a case where a teacher unsuccessfully sued a school district for discrimination because the school screened his curriculum for any inappropriate religious content).

science can bolster [her] . . . authority" in light of the "pronounced power disparity in the state's favor."[246]

The desire to have government take sides and choose whose conscience ought to be favored is not entirely an American development. In Canada, for instance, society's collective conscience has been summoned to disqualify otherwise qualified teachers who come to the educational table with a distinctly different moral compass—even when their moral beliefs have no direct effect on their approach to teaching.[247] Evidently, when students and faculty agree to refrain from engaging in all non-biblical sexual conduct as a matter of conscience inspired by religious devotion, their statement of belief amounts to conduct that constitutes an act of discrimination against homosexuals.[248] This process renders their beliefs, at least potentially, illegitimate. Whether such legal argumentation sustains the conclusion that the Anglo-American constitutional system "regularizes deception on a massive scale,"[249] "[a]ll modern democracies, but especially the United States, have transformed the state into an arena of doctrinal conflicts, wherein . . . contending political movements vie for supremacy."[250] Surely courts have a role to play in alleviating such conflicts. The courts' ability to play a role has been made easier by the arrival of a postmodern era that challenges the existence or even the possibility of trustworthy "principles in either natural, moral, or political science."[251] In assessing contending political movements, it is likely that "[w]e carry on practices begun in the Age of Reason, but without the

246. Vischer, *supra* note 241, at 3 ("If teachers and students are understood to operate within a monolithic, unitary educational system, their claims to be empowered legally to act (or not act) on conscience in the face of conflicting normative claims by the system are not to be dismissed lightly.").

247. Trinity W. Univ. v. B.C. Coll. of Teachers, No. 27168, 2001 Can. Sup. Ct. LEXIS 32, at *22-27 (Can. 2001). In *Trinity Western University*, British Columbia College of Teachers (BCCT) refused Trinity Western's application "to assume full responsibility for [its] teacher education program" because the college required all students, faculty and staff to refrain from engaging in all forms of sexual practices that are biblically condemned including, but not limited to, homosexual conduct. *Id.* at *22-25. Agreeing to refrain from engaging in non-biblical sexual practices was seen by the BCCT, the appropriate jurisdictional unit, as discrimination against homosexuals. *Id.* at *25-27. The Supreme Court of Canada decided that the BCCT's approach went too far. *Id.* at *66-72.

248. *See id.* at *66-71.

249. Robert F. Nagel, *Lies and Law*, 22 HARV. J.L. & PUB. POL'Y 605, 616 (1999).

250. GRAY, *supra* note 239, at 4.

251. OWEN, *supra* note 148, at 1. It is possible that:

> [L]iberal institutions concerning religion—the separation of church and state, religious pluralism, religious freedom—were originally justified on the basis of a revolutionary comprehensive philosophic doctrine, covering human nature, the purpose of political society, and the proper domain of religious faith. . . . Today, belief in the comprehensive philosophic teaching of the Enlightenment appears to lie in ruins . . . .

Id.

confidence that our practices are moored to timeless principles.[252] Given the absence of confidence in legal principles, one possibility commands attention from courts committed to diminishing social strife: doing politics rather than law.[253]

The principal question becomes: what sort of politics? An alluring answer materializes: whether obliged by the Constitution or their own set of preferences that reify maneuvers aimed at eliminating, or at a minimum, lubricating friction, the courts, aided by imaginative abstractions,[254] or alternatively, "opportunistic claims to authority,"[255] perform the political function of conciliation by ending division through compromise.[256] Presumably, the Supreme Court, whether it is qualified for this role or not, has paved the way.[257] Charitably accepted, "these Justices see themselves not as taking sides in the culture wars but rather as working to reconcile the warring factions."[258] As Hobbes might argue, things fall apart and so the courts must keep them together.[259] The Supreme Court, for example, has often transmuted its desire to hold things together into a presumption that religious strife is particularly debilitating for the nation.

Zelman v. Simmons-Harris supplies a fresh reminder of this inclination.[260] A number of Justices appealed to empirical and consequentialist considerations to make their case against school vouchers without providing a complete understanding of the history of religious strife or a perceptive understanding of consequentialism.[261] As I have argued elsewhere, a concern for religious strife premised on "empirical and consequentialist considerations, in the [skillful] hands of Charles Taylor, might reflect the nuanced deliberation that '[o]ur understanding of the place of religion in a free society is bedeviled by our different understandings of freedom.'"[262] By contrast, "holding things together," as interpreted by Justices Stevens, Breyer, and Souter, obliges the Court to discard "evidence that 'the secular ideological wars of the twentieth century killed far more people than

252. *Id.*
253. *See, e.g.*, Smith, *supra* note 1, at 17-18.
254. Nagel, *supra* note 249, at 606-07.
255. *Id.* at 609.
256. Smith, *supra* note 1, at 18.
257. *Id.*
258. *Id.* at 17.
259. *Id.*
260. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting).
261. For a discussion of the dissenting Justices' failings, see Hutchison, *supra* note 64, at 622-30.
262. *Id.* at 623 (second alteration in original) (quoting Charles Taylor, *Religion in a Free Society*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSE AND THE AMERICAN PUBLIC PHILOSOPHY 93, 94 (James Davidson Hunter & Os Guinness eds., 1990)).

all the religious wars of history combined.'"[263] Paradoxically, "secular ideologies are not banned from the liberal public square because of their dangers."[264] Nevertheless, the implication seems clear enough. The Court must inescapably take sides in its selective examination of the evidence and its selection of disfavored groups when fulfilling its role as our national conciliator. As such, the courts offer their own moral compass, which allows them to outlaw as illegitimate the moral compass of others without so much as providing a principled basis for doing so.[265] Alasdair MacIntyre suggests there is an interminable and unsettled character in what passes for America's contemporary moral and philosophical debates.[266] Yet, the courts in their role as conciliator often fail to reflect a nuanced understanding of the marketplace of freedom, the disparate conceptions of human autonomy available in contemporary society, and the variety of heterogeneous and incommensurable concepts that inform the major premises from which the protagonists in such debates argue.[267]

To be sure, this approach may be consistent with two possibilities: (1) seeing religion as some minor component of the exercise of "the 'right' proclaimed as fundamental and 'at the heart of liberty,' in *Planned Parenthood v. Casey* . . . 'to define one's own concept of existence, of meaning, of the universe, and the mystery of human life,'"[268] or (2) accepting as true, Ronald Dworkin's conception of the First Amendment's guarantee of religious freedom as simply a proscription that allows one to decide for himself.[269] Either approach may lead inexorably to a world grounded in "self-interested make-believe."[270] In spite of the latter possibility, it is likely that when confronted with heterogeneous beliefs and language, the courts, for a number of reasons, incline toward the State's preferred understanding of human autonomy as opposed to the tradition and values represented by resisting parents.[271]

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263. *Id.* at 624 (quoting Carter, *supra* note 43, at 52).

264. Carter, *supra* note 43, at 52.

265. *See* Lund & McGinnis, *supra* note 17, at 1584-85 (discussing the Supreme Court's willingness to rule out-of-bound different moral judgment without providing any constitutional justification).

266. ALASDAIR MACINTYRE, AFTER VIRTUE 226 (1981).

267. *Cf. id.*

268. Finnis, *supra* note 13, at 112 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 864 (1992)).

269. *Id.*

270. *Id.*

271. One possible reason for judicial discomfort is suggested by Stephen Carter. The deployment of religious language in public debates provides something more than cacophony—it provides, at times, a basis for prevailing in such debates. Indeed, "Charles Taylor argues that liberal uneasiness with strong religious commitments rests in large measure upon this historical truth." Carter, *supra* note 43, at 38.

By impressing school children into the fray, as the district court opinion in *Baldwinsville* shows, courts contribute—inadvertently or deliberately—to the battle of all against all while exacerbating the "corrosive, irreconcilable, and proliferating conflict between government and family."[272] The courts defend such incursions by steadfastly proclaiming their commitment to compromise[273] and finding a reasonable balance, even at the costs of declining to overrule prior cases that were wrongly decided.[274] Thus, the Supreme Court contends that its commitment to such values and its adherence to such motives are necessitated, "not for the sake of the Court, but for the sake of the Nation."[275] Ominously, such self-portrayals threaten the return of *Dred Scott*,[276] and on one account, amount to little more than "'an outpouring of self-important romance'" that brings to mind a "'late-night fit of drunken sentimentality.'"[277]

Complementing this move, courts regularly invoke the "no endorsement" rationale. As we have seen, this contemporary theory suggests:

> [M]essages of endorsement or disapproval of religion are impermissible because they cause some people to feel like outsiders or "lesser members of the political community." The "no endorsement" doctrine, which at least on its face prohibits both endorsement and disapproval, and hence purports to protect both believers and nonbelievers against offense, seeks to avoid such alienation and so to hold all citizens together in full political communion.[278]

Of course, as Professor Steven Smith shows, "[f]aithfully applied, the 'no endorsement' prohibition would render unconstitutional such landmarks as the Declaration of Independence, Lincoln's Second Inaugural Address, and, ironically, Jefferson's famous 'Virginia Statute for Religious Freedom.'"[279] However honorable its purpose, the "no endorsement" test remains "hopelessly indeterminate."[280]

If the Supreme Court counts as a reasonable observer, it is possible that the "no endorsement" test amounts simply to the Court's own version of

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272. STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING, at vii (1983).

273. Smith, *supra* note 1, at 18.

274. *Casey*, 505 U.S. at 864.

275. *Id.* at 868.

276. Evidently *Dred Scott* is "the leading precedent for [such] self-portrayal[s]." Smith, *supra* note 1, at 18. "[T]he Supreme Court . . . attempted to call the contending sides of a national controversy to end their national division . . . . Four years later the nation was engaged in a civil war." *Id.*

277. *Id.* (citations omitted).

278. *Id.* at 17.

279. *Id.*

280. Wallace, *supra* note 166, at 47 (quoting a judge who had just invalidated the Pledge of Allegiance).

the politics of fear[281] grounded in the notion of "'putting cruelty first,'" and thus articulating from what we most want to escape.[282] This move is complemented by ascription. The Court ascribes bad motives to those groups and individuals who sustain the controversy in ways the Court dislikes.[283] The search for bad motives operates dependably with the claim that courts have an expanding political role in alleviating conflict through appeals to conciliation and inclusion.[284] Whether the theme of conciliation operates as a form of shared social "consensus for perpetually controversial principles,"[285] or instead amounts to the predominant opinion of a society that "inevitably reflect[s] the views of the social and intellectual elites who have the greatest access to public modes of expression,"[286] it will likely survive the retirement of the Supreme Court's most consistent proponent of conciliation, Justice Sandra Day O'Connor.[287] Whether truly driven by conciliation or other values, it is probable that actual adjudication simply articulates congeries including "play[ing] in the joints,"[288] the deduction that religious speech is entitled to less protection than other kinds of expression,[289] or the State's philosophical preference requiring discrimination against religious beliefs.[290] While these

281. Bernard Yack, *Introduction* to LIBERALISM WITHOUT ILLUSIONS 1, 2 (Bernard Yack ed., 1996) (discussing the "liberalism of fear" that is "reinforced by the extraordinary violence and irrationality of politics in twentieth-century Europe").

282. Michael Walzer, *On Negative Politics*, *in* LIBERALISM WITHOUT ILLUSIONS, *supra* note 281, at 17, 17 (discussing Judith Shklar's politics).

283. Smith, *supra* note 1, at 19.

284. *See id.* at 18.

285. Yack, *supra* note 281, at 8.

286. *Id.* at 8-9; *see also* Nagel, *supra* note 249, at 610-11 (describing the Yale argument used in constitutional adjudication as an exercise in superior effort, skill, or intelligence leading to a claim of authority from effort). For instance, members of the philosophical elites, such as Ronald Dworkin, present themselves as "having thought harder than the Pope about Catholic theology." *Id.* at 610.

287. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 687-94 (O'Connor, J., concurring). In particular, Justice O'Connor concentrates on whether a challenged government practice contributes to political divisiveness, but concludes that the Supreme Court has "never relied on divisiveness as an independent ground for holding a government practice unconstitutional," but then goes on to assert that "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." *Id.* at 689. Ultimately, Justice O'Connor asserts, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community." *Id.* at 692.

288. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 669 (1970); *see also* Locke v. Davey, 540 U.S. 712, 725 (2004) ("If any room exists between the two Religion Clauses, it must be here.").

289. *See* Chess v. Widmar, 480 F. Supp. 907, 918 (W.D. Mo. 1979), *remanded*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub. nom.* Widmar v. Vincent, 454 U.S. 263 (1981).

290. *Locke*, 540 U.S. at 730 (Scalia, J., dissenting).

ideas have all become part of America's uncertain constitutional lexicon, the invocation of such concepts leads inescapably to judgment concerning the relative merits of competing ideas as well as the relative worth of human subjects.[291]

Chantal Delsol provides this gloomy account of one postmodern-cosmopolitan worldview that may place at risk those who hold contrasting views:

> Simultaneously with the rejection of any idea of the objective good, a discourse of the *obligatory* good has developed. . . . We feel that we must share. Similarly, we are under an obligation to protect the earth. No one can defend the destruction of the environment or manifest his indifference to such destruction. . . . The mandatory discourse about objective good . . . seeks its justifications in vain, for why must we show solidarity with our contemporaries, or even, according to the environmentalist discourse, with future generations.[292]

However incoherent this postmodern discourse may appear, if this view is mandated in public schools because it is deemed essential to the survival of liberal society, religious students who hold opposing views may be required to accept this view or risk rejection and vilification.

Progress as an ambition may supply a nimble and adaptable justification that complements such developments. Concepts such as inclusion or conciliation carry with them the presumption that such inventions are necessary for progress, or necessary to preclude actors with suspect motives from disrupting America's social consensus. These arguments may commence, as Robert Nagel shows, with the best of intentions—"the desire to improve the world. But as the political scientist Rogers Smith and others have pointed out, in order to mandate progress in the name of law, especially in the name of constitutional law, it [may be] necessary to deceive."[293] Although "legal thinking and legal argumentation are not always or necessarily dishonest,"[294] it is difficult to take seriously the Supreme Court's confident claim that "[t]he law knows no heresy, and is committed to the support of no dogma."[295] Conversely, when religious liberty claims are decided on grounds of one version of liberal rhetoric—wherein conciliation acts as a unifying ideal—courts attempt regularly to

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291. In assessing human subjects, it is possible that the terms of any debate concerning religious liberty are set, as philosopher Daniel Dennett clarifies by the "Brights" (including the courts), while concurrently diminishing the worth of the "Dims" (the others). On this point, see Crouch, *supra* note 1, at 46 (interviewing Robert George).

292. CHANTAL DELSOL, ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD 54 (Robin Dick trans., 2003).

293. Nagel, *supra* note 249, at 611.

294. *Id.* at 606.

295. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871).

limit the reach of religion, premised on the conclusion that the government must be neutral among competing moral and theological visions while simultaneously and unfairly demanding that religion should be confined to private life.[296] Although not all lower courts or public officials accept Supreme Court precedent as a rule that commands obedience,[297] it is true that if one accepts "the 'settlement function' of law,"[298] then officials as a general matter "must obey the Constitution as it has been interpreted by the Supreme Court, even when they disagree with the Court's interpretation."[299] As such, most public officials must accept as binding or persuasive authority, the notion of conciliation as a national goal.

Whether or not the rule of obedience to the Supreme Court "promote[s] social stability and enable[s] individuals to coordinate their actions in mutually beneficial ways,"[300] it is clear those words such as "inclusion," "tolerance," and "conciliation," however progressive such words may be, are characterized by elasticity. Since such words and phrases have become part of the vocabulary of American jurisprudence, school officials have become understandably confused about what constitutes appropriate moral and legal norms, particularly when the dispute implicates the Free Exercise or Establishment Clauses of the Constitution.[301] Although constitutional concepts when applied to specific public school regulations by well-socialized school officials are likely to produce confu-

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296. *See, e.g.*, Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*, *in* ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY, *supra* note 262, at 74, 74-92 (assessing liberal theory); *see also* PEARCEY, *supra* note 147, at 99 (discussing dualism and how it "became secularized, producing the modern dichotomies between public and private, fact and value").

297. *See generally* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (reversing, for the second time, the Second Circuit on the same issue (a weakly distinguishable exclusion from school), despite the fact that the Supreme Court had reversed the Second Circuit in an earlier case, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993)). *See* ANN COULTER, GODLESS: THE CHURCH OF LIBERALISM 11-12 (2006).

298. *See, e.g.*, Emily Sherwin, *Ducking* Dred Scott*: A Response to Alexander and Schauer*, 15 CONST. COMMENT. 65, 65 (1998).

299. *Id.*

300. *Id.* (describing Alexander's and Schauer's claims).

301. Confusion is no doubt enhanced by the failure of the courts to distinguish clearly whether they are considering Free Exercise Clause or Establishment Clause issues. *See* Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 608 n.18 (1987). Disputed points include the contention that secularism is the religion that public schools tend to promote in violation of the Establishment Clause. *Id.* at 608. Another point of contention involves the claim that the law, lawyers, and judges have been given over to secularistic ideology. *Id.* at 607; *see also* Torcaso v. Watkins, 376 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.").

sion,[302] given judicial precedents and the transaction costs imbalance that favors public schools as opposed to individual dissenters, confusion can be made more manageable by assiduously evaluating the worth of certain words even at the costs of producing shame or scorn, even though admissions of animosity toward religious practice remain rare.

The ongoing conflict between secularism and religion provides an illustration. One observer states that "the law in our system of government is peculiarly disqualified to adjudge the relative merits of [the debate concerning] Secularism and 'traditional' religions."[303] Indeed, case law exists stating "that public schools 'may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion.'"[304] Reliably with this approach, it is unlikely that religious expression will face explicit hostility—at least immediately. Doubtlessly, whatever regulatory regime contemporary American courts and officials adopt, will likely be explained in benign terms. While the original purpose of a challenged rule or regulation in many cases may be benign,[305] it is possible that "those singled out for disfavor can be forgiven for suspecting more invidious forces at work."[306] Thus, the singling out of kindergartners because of their expression of detestable views should not be surprising in light of the escalating political role of courts in settling disputes through the invocation of values, which find scant support within either the text or presumed penumbras emanating from the Constitution. The *Baldwinsville* case provides a propitious opportunity to renew America's ongoing conversation about the intersection of religious preferences, freedom of expression, and the persistent efforts of public school officials to preclude First Amendment issues from disrupting the educational hierarchy's modest pedagogical achievements.[307] As applied, this effort may be seen as a denial of equal treatment and may amount to the elision of "benevolent motives shade[d] into indifference and ultimately into repression."[308]

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302. One source of confusion arises because the concept of "[t]he separation of church and state remains" even though its justification may remain insecure in light of "the demise of liberal rationalism." OWEN, *supra* note 148, at 1.

303. Mitchell, *supra* note 301, at 605-06 (emphasis omitted).

304. *Id.* at 608 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 225 (1963)).

305. *See, e.g.*, Locke v. Davey, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting).

306. *Id.*

307. *See generally* JAY P. GREENE WITH GREG FORSTER & MARCUS A. WINTERS, EDUCATION MYTHS: WHAT SPECIAL INTEREST GROUPS WANT YOU TO BELIEVE ABOUT OUR SCHOOLS—AND WHY IT ISN'T SO 95-96 (2005) (describing the evidence showing that far fewer students graduate from high school than many in the public believe); *see also* Adam Meyerson, *Foreword* to SAMUEL CASEY CARTER, NO EXCUSES: LESSONS FROM 21 HIGH-PERFORMING, HIGH-POVERTY SCHOOLS 1, 1 (2000) ("Fifty-eight percent of low-income 4th graders cannot read, and 61 percent of low-income 8th graders cannot do basic math.").

308. *Locke*, 540 U.S. at 734 (Scalia, J., dissenting).

In the gathering gloom, one observer notes that "liberal principles of religious freedom and disestablishment and the presuppositions underlying those principles are not self-evident, but in need of explanation."[309] Equally true, "[r]eligious freedom is politically limited."[310] Liberal principles including the values of conciliation and inclusion "require investigation and justification, even if we are predisposed to accept them as just."[311] Insofar as kindergarteners and their parents "take the justice of liberal institutions for granted, [they] merely conform out of habituation."[312] Although it is possible that inclusion and conciliation are consistent with liberalism's assertion that "sectarianism is none of its concern," this claim requires that liberal institutions must appear to keep their hands off.[313] In separating uniquely religious concerns from political ones, liberalism must appear religiously neutral—but "[t]he appearance of neutrality serves a nonneutral . . . political end."[314] The question becomes whether such service is consistent with the Constitution or simply judicial preferences that lead ultimately to neutrality against religion? On one account, "Americans tend to think that any problem can be solved and that progress is always possible. When these happy assumptions collide with facts, the temptation is great to reform the world by reforming language."[315] If the proper answer to the pending question is simply judicial preferences, then creative argumentation may operate as a cover that allows the courts to do politics while ascribing inferior motives to disfavored individuals, groups, and proponents of disfavored political positions. This approach sets the stage for public school officials to interpret the "law" in ways that favor the State's creation of meaning while protecting public schools from those kindergartners and others who are "perceived to be fanatical, intolerant, or prejudiced."[316]

By imposing its ambition—conciliation as an idealized construct—a putatively liberal society demonstrates that contemporary "[l]iberalism is . . . deeply paradoxical at its core."[317] As Larry Alexander shows, "the freedoms that are emblematic of liberalism—the freedoms of expression, religion, and association—all appear to require a governmental stance of evaluative neutrality."[318] Thus, freedom of expression and freedom of religion reserved only for people with whom the government agrees is

309. OWEN, *supra* note 148, at 166.
310. *Id.* (emphasis omitted).
311. *Id.*
312. *Id.*
313. *Id.* at 168.
314. *Id.* at 169.
315. Nagel, *supra* note 249, at 615.
316. *Id.*
317. ALEXANDER, *supra* note 24, at 148.
318. *Id.*

neither freedom of expression nor freedom of religion.[319] To take this claim seriously is "to recognize limitations in the liberal order, even radical limitations."[320] This "need not mean that liberalism should be condemned or rejected in the absence of a superior alternative,"[321] but assuming "the practical superiority of liberalism in our circumstances should not induce us to ignore possible flaws in the liberal order's foundations," purposes, and procedures.[322]

IV. CONCLUSION

John Rawls articulates a perspective of public reason that

> "excludes the religious by drawing the boundaries of public reason so that comprehensive religious doctrines fall outside them for the most part" or that the bifurcation of public and private reason marginalizes those "for whom it is a matter of religious conviction that they ought to strive for a religiously integrated existence."[323]

The Rawlsian approach, if accepted as normative, lends itself to a kind of stasis that frees the domain of expression from discomforting heterogeneity. Instead, the public square, premised on the postmodern celebration of difference and diversity, is characterized correctly by a compulsory convergence of views on important as opposed to trivial issues. Although "[t]he histories of liberal political thought and revealed religion have been inextricably intertwined since the birth of liberalism,"[324] liberalism confronts an unavoidable problem: if our "'constitutional faith'" and our liberal principles have become our "'civil religion,'" "the liberal state cannot adjudicate rationally or impartially among the various faiths, as it claims to do, if it itself rests on one of the competing faiths."[325] Today, it is possible to conclude that "the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights,"[326] so that "[l]iberty finds no refuge in a jurisprudence of doubt,"[327] except when religious liberty threatens a court-mandated compromise deemed necessary for the survival of "liberal" society. This presents a paradox for advocates of compromise, conciliation, and tolerance because "a campaign

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319. *Id.*
320. OWEN, *supra* note 148, at 166.
321. *Id.*
322. *Id.*
323. Joseph M. Knippenberg, *Liberalism and Religion: The Case of Kant*, 30 POL. SCI. REVIEWER 58 (2001) (citations omitted).
324. *Id.*
325. OWEN, *supra* note 148, at 2. It is not obvious that Owen fully accepts the claim that liberalism rests on faith. *See generally id.* at 2-14.
326. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992).
327. *Id.* at 844.

on [civil religion's] behalf is an act of intolerance, an act likely to provoke resistance and to multiply divisions among [and also within] the different groups."[328]

In the past, of course, religious expression and religious groups could take refuge in Supreme Court rulings that provided a protective umbrella for putatively illiberal religions. This traditional view of liberalism as neutrality is now under review. Today, the exclusion of religious views in public school may be seen as justifiable and necessary in order to spur the kind of human flourishing that exalts the individual self, human singularity, and the necessity of human choice as society prepares for the advent of the Age of Cosmopolitanism. Choice as the prolepsis—the present anticipation—of the cosmopolitan era fails to capture everyone. Christianity, for example, unlike liberalism, does not provide a vision of life simply as a choice. Stephen Carter provides this account: "One does not *decide* to be a Christian. One is *called* to be a Christian."[329] If this account is true, religious parents may respond to society's encroachment on their worldview by asserting that a state which freezes out their aspirations, religious expression and beliefs, and then demands that they send their children to public schools that reify shame production "has no serious claim on [their] allegiance."[330] Predictably, the State will respond by engaging in a political and juridical calculus that wrest "children from the grasp of the religion of the parents, thus denying the putatively illiberal religion the opportunity to extend itself into the future."[331]

Courts and public officials as purveyors of "elite [cultural] values"[332] can enforce society's embrace of liberalism by mandating the deployment of postmodern language. "Ending division," "finding consensus," "finding compromise," and "no endorsement" are all part of the pantheon of phrases which are accessible to courts that are engaged in an unswerving search for conciliation. Doing politics means putting those we wish to exclude beyond the protection of the State by diminishing their worth as humans and incapacitating their "divisive" expression, which presumably poses a threat to the separation we crave. A society committed to the magisterium of the liberal vision will find all that is needed to accomplish this maneuver is to reform words.[333]

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328. MICHAEL WALZER, ON TOLERATION 79 (1997).

329. Carter, *supra* note 43, at 48.

330. *Id.* at 53. Understood this way, society's central culture (bureaucratic or liberal individualism) aims to marginalize those groups and individuals who affirm the tradition of virtues. *See* MACINTYRE, *supra* note 266, at 223-24.

331. Carter, *supra* note 43, at 50.

332. Lund & McGinnis, *supra* note 17, at 1589 (discussing this concept of constitutional adjudication).

333. Nagel, *supra* note 249, at 615.