

RELIGION, NEUTRALITY, AND THE PUBLIC SCHOOL CURRICULUM: EQUAL TREATMENT OR SEPARATION?

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INTRODUCTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof¹

What are the interpretive principles behind the Religion Clauses of the First Amendment? The United States Supreme Court has traditionally used the term “neutrality” as the decisive standard for the Government’s position toward religion.² But as some scholars have suggested, one searches in vain for a clear definition of the term from the Court.³ In fact, the term neutrality has taken on a few different meanings over the years.⁴ For the purposes of this article, two such definitions will be explored.⁵ One view proposes a kind of separation of church and state, where the neutral position is effectively aligned with the secular or non-religious position. The idea here is to keep public institutions, like our nation’s public schools, as secular as possible by restricting their government benefits and denying such benefits to any comparable religious institution. The other

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¹ U.S. CONST. amend. I.

² See John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 84 (1986).

³ It must be acknowledged at the outset that Professor Thomas C. Berg largely influenced the choice of the relevant case law and its basic organization around principles of neutrality. For his enormously comprehensive lectures and texts I am forever grateful

⁴ See *Mitchell v. Helms*, 530 U.S. 793, 878–84 (1999) (Souter, J., dissenting).

⁵ Another view, sometimes called ‘substantive neutrality,’ seeks to avoid, whenever possible, the creation of choice incentives for or against religion. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–06 (1990); see also *infra* note 126.

view proposes equal treatment for all institutions where the neutral position is one that does not discriminate on the basis of religious denomination or even non-religion. This position tries to make sure that government benefits are distributed equally regardless of the institution's religious or secular nature.

Within the context of education, the Court remains divided on the meaning of neutrality.⁶ With respect to government aid to religious schools, separation seems to have given way to equal treatment.⁷ However, when the issue involves the public school curriculum, the Court has held fast to the former view, requiring that our nation's public schools remain strictly secular.⁸

Some proponents of religion in the public school curriculum, like Charles C. Haynes and Warren A. Nord, have advocated that equal treatment neutrality should be extended to the public school curriculum.⁹ Haynes and Nord argue, "that if schools are to be truly neutral they must be truly *fair*—and this means including in the curriculum religious as well as secular ways of making sense of the world when we disagree."¹⁰ The authors argue that the traditional constitutional and controversial concerns for excluding religion from the curriculum can be laid to rest if religion is presented in an 'objective' manner, usually within some historical context.¹¹ Their proposal is not entirely new, as the Court itself acknowledged in *McCullum v. Board of Education*¹² over half a century ago.

The "objective" presentation of religion hinted at by the Court and advocated by Haynes and Nord, however, does have its problems. Offering a particular religious doctrine objectively, as it turns out, requires that it be presented without any

⁶ See Joseph P. Viteritti, *Reading Zelman: The Triumph of Pluralism, and its Effects on Liberty, Equality, and Choice*, 76 S. CAL. L. REV. 1105, 1123–42 (2003).

⁷ See *Zelman v. Simmons-Harris*, 536 U.S. 639, 653–54 (2002) (upholding a State voucher program where government aid was distributed equally and whose recipients, by their own choice, directed such aid toward religious schools); see also discussion *infra* § III. But see *infra* note 126 for another possible justification based on a third notion of neutrality.

⁸ See discussion *infra* Part III.

⁹ See Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1186–88 (2002).

¹⁰ CHARLES C. HAYNES & WARREN A. NORD, TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM 8 (1998) [hereinafter TAKING RELIGION SERIOUSLY].

¹¹ See discussion *infra* Part IV.

¹² 333 U.S. 203, 236 (1948); see discussion *infra* pp. 25–27.

reference to truth. But truth is arguably the most fundamental element of almost all religions, especially Christianity,¹³ by which our nation's founding and subsequent culture has been largely influenced. A religion that is presented without any reference to a claim of truth effectively dilutes it into an undignified form. From the point of view of religion, then, an objective implementation into the public school curriculum may not be the best course of action.

My suggestion is that while the Court's separatist position toward religion in the public school curriculum may seem anomalous and outmoded in light of its most recent decisions, it may be the most prudent position to take. The basic structure of my argument is as follows: Parts I and II begin with a general survey of the Court's understanding of neutrality towards religion—both as separation and equal treatment—in the educational context. Part III then explores neutrality within the particular context of the public school curriculum. Part IV presents the Haynes/Nord proposal for integrating religion into the curriculum. Finally, part V discusses the potential damage to religion caused by such a proposal.

I. SEPARATION

We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

-James Madison¹⁴

One way of understanding neutrality toward religion in public schools is found in the famous Bible-reading case of *Abington School District v. Schempp*.¹⁵ In *Schempp*, the Court struck down a Pennsylvania law requiring at least ten verses of

¹³ For an example of the importance of truth in the context of Christianity, see *John* 14:6 ("I am the way, and the truth and the life."); and 1 *Corinthians* 15:16–19 ("For if the dead are not raised, then Christ has not been raised. If Christ has not been raised, your faith is futile, and you are still in your sins. Then those who also have died in Christ have perished. If for this life only we have hoped in Christ, we are of all people most to be pitied.").

¹⁴ MEMORIAL AND REMONSTRANCE, in THE COMPLETE MADISON: HIS BASIC WRITINGS ¶ 1, at 302 (Saul K. Padover ed., 1953) [hereinafter MEMORIAL AND REMONSTRANCE].

¹⁵ 374 U.S. 203 (1963).

the Bible to be read at the beginning of each school day, despite a provision permitting students to be excused from the readings.¹⁶ The Court followed its earlier decision in *Engel v. Vitale*,¹⁷ by holding that such official prayers and activities are unconstitutional in the public schools regardless of any denominationally neutral wording, and regardless of whether such prayers are pronounced in a coercive manner.¹⁸ Instead, the Court established a standard of neutrality forbidding any law, the “purpose and a primary effect” of which amounts to “the advancement or inhibition of religion.”¹⁹ Applying the standard, the Court determined that the required Bible reading had the effect of advancing religion.²⁰ This holding also suggested that the elimination of the practice would not have an inhibiting effect on religion.²¹ Neutrality in this sense, then, seems to suggest that silence on matters of religion might be the best policy.²² For how better could a public school ensure practices “neither aiding nor opposing religion”?²³

One has to be honest enough, however, to ask further whether such a policy is really silent with respect to religion.²⁴ Indeed, Justice Stewart raised this very question in his dissent.²⁵ A student’s daily public school experience is so comprehensive, he answered, that an absolute and mandated absence of religion would effectively send the opposite message:²⁶

[I]f religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization

¹⁶ *Id.* at 223.

¹⁷ 370 U.S. 421 (1962) (holding unconstitutional a New York statute prescribing a non-denominational school prayer as a violation of the Establishment Clause).

¹⁸ *Schempp*, 374 U.S. at 220–22.

¹⁹ *Id.* at 222. “Neutrality” is also used here in the sense that religious exercises are to be “freely chosen” without any kind of governmental influence. *See infra* note 126.

²⁰ *Schempp*, 374 U.S. at 223–24.

²¹ *Id.* at 225.

²² *Id.* at 222 (avoiding “the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies”).

²³ *Id.* at 225.

²⁴ For full treatment of the question, see *infra* Part II.

²⁵ *Schempp*, 374 U.S. at 313 (Stewart, J., dissenting).

²⁶ *Id.*

of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.²⁷

From this point of view, then, the position taken by the majority in *Schempp* is only neutral on its surface. That is, insofar as it takes a hands-off approach with respect to religion, *Schempp* only appears to be neutral. Saying nothing (or more properly, mandating that nothing be said) about a particular topic can have the implied effect of saying something negative about the same topic; a kind of passive inhibition.²⁸ At the least, *Schempp* seems to establish non-religion as the standard for the neutral treatment of religion.²⁹ Since the non-religious position is the same as the secular position, *Schempp* effectively established the secular as the neutral, invoking earlier separatist precedent.³⁰

²⁷ *Id.*

²⁸ Consider, for example, the statement from Haynes and Nord:

Traditional textbooks . . . that ignored the role of blacks or women in history and literature were neither neutral nor objective, but as we now recognize, deeply prejudiced. Similarly, to ignore religious voices is not neutral; rather, it marginalizes those voices, conveying implicitly their irrelevance to the search for the truth.

TAKING RELIGION SERIOUSLY, *supra* note 10, at 47.

²⁹ It is important to note, however, that the majority in *Schempp* conceded that “the State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’” *Schempp*, 374 U.S. at 225. For a discussion of whether or not that directive was or has been followed in the context of the public school curriculum see *infra* Part IV.

³⁰ *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (following Thomas Jefferson, “the clause against establishment of religion by law was intended to erect ‘a wall of separation between church and State.’”). This position, as we shall see, is not foreign to the modern Court. Indeed, Justice Rehnquist observed in his dissent in *Meek v. Pittenger*, 421 U.S. 349 (1975), that:

The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one.

Id. at 396 (Rehnquist, J., dissenting).

See *infra* pp. 9–11 for an additional discussion on the *Meek* case. Or take Justice Stevens’ concurrence in *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994), which struck down as an “impermissible establishment” a New York statute that carved out a separate school district accommodating Hasidic school children. Justice Stevens sharply criticized the NY statute as “increas[ing] the likelihood that [the Hasidic children] would remain within the fold, faithful adherents of their parents’ religious

The *Schempp* test of neither advancing nor inhibiting religion was eventually differentiated and made explicit in *Lemon v. Kurtzman*,³¹ which set forth a three-prong test for Establishment Clause violations.³² In *Lemon*, the Court struck down both a Rhode Island statute allowing for state-issued salary supplements to private school teachers of secular subjects, and a Pennsylvania statute allowing private schools to be reimbursed by the State for the cost of secular learning materials.³³ The Court rejected both statutes as failing the third prong of its test concluding, “that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.”³⁴

While the *Lemon* ruling was explicit about the impossibility of “separation . . . in an absolute sense,” its concern to keep the spheres clear of one-another is fairly apparent.³⁵ For one, the majority found it pertinent to point out, with respect to the Pennsylvania statute, that not only were ninety-six percent of the State’s non-public schools religious in nature, but that many of these schools were “affiliated with the *Roman Catholic* church.”³⁶ Perhaps the reason for pointing out this seemingly innocuous fact can be found in the analysis of the Rhode Island statute; the concern there, however, was just as questionable.³⁷ The fact that religious authority tends to pervade Rhode Island’s Catholic school system may not be overly tenuous when one considers that a particular teacher’s lesson in a secular subject might also “constitute instruction in religion.”³⁸ But there are at least two passages where such motivations may not have been altogether proper.³⁹

faith” and “provid[ing] official support to cement the attachment of young adherents to a particular faith.” *Id.* at 711. As if wrenching school-age children from their faith is a bona-fide state interest!

³¹ 403 U.S. 602 (1971).

³² *Id.* at 612–13 (requiring that a particular law (1) have a secular purpose; (2) have a primary effect which “neither advances nor inhibits religion;” and (3) does not lead to excessive entanglement between government and religion).

³³ *Id.* at 615.

³⁴ *Id.* at 614.

³⁵ *Id.* at 614.

³⁶ *Id.* at 608 (emphasis added).

³⁷ *Id.* at 617.

³⁸ *Id.* at 619.

³⁹ Some of Justice Burger’s remarks seem to point to the basic anti-Catholic

Speculations of anti-Catholicism aside, “[t]he Constitution,” according to *Lemon*, “decrees that religion must be a private matter for the individual, the family, and the institutions of private choice”⁴⁰ This dictates that the Government must, as much as possible, keep its hands free of any kind of religious educational enterprise despite the secular nature of the subject matter being taught.⁴¹ Again, the only way to truly ensure religious neutrality within the educational is to require that schools remain utterly secular.⁴²

The fact that *Schempp* and *Lemon* set the precedent for equating neutrality with the secular perhaps becomes clearer when considering the decisions that followed. For roughly fifteen years, the *Lemon* test was *the* standard by which the Court decided Establishment issues.⁴³ In particular, government interaction with schools did not fair well during this period. For example, in *Committee for Public Education & Religious Liberty v. Nyquist*,⁴⁴ the Court struck down three New York programs

concern that Catholic school students are not *educated*, but *indoctrinated* into an un-patriotic disposition or even non-traditional lifestyles. For example, consider the following statements expressing concern over the potential for religious vocations:

[The nuns’] dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. . . . [T]he role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

Id. at 615–16.

“[The official school regulations], advis[e] teachers to stimulate interest in religious vocations and missionary work.” *Id.* at 618. Additionally, Justice Douglas in his concurrence made reference to Loraine Boettner’s *Roman Catholicism*, one of the more widely known pieces of Protestant apologetics, which some have even dubbed “the Bible of the anti-Catholic movement.” *Id.* at 635, n.20; see generally LORRAINE BOETTNER, *ROMAN CATHOLICISM* (1962); Catholic community Library’s definition of “The Anti-Catholicism Bible” (stating that this book is known as the “Bible of the anti-Catholic movement”), available at http://www.catholic.com/library/The_Anti_Catholic_Bible.asp (last visited Mar. 22, 2004). For a full treatment of the Anti-Catholicism issue in *Lemon* and in general, see Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 *LOY. U. CHI. L.J.* 121 (2001).

⁴⁰ *Lemon*, 403 U.S. at 625.

⁴¹ This raises perhaps a legitimate question about whether a religious adherent can really be neutral in the classroom; or the further question of whether the adherent *ought* to remain neutral. See discussion *infra* Part V.

⁴² *Lemon*, 403 U.S. at 618–19 (expressing serious concerns about the unconscious influence of teachers or institutions that are religious).

⁴³ MICHAEL W. MCCONNELL ET AL., *RELIGION AND THE CONSTITUTION* 483–503 (2002).

⁴⁴ 413 U.S. 756 (1973).

implemented in support of the State's non-public schools.⁴⁵ The first program allowed for direct maintenance grants to schools for the upkeep of "facilities and equipment."⁴⁶ The second program provided fifty to one hundred dollars per-child tuition grants for nonpublic school families with incomes below five thousand dollars.⁴⁷ The third program made available a per-child tuition tax credit for non-public school families whose incomes fell between five thousand and twenty five thousand dollars.⁴⁸

All three programs were struck down on the basis of the "effects" prong of the *Lemon* test.⁴⁹ The maintenance grants were invalidated because such funds could possibly be put toward the maintenance of "the school chapel" or "classrooms in which religion is taught," thereby having the potential effect of advancing religion.⁵⁰ The tuition grants and tax credits were invalidated because of a similar lack of guarantee that such funds would be put toward "secular, neutral, and nonideological purposes."⁵¹ In plain language, *Nyquist* equates the neutral with the secular.

Several other decisions followed suit, citing this language from *Nyquist*. In *Levitt v. Committee for Public Education & Religious Liberty*,⁵² the Court struck down a New York law that reimbursed its non-public schools for costs relating to "testing and recordkeeping."⁵³ The Court argued that since testing is "an integral part of the teaching process," there was no way to ensure that such funds were not used for exams involving religious instruction.⁵⁴

In *Meek v. Pittenger*,⁵⁵ the Court struck down a Pennsylvania law providing its non-public schools with auxiliary services (including counseling, testing, psychological services, speech and hearing therapy, and similar services for special-

⁴⁵ *Id.* at 797–98.

⁴⁶ *Id.* at 762.

⁴⁷ *Id.* at 764.

⁴⁸ *Id.* at 765–66.

⁴⁹ *Id.* at 769.

⁵⁰ *Id.* at 774.

⁵¹ *Id.* at 780.

⁵² 413 U.S. 472, 474 (1973).

⁵³ *Id.* at 474, 482.

⁵⁴ *Id.* at 481.

⁵⁵ 421 U.S. 349 (1975).

needs students), instructional materials (including periodicals, photographs, maps and charts, etc.), and equipment (including projectors, recorders, and laboratory instruments).⁵⁶ The fact that some seventy-five percent of the State's non-public schools are religious in nature,⁵⁷ argued the Court, "compels the conclusion that [the Pennsylvania statute] violates the constitutional prohibition against laws 'respecting an establishment of religion.'"⁵⁸ Ensuring that school officials see to the prevention of such advancement, the Court concluded, would involve excessive entanglement.⁵⁹

In *Wolman v. Walter*,⁶⁰ the Court again rejected state funding (this time in Ohio) of non-public schools for instructional materials, but extended its prior restrictions to include transportation funds for school-sponsored field trips.⁶¹ The Court argued that the requisite monitoring to ensure that there would be no advancement would, like in *Meek*, cause excessive entanglement.⁶² Two additional cases, *School District of Grand Rapids v. Ball*⁶³ and *Aguilar v. Felton*⁶⁴ round out this separatist period where neutrality is equated with the secular.

II. EQUAL TREATMENT

For if liberty and equality, as is thought by some, are chiefly to be found in democracy, they will be best attained when all persons alike share in the government to the utmost.

-Aristotle⁶⁵

A second way of understanding neutrality towards religion has generally taken hold in the last ten to fifteen years—

⁵⁶ *Id.* at 352–55.

⁵⁷ *Id.* at 364.

⁵⁸ *Id.* at 372.

⁵⁹ *Id.* at 370.

⁶⁰ 433 U.S. 229 (1977).

⁶¹ *Id.* at 233, 255.

⁶² *Id.* at 254.

⁶³ 473 U.S. 373 (1985) (invalidating a supplemental community education program because its classes were held on parochial school grounds).

⁶⁴ 473 U.S. 402 (1985) (going even further than *Ball* by striking down a similar, yet federally funded program, even though the program provided monitoring restrictions to see that religion was not taught).

⁶⁵ ARISTOTLE, *POLITICS* Bk. IV, 1291a (Benjamin Jowett trans., 1943).

especially in the school aid context.⁶⁶ Here, the term “neutrality” itself may be most appropriately designated.⁶⁷ Similar to the goals of the former version, the basic motivation behind this version of neutrality was to eliminate the discrimination of one religious view over another in order to protect minority religious viewpoints.⁶⁸ The meaning has been expanded, however, to encompass discrimination between religion and non-religion since the secular, as the Court has suggested, can sometimes be hostile to religion.⁶⁹

Three kinds of cases have taken on this new understanding of neutrality. The first set of cases—the cases from which this view emerged—has to do with the granting of certain tax benefits to religious organizations. In *Walz v. Tax Commission of New York*,⁷⁰ the Court upheld a New York statute exempting certain organizations, including those whose activities were strictly religious in nature, from property taxes.⁷¹ The majority did so on the grounds that “[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.”⁷² The Court approved of the New York tax scheme, which consisted of an underlying policy tending to benefit “certain

⁶⁶ Michael W. McCONNELL, JOHN H. GARVEY, & THOMAS C. BERG, RELIGION AND THE CONSTITUTION 503 (Aspen Law & Business 2002) (2002).

⁶⁷ See *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 694 (1970) (Harlan, J., dissenting) (“[Neutrality is] short-form for saying that the Government must neither legislate to accord benefits that favor religion over nonreligion, nor sponsor a particular sect . . .”).

⁶⁸ *Grumet*, 512 U.S. at 706–07 (“[W]hatever the limits of permissible legislative accommodations may be . . . it is clear that neutrality as among religions must be honored.”).

⁶⁹ See *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995) (O'Connor, J., concurring) (“Th[e] insistence on government neutrality toward religion explains why we have held that schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all Withholding access would leave an impermissible perception that religious activities are disfavored”); *Edwards v. Aguillard*, 482 U.S. 578, 616 (1987) (Scalia, J., dissenting) (“[W]e have consistently described the Establishment Clause as forbidding not only state action motivated by the desire to advance religion, but also that intended to ‘disapprove,’ ‘inhibit,’ or evince ‘hostility’ toward religion”); *Walz*, 397 U.S. at 673 (1970) (“Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms”); see also *Bd. of Educ. v. Mergens*, 496 U.S. 226, 249–250, *infra* note 97.

⁷⁰ 397 U.S. 664 (1970).

⁷¹ *Id.* at 680.

⁷² *Id.* at 672.

entities that exist in a harmonious relationship to the community at large,” and which refrained from singling out any group within a class that “include[s] hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups.”⁷³ Under *Walz*, then, the concept of neutrality shifts insofar as both religious and secular organizations, because of their potential benefits to the community, are treated equally with respect to property taxes.

The case that really set forth the equal treatment trend in recent years, however, is *Mueller v. Allen*.⁷⁴ In *Mueller*, parents of parochial school children, under Minnesota law, claimed a state income tax deduction for educational expenses.⁷⁵ The Court upheld the deduction against state taxpayers’ Establishment arguments on the grounds that this particular tax break was simply one among many deductions under the state’s tax laws, equally available to all parents.⁷⁶ The Court paid lip-service to *Lemon* by applying its test, but held that all three prongs had been satisfied since: 1) the deduction was instituted towards the state’s interest in the education of all its citizens (a secular purpose);⁷⁷ 2) the deduction, like all other deductions, was equally available to all parents (no advancing or inhibiting effect);⁷⁸ and 3) the requirement that state officials monitor the nature of the textbooks for religious content was fairly benign (no entanglement).⁷⁹

The language of *Mueller* emphasizes neutrality as equal treatment:

[The Minnesota statute] permits *all* parents—whether their children attend public school or private—to deduct their children’s educational expenses [A] program . . . that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.⁸⁰

The holding in *Mueller*, therefore, effectively adjusted *Lemon*’s definition of neutrality, where *any* kind of government benefit to

⁷³ *Id.* at 672–73.

⁷⁴ 463 U.S. 388 (1983).

⁷⁵ *Id.* at 390.

⁷⁶ *Id.* at 397.

⁷⁷ *Id.* at 395.

⁷⁸ *Id.* at 396–97.

⁷⁹ *Id.* at 403.

⁸⁰ *Id.* at 398–99.

religious organizations advanced religion, to a new definition where government benefits only advance religion if more is given to the religious organization than other organizations.

A second set of cases establishing neutrality in this new sense deals with granting religious groups access to government property.⁸¹ In *Widmar v. Vincent*,⁸² the University of Missouri forbade a registered student religious group from meeting on campus for prayer and discussion.⁸³ The University's policy of denying use of its facilities "for purposes of religious worship or religious teaching,"⁸⁴ was an effort to ensure, *inter alia*, its compliance with the Establishment Clause.⁸⁵ Since approximately one hundred other registered student groups were given access to the University's facilities,⁸⁶ and since the presence of religiously natured groups was not dominating, the Court argued that no threat of advancement existed.⁸⁷ "It does not follow," the majority pointed out, "that an 'equal access' policy would be incompatible with this Court's Establishment Clause cases."⁸⁸ For while "[i]t is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities . . . , [t]his Court has explained that a religious organization's enjoyment of merely 'incidental' benefits

⁸¹ In addition to the cases discussed *infra*, see also *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 393–95 (1993) (allowing evening use of public school classrooms for a religious group to show films on family and child rearing because such use was extended to other community groups and the films fit the social and civic purposes of the law).

⁸² 454 U.S. 263 (1981).

⁸³ *Id.* at 265.

⁸⁴ *Id.* at 265 n.3.

⁸⁵ *Id.* at 270–71. While the Establishment issue is most relevant for the purposes of this paper, it is important to note that *Widmar* also addressed a free speech issue. *Id.* at 269–70. With respect to free speech, the Court applied strict scrutiny since the University's restrictions were based on the subject matter or content (in this case religion). *Id.* The University argued that it had a compelling government interest in ensuring that government and religion remain separate. *Id.* at 270. The Court rejected this argument as insufficient, holding that "[W]e are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." *Id.* at 273. Merely permitting religious speech on the part of private individuals, the Court argued, does not constitute government sponsorship. *See id.* at 271 (discussing that a party will not violate the Establishment Clause if it institute satisfies the three-prong test established by the court).

⁸⁶ *Id.* at 274.

⁸⁷ *Id.* at 275.

⁸⁸ *Id.* at 271.

does not violate the prohibition against the ‘primary advancement’ of religion.”⁸⁹ Again *Widmar*, like the tax benefit cases, understood neutrality with respect to religion primarily as equal treatment.

Following the Court’s ruling in *Widmar*, Congress, by enacting the Equal Access Act,⁹⁰ extended students’ religious assembly rights to public high school students, so long as other groups are given the same opportunity.⁹¹ The statute required that such religiously natured extra-curricular groups must be “voluntary,”⁹² “student-initiated,”⁹³ and “student-direct[ed].”⁹⁴ No school may officially sponsor such groups,⁹⁵ and no school official can actively participate in such a group.⁹⁶ In *Board of Education v. Mergens*,⁹⁷ the Court upheld the Act⁹⁸ reiterating the equal treatment principle:

Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion. Under the Act, a school with a limited open forum may not lawfully deny access to a Jewish students’ club, a Young Democrats club, or a philosophy club devoted to the study of Nietzsche. To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion. Thus, we conclude that the Act does not, at least on its face and as applied to [the high school], have the primary effect of advancing religion.⁹⁹

The equal treatment principle with respect to student group assembly has even been held to apply in the elementary school

⁸⁹ *Id.* at 273.

⁹⁰ 20 U.S.C. § 4071 (2000).

⁹¹ *Id.* at § 4071(a).

⁹² *Id.* at § 4071(c)(1).

⁹³ *Id.*

⁹⁴ *Id.* at § 4071(c)(5).

⁹⁵ *Id.* at § 4071(c)(2).

⁹⁶ *Id.* at § 4071(c)(3).

⁹⁷ 496 U.S. 226 (1990). The Court in *Mergens* also pointed out the potential hostility of exclusion. “Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.” *Id.* at 248.

⁹⁸ *Id.* at 252–53.

⁹⁹ *Id.* at 252.

context. In *Good News Club v. Milford Central Schools*,¹⁰⁰ the Court admitted, “it cannot be said that the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward [religion] if the Club were excluded from the public forum.”¹⁰¹ The kind of neutrality introduced in the tax benefit cases, then, was extended to mean equal access for religious organizations to government property as well.

The final set of cases interpreting neutrality as equal treatment is the one encompassing the school voucher cases. In *Witters v. Washington Department of Services for the Blind*,¹⁰² the Court upheld a Washington statute that funded “visually handicapped persons to overcome vocational handicaps,” even when such funds were used to further one’s ministerial aspirations.¹⁰³ Petitioner Larry Witters, who suffered from a “progressive eye condition,” used the funds to attend a private Bible college “in order to equip himself for a career as a pastor, missionary, or youth director.”¹⁰⁴ The Court rejected the Establishment Clause claim, emphasizing the generally applicable (neutral) nature of the Washington program, which was “in no way skewed towards religion.”¹⁰⁵ The Court argued:

[The program] creates no financial incentive for students to undertake sectarian education. It does not tend to provide greater or broader benefits for recipients who apply their aid to religious education, nor are the full benefits of the program limited, in large part or in whole, to students at sectarian institutions. On the contrary, aid recipients have full opportunity to expend vocational rehabilitation aid on wholly secular education, and as a practical matter have rather greater prospects to do so.¹⁰⁶

In *Zobrest v. Catalina Foothills School District*,¹⁰⁷ the Court followed *Witters* with respect to the constitutionality of a generalized educational program.¹⁰⁸ James Zobrest, a deaf

¹⁰⁰ 533 U.S. 98 (2001).

¹⁰¹ *Id.* at 100.

¹⁰² 474 U.S. 481 (1986).

¹⁰³ *Id.* at 483.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 488.

¹⁰⁶ *Id.* (citation omitted).

¹⁰⁷ 509 U.S. 1 (1993).

¹⁰⁸ *Id.* at 9–10.

Catholic high school student, was denied assistance under the Individuals with Disabilities Education Act (IDEA), which provided sign language interpreters to deaf students in schools.¹⁰⁹ The claim was that such assistance would play an essential role in the religious “inculcation” and “development” of students educated in religious schools.¹¹⁰ Again, the Court emphasized the generally applicable nature of the program in ruling on its neutrality:

The service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as ‘disabled’ under the IDEA When the government offers a neutral service on the premises of a sectarian school as part of a general program . . . it follows under our prior decisions that provision of that service does not offend the Establishment Clause.¹¹¹

In *Rosenberger v. University of Virginia*,¹¹² the Court held that the University of Virginia, a state university, could financially support student religious publications by paying their printing costs as long as it does so for other non-religious publications.¹¹³ *Wide Awake: A Christian Perspective at the University of Virginia*¹¹⁴ was a publication exhorting its publishers as well as other university students to remain true to their Christian faith through a relationship with Jesus Christ.¹¹⁵ The University denied paying *Wide Awake*’s printing costs in order to, *inter alia*, avoid an Establishment Clause violation by supporting a group which “primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.”¹¹⁶ By the time certiorari was granted, the Establishment Clause issue had been substantially assuaged.¹¹⁷ The Court nonetheless addressed it considerably reminding the reader that:

[A] significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion We have held that the guarantee of

¹⁰⁹ *Id.* at 3–4.

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 10.

¹¹² 515 U.S. 819 (1995).

¹¹³ *Id.* at 844.

¹¹⁴ *Id.* at 826.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 823 (alteration in original).

¹¹⁷ *Id.* at 837–38.

neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.¹¹⁸

Picking up the printing costs of such publications as *Wide Awake: A Christian Perspective*,¹¹⁹ argued the Court, could only be “in recognition of the diversity and creativity of student life.”¹²⁰ To remain neutral, then, the publication should have been eligible for the same financial support as any other University publication.¹²¹

Finally, in its most recent decision on these matters, the Court upheld a Cleveland school-voucher program providing tuition and tutorial aid to parents of children in the Cleveland City School District in *Zelman v. Simmons-Harris*.¹²² In an effort to remedy the problems related to some of “the worst performing public schools in the Nation,” Ohio enacted the “Pilot Project Scholarship Program.”¹²³ Under the program, parents could use the state funds either toward the tuition costs of participating private schools or tutorial expenses to supplement their child’s public school experience.¹²⁴ The Court’s neutrality analysis with respect to the emphasis on equal treatment echoed its recent precedent:

[T]he Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district [It] permits the participation of *all* schools within the district, religious or non-religious Program benefits are available to participating families on neutral terms, with no reference to religion.¹²⁵

¹¹⁸ *Id.* at 839.

¹¹⁹ *Id.* at 840.

¹²⁰ *Id.*

¹²¹ Another seemingly important factor in the Court’s neutrality analysis was the indirect nature of the University’s financial support. The money allocated for the printing costs of the various student publications was not given directly to the publication, but to the printer with whom the University had contracted. *Id.* at 843–44. Thus, the Court pointed out that “[b]y paying outside printers, the University in fact attains a further degree of separation from the student publication.” *Id.* at 844.

¹²² 536 U.S. 639, 641 (2002).

¹²³ *Id.* at 644.

¹²⁴ *Id.* at 645–646.

¹²⁵ *Id.* at 653.

And so, even with respect to government aid to religious schools—the very context within the Court’s former understanding of neutrality had reached its high mark—a new principle, establishing equal treatment as the standard, has seemingly become the norm.¹²⁶

III. NEUTRALITY AND THE CURRICULUM

They are poetic and pleasing to the majority of hearers, but the more poetic they are the less they should be heard by children

-Plato¹²⁷

While the equal treatment principle with respect to religion has seemed to prevail in the context of tax benefits,¹²⁸ access to government property, and school aid,¹²⁹ it has not been adopted

¹²⁶ It should also be noted that these cases (Mueller, Witters, Zobrest, and Zelman especially) provide evidence for the third possible understanding of [‘substantive’] neutrality toward religion. See supra note 5 and accompanying text. In Witters and in Zelman, the Court showed an interest in leaving the choice of using government funds for religious schools to the individual parents. The Court in Zelman summarized:

Mueller, Witters and Zobrest thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Zelman, 536 U.S. at 652.

This view is unique in that it requires equal treatment in general, except in cases where a generally applicable law discourages a particular religious practice. Even Justice Scalia, writing for the majority in *Employment Division v. Smith*, 494 U.S. 872 (1990), arguably justified this third view by conceding that “leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in” *Id.* at 890 (holding that where the burdensome law in question is generally applicable, no religious exemptions need be granted).

¹²⁷ PLATO, *REPUBLIC* Bk. III, 387b (G.M.A. Grube trans., Hackett Publishing Co. 1974) (1982). This quote is taken from the beginning of Bk. III of the *Republic* where Socrates had convinced his interlocutors to banish from their city certain poets whose teachings on the gods were deemed to be dangerous to the cause of civil justice.

¹²⁸ See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 715 (1994) (emphasizing equal treatment and holding that absent extraordinary circumstances one’s religion should not affect one’s legal rights, duties, or benefits).

¹²⁹ See *id.*

in the context of the public school curriculum,¹³⁰ where the separation principle of *Schempp*, *Lemon*, and *Nyquist* seems to hold sway. In *Epperson v. Arkansas*,¹³¹ for example, the Court invalidated a state law forbidding the teaching of evolution in public schools.¹³² The Court struck down the law as having a religious purpose, drawing its rationale from certain advertisements encouraging adoption of the law, and on the nature of certain letters to the editor of the *Arkansas Gazette* from the public on the matter.¹³³ Thus, the Court forbade the state legislature, which normally has wide discretion in setting the curriculum for its own schools, from removing a particular scientific theory from the curriculum.¹³⁴ But a holding that forbids a state from removing a secular theory from the curriculum effectively elevates the secular position over the religious, or establishes the secular as the baseline by which Establishment violations may be determined.¹³⁵ Thus, *Epperson*, like the *Schempp/Lemon/Nyquist* line, seems to equate neutrality toward religion with the secular.¹³⁶

This becomes clearer in light of *Edwards v. Aguillard*,¹³⁷ in which the Court, some twenty years later, again took up the evolution/curriculum issue.¹³⁸ In response to the *Epperson* decision and in an effort to conform to the new understanding of neutrality as equal treatment, the Louisiana legislature enacted the Balanced Treatment for Creation-Science and Evolution-

¹³⁰ See *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987).

¹³¹ 393 U.S. 97 (1968).

¹³² *Id.* at 107, 109.

¹³³ *Id.* at 108 n.16.

¹³⁴ *Id.* at 106–17.

¹³⁵ See *supra* Part II.

¹³⁶ It would be unfair, of course, not to acknowledge the Court's explicit statements to the contrary:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.

Epperson, 393 U.S. at 103–04.

This language notwithstanding, the main thrust of the opinion seems to elevate the secular to a higher plane than religion.

¹³⁷ 482 U.S. 578 (1987).

¹³⁸ *Id.* at 596–97.

Science in Public School Instruction Act.¹³⁹ The Act mandated a collaborative teaching of both “creation science”¹⁴⁰ and evolution whenever the subject of human origin was taught.¹⁴¹ The Court rejected the Louisiana statute as having a “sham”¹⁴² secular purpose, noting again the religious motivations of the legislative history.¹⁴³ The Court stated that “[t]he preeminent purpose of the [Act,] was clearly to advance the religious viewpoint that a supernatural being created humankind.”¹⁴⁴ Thus, the precedent set in *Epperson* was furthered: states are not only prohibited from removing a secular subject from its public school curriculum, but are also prohibited from adding a supplemental presentation of its religious counterpart. In this sense, as Justice Scalia argued in his dissent, *Aguillard* amounts to a flat-out rejection—at least in the context of the public school curriculum—of neutrality as equal treatment of both religion and non-religion.¹⁴⁵

Public school curricula across the nation have been challenged because, as the Court has suggested, the secular can be hostile to religion.¹⁴⁶ These challenges, however, have not fared well.¹⁴⁷ One reason is because state governments have demonstrated compelling interests in the democratic values inculcated by secular curricula.¹⁴⁸ For example, in *Mozert v.*

¹³⁹ *Id.* at 599–602.

¹⁴⁰ *Id.* at 592 (The term creation science “embodies the religious belief that a supernatural creator was responsible for the creation of humankind.”).

¹⁴¹ *Id.* at 581.

¹⁴² *Id.* at 587.

¹⁴³ *Id.* at 592–93 (“The state senator repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own. The legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.”).

¹⁴⁴ *Id.* at 591.

¹⁴⁵ *See id.* at 628–29 (Scalia, J., dissenting). [T]here is no basis whatever for concluding that the [secular] purpose . . . is a “sham.” To the contrary, the Act pursues that purpose plainly and consistently. It requires that, whenever the subject of origins is covered, evolution be “taught as a theory, rather than as proven scientific fact” and that scientific evidence inconsistent with the theory of evolution (viz., ‘creation science’) be taught as well. *Id.* (internal citations omitted).

¹⁴⁶ *See id.* at 616.

¹⁴⁷ *See infra* pp. 21–25.

¹⁴⁸ *Aguillard*, 482 U.S. at 242 (Brennan, J., concurring) (explaining that a public secular education is one with “uniquely democratic values,” and that the choice between public secular education and some form of a private or Sectarian one

Hawkins County Board of Education,¹⁴⁹ the Sixth Circuit argued at great length for the “fundamental values”¹⁵⁰ taught in the public schools including: “civil tolerance” and diversity,¹⁵¹ critical thinking, and “self-government.”¹⁵² Similarly, in *Smith v. Board of School Commissioners*,¹⁵³ the Eleventh Circuit justified certain public school textbooks as “a governmental attempt to instill in . . . public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making.”¹⁵⁴

These decisions are not without Supreme Court guidance. Both *Mozert* and *Smith* drew upon the Court’s own understanding of the role of education and the values it ought to inculcate.¹⁵⁵ In *Wisconsin v. Yoder*,¹⁵⁶ the Court accepted the State’s proposition (following Jefferson) “that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence . . . [E]ducation prepares individuals to be self-reliant and self-sufficient participants in society.”¹⁵⁷

Value education of this sort, from the Court’s point of view, seems imperative for the health of the nation. Consider Chief Justice Warren’s statements in *Brown v. Board of Education*:¹⁵⁸

should be vested to each individual parent.).

¹⁴⁹ 827 F.2d 1058, 1061–62, 1070 (6th Cir. 1987) (holding that compelled exposure to secular values in the public schools is insufficient to establish a burden on religious freedom).

¹⁵⁰ *Id.* at 1068.

¹⁵¹ *Id.* at 1068–69.

¹⁵² *Id.* at 1070–71 (Kennedy, J., concurring).

¹⁵³ 827 F.2d 684, 690 (11th Cir. 1987) (holding that certain challenged textbooks neither sufficiently endorsed an alleged religion of “secular humanism,” nor disapproved of theistic religion).

¹⁵⁴ *Id.* at 692.

¹⁵⁵ See *Ambach v. Norwick*, 441 U.S. 68, 72, 75–80 (1979) (holding that public schoolteachers’ “governmental function” of imparting upon their students important social and cultural values, reduces the level of scrutiny applied by the Court in cases where lawful resident aliens are not considered for employment (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (holding that the First Amendment does not protect sexually lewd speech in the context of the public school because of its mission to inculcate certain fundamental values).

¹⁵⁶ 406 U.S. 205 (1972).

¹⁵⁷ *Id.* at 221.

¹⁵⁸ 347 U.S. 483 (1954).

[E]ducation is perhaps the most important function of state and local governments It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship [I]t is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.¹⁵⁹

Consider also Justice Brennan's simple declaration in *Plyler v. Doe*:¹⁶⁰ "[E]ducation has a fundamental role in maintaining the fabric of our society."¹⁶¹ There is little doubt, then, that the government has *some* interest in the subject matter of the education of its citizens.

However, what if the values of one's particular religious beliefs do not completely square with the requisite values for the health of our society? Again, the appellant in *Mozert*, a self-described "born again Christian,"¹⁶² claimed that certain textbooks were indoctrinating her children with offensive ideas relating to what she called "secular humanism" and "futuristic supernaturalism."¹⁶³ She argued that ideas relating to mental telepathy, evolution, pacifism and magic conflicted with her family's Christian worldview.¹⁶⁴ In fact, seven families (fourteen parents and seventeen children)¹⁶⁵ objected to the texts, raising further conflicts relating to role identity, social globalism, and the presentation of other religions.¹⁶⁶ The families claimed that:

[Their] sincere religious beliefs . . . are contrary to the values taught or inculcated by the . . . textbooks and that it is a violation of the religious beliefs and convictions of the . . . students to be required to read the books and a violation of the religious beliefs of the . . . parents to permit their children to read the books.¹⁶⁷

In *Smith*, the appellee argued that the public schools, through the use of certain textbooks, were actually establishing a secular religion.¹⁶⁸ The texts primarily looked to "humanistic

¹⁵⁹ *Id.* at 493.

¹⁶⁰ 457 U.S. 202 (1982).

¹⁶¹ *Id.* at 221.

¹⁶² *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987).

¹⁶³ *Id.* at 1062.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1060.

¹⁶⁶ *Id.* at 1062.

¹⁶⁷ *Id.* at 1060.

¹⁶⁸ *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 688 (11th Cir. 1987).

psychology” for guidance in establishing a moral ethos based upon individualism and relativism for the students.¹⁶⁹ The district court, which ruled in favor of appellant, stated that “[t]his highly relativistic and individualistic approach constitutes the promotion of a fundamental faith claim” in its own right.¹⁷⁰ The court found that such a claim flew in the face of any theistic religion that took the notion of natural law seriously, and the consequences for disobedience may echo well beyond the grave.¹⁷¹ The ethical methodology of the State’s public schools, by contrast, “assumes that self-actualization is the goal of every human being, that man has no supernatural attributes or component, that there are only temporal and physical consequences for man’s actions, and that these results, alone, determine the morality of an action.”¹⁷²

Whether one takes seriously these particular arguments, one should at least acknowledge some fairly significant differences between the goals of liberal democracy and those of Christianity—differences that may reasonably be interpreted as conflicting.¹⁷³ To be sure, the Gospels propose a way of life that in some sense does not equate with the political life and its requisite values.¹⁷⁴ Christianity is a doctrinal religion, which is to say that it is centered on right teaching (orthodoxy).¹⁷⁵ Therefore, it is not, strictly speaking, a law.¹⁷⁶ Furthermore, Jesus’ teachings effectively re-orient human goals or ends to a different kind of life; namely, the eternal life—a life secured by a

¹⁶⁹ *Id.* at 690–91 (quoting the district court’s conclusions about the texts in question: “ ‘the student must determine right and wrong based only on his own experience, feelings and [internal] values’ and that ‘the validity of a moral choice is only to be decided by the student’ ”) (alternation in original).

¹⁷⁰ *Smith v. Bd. of Sch. Comm’rs*, 655 F. Supp. 939, 986 (S.D. Ala. 1987).

¹⁷¹ *Id.* at 987.

¹⁷² *Id.* 986–87.

¹⁷³ *See generally* ERNEST L. FORTIN, HUMAN RIGHTS, VIRTUE, AND THE COMMON GOOD: UNTIMELY MEDIATIONS ON RELIGION AND POLITICS (J. Brian Benestad, ed., 1996) [hereinafter HUMAN RIGHTS] (arguing, *inter alia*, that the origins of modern liberal democracy are to be traced to a political philosophy, the fundamental tenets of which are at intentional odds with the tenets of an earlier political philosophy within which Christianity arose and, in some sense, had allied itself).

¹⁷⁴ *See John* 18:36 (New American); *Matthew* 5:3–12, 6:19–21, 24–34 (New American).

¹⁷⁵ By contrast, consider how Judaism from which Christianity arose and Islam with which it was later to contend are both legalistic in nature—that is to say, are centered around right *conduct* (orthopraxy).

¹⁷⁶ *Galatians* 5:18 (New American).

King not related to Caesar, the Founding Fathers, or any other worldly regime.¹⁷⁷ Sacrificing religion for a secular or even politically based value-education in the schools, therefore, may not rest neutrally in the minds and souls of some religious children and their parents.

In any case, if the events of 9/11 have taught us anything, it is that religion is indeed a powerful historical force. A student would (indeed, *should*) expect to encounter such ramifications in her most basic historical studies. Ironically, however, a number of studies conducted in the 1980's suggest that religion—even as a historical subject—has been largely ignored in the public school curriculum.¹⁷⁸ One study “examined the treatment of [religion] and traditional family values” in several widely used public school textbooks and concluded there to be “a systematic denial of the history, heritage, beliefs, and values of a very large segment of the American people.”¹⁷⁹ Another summarized, “not one of [the history texts surveyed] acknowledges, much less emphasizes, the great religious energy and creativity of the United States.”¹⁸⁰ Yet another study determined that “religion is simply not treated as a significant element in American life—it is not portrayed as an integrated part of the American value system or as something that is important to individual Americans.”¹⁸¹ An overarching and common conclusion among all these studies suggests that, at the very least, the systematic neglect of religion in public schools sends a message that religion is unimportant in the formation of American citizens.¹⁸² Such a trend, if it indeed exists, does not reflect neutrality.

¹⁷⁷ *John* 14:6.

¹⁷⁸ See PAUL VITZ, CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS 1–4 (1986) [hereinafter CENSORSHIP]; Paul Vitz, *Religion and Traditional Values in Public School Textbooks*, 84 PUB. INT. 79, 80–83 (1986) [hereinafter *Religion and Traditional Values*]; PAUL GAGNON, DEMOCRACY'S UNTOLD STORY: WHAT THE WORLD HISTORY TEXTBOOKS NEGLECT (1987); CHARLES C. HAYNES, TEACHING ABOUT RELIGIOUS FREEDOM IN AMERICAN SECONDARY SCHOOLS (1985); PEOPLE FOR THE AMERICAN WAY, LOOKING AT HISTORY: A REVIEW OF MAJOR U.S. HISTORY TEXTBOOKS (1986) [hereinafter PEOPLE FOR THE AMERICAN WAY].

¹⁷⁹ *Religion and Traditional Values*, *supra* note 178, at 83, 90.

¹⁸⁰ CENSORSHIP, *supra* note 178, at 56.

¹⁸¹ PEOPLE FOR THE AMERICAN WAY, *supra* note 178, at 3.

¹⁸² See generally WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 138–59 (1986).

What, then, are the options for parents who do not want their children exposed to such hostility, or at least on some level, find religion to be an important enough factor to be included in the educational formation of their children? After all, children are in school for roughly eight hours a day, five days a week, forty weeks of the year, twelve years of their lives.¹⁸³ One option is to send them to religious schools. After *Zelman*, this seems like a legitimate option, especially for those parents who might not otherwise be able to afford such schools. Another option, however, is to find a way to introduce religion into the public school curriculum without violating the Establishment Clause.

Indeed, the Court itself has suggested that there might be room for religion in the curriculum, even under its former separatist understanding of neutrality.¹⁸⁴ Justice Jackson, concurring in *McCullum*, stated that “it is a proper, if not indispensable, part of preparation for a worldly life” to understand the effect of religion on society.¹⁸⁵ “One can hardly respect a system of education,” he claimed, “that would leave the student wholly ignorant of the currents of religious thought”¹⁸⁶

Justice Clark, writing for the majority in *Schempp*, suggested that “it might well be said that one’s education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities.”¹⁸⁷ Justice Goldberg, in his concurrence, provided further justification and even a general methodology for finding a place for religion in the curriculum:

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to

¹⁸³ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 313 (1962) (Stewart, J., dissenting).

¹⁸⁴ *McCullum v. Bd. of Educ.*, 333 U.S. 203, 237 (1948) (Jackson, J., concurring).

¹⁸⁵ *Id.* at 236.

¹⁸⁶ *Id.*

¹⁸⁷ *Schempp*, 374 U.S. at 225.

me . . . that the Court would recognize the propriety of . . . teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools.¹⁸⁸

Justice Goldberg's distinction between 'teaching of' and 'teaching about' religion proved to be an important one. The Court in *Epperson* would later help to spell out its meaning: "[The] study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition . . ."¹⁸⁹

Just what does an 'objective presentation' of religion mean? Justice Souter, in his dissent in *Rosenberger*, provided a fairly lucid explanation.¹⁹⁰ An objective presentation of religion, he suggested, was a "*descriptive examination* of religious doctrine or even of ideal [religious] practice" or an "analysis and interpretation of biblical texts . . ."¹⁹¹ On the other hand, "[a] *straightforward exhortation* to enter into a relationship with God . . . and to satisfy a series of moral obligations derived from the teachings [of a particular religion]," he argued, was not an objective presentation.¹⁹² This distinction provides the foundation for the proposal of the implementation of religion into the curriculum as developed by Haynes and Nord.

IV. THE HAYNES/NORD PROPOSAL

The very power of [modern education] depends on the fact that [it is] dealing with a boy: a boy who thinks he is 'doing' his 'English prep' and has no notion that ethics, theology, and politics are all at stake.

-C.S. Lewis¹⁹³

¹⁸⁸ *Id.* at 306 (Goldberg, J., concurring).

¹⁸⁹ *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).

¹⁹⁰ *Rosenberger v. Univ. of Virginia.*, 515 U.S. 819, 863–99 (1995) (Souter, J., dissenting).

¹⁹¹ *Id.* at 866–67 (emphasis added).

¹⁹² *Id.* at 867 (explaining how Justice Souter quoted at length several articles from *Wide Awake*, to suggest that its contents were far from objective). See *supra* text accompanying notes 114–15, for a description of the stated purpose of *Wide Awake*.

¹⁹³ C.S. LEWIS, *THE ABOLITION OF MAN* 3 (1957).

In response to the results of the studies of the 1980's, two leading scholars on these matters, Charles C. Haynes and Warren A. Nord, collaborated on the now widely referenced, *Taking Religion Seriously Across the Curriculum*.¹⁹⁴ In their book, Haynes and Nord argued that religion ought to be included in the curriculum for civic, constitutional, and educational reasons.¹⁹⁵ They recognized and emphasized that the inclusion of religion in the curriculum is conditioned upon its objective presentation to students.¹⁹⁶ The authors ultimately suggested a method of implementation that would achieve this goal.¹⁹⁷

Haynes and Nord believed that there are civic and constitutional justifications for including religion in the public school curriculum.¹⁹⁸ Their basic argument was as follows: They began by suggesting that our nation's founding is based on the principles of tolerance and respect. A representative democracy requires dialogue and truth, especially in a pluralist society, which requires that citizens take each other seriously. The framework for taking each other seriously in the context of religion, they argued, was laid out in the Religion Clauses of the First Amendment. The First Amendment requires that the Government be neutral with respect to religion, and, according to the authors, neutrality means equal treatment as between religions, and as between religion and non-religion.

For Haynes and Nord, then, "[t]he solution is for schools and communities to openly and honestly address religious liberty in public education."¹⁹⁹ The authors thus "propose a . . . model that is consistent with First Amendment principles: the 'civil public school,' where people of all faiths and no faith are treated with fairness and respect."²⁰⁰ At the outset, they noted that America is indeed a religious nation.²⁰¹ If it is a civic responsibility of public schools to "take *the public* seriously," then the public schools must take religion seriously.²⁰²

¹⁹⁴ See *TAKING RELIGION SERIOUSLY*, *supra* note 10.

¹⁹⁵ *Id.* at 15–33.

¹⁹⁶ *Id.* at 46–57.

¹⁹⁷ *Id.* at 61–198.

¹⁹⁸ See *generally id.* at 15–33.

¹⁹⁹ *Id.* at 15.

²⁰⁰ *Id.* at 16.

²⁰¹ *Id.* at 1.

²⁰² *Id.* at 19.

Haynes and Nord also believed in the existence of an educational justification for including religion in the public school curriculum.²⁰³ The authors assumed that our educational system strives to make available a liberal education to children. A liberal education, they suggested, is “an education that enables students to think in an informed and critical way about the world.”²⁰⁴ It placed students “in some position to responsibly judge what is true and good all things considered.”²⁰⁵ An education that excludes a whole category of worldviews, however, is not a liberal education. In fact, they argued that the one-sidedness of the current system actually indoctrinates students to believe that religion does not matter, is unimportant, or is simply not a valid resource for understanding the world. This, they concluded, does a great injustice to our children. A truly liberal education—that is, the kind of education to which the nation ought to be committed—requires that “religious voices be included in the curricular conversation.”²⁰⁶

Haynes and Nord suggested seven principles for guidance in implementing religion into the public school curriculum.²⁰⁷ The first principle, “diversity and fairness,”²⁰⁸ aids in asking and answering the question about which religions to include and how much emphasis to place on them.²⁰⁹ Since neutrality dictates that truth cannot be the standard for answering these questions, the authors suggested a “criterion of influence.”²¹⁰ Under this standard, the inclusion of and emphasis on a particular religion is determined according to its relation to the cultural situation of the students and subject matter being taught. Thus, “in a course on American history,” for example, “it would be foolish to give equal time to Christianity and Confucianism because the *influence* of Christianity on America has been so much greater.”²¹¹

²⁰³ See generally *id.* at 35–57.

²⁰⁴ *Id.* at 35.

²⁰⁵ *Id.* at 57.

²⁰⁶ *Id.* at 57.

²⁰⁷ See generally *id.* at 46–55.

²⁰⁸ *Id.* at 47.

²⁰⁹ *Id.* at 47–49.

²¹⁰ *Id.* at 48.

²¹¹ *Id.*

The second principle concerns “the many dimensions of religion.”²¹² It reminds the teacher that all religions, to one degree or another, consist of doctrines, narratives, ethics, rituals, experiences, institutions, art, and customs. Different spiritual traditions emphasize some elements over others. These differences, argue Haynes and Nord, should be brought to light when presented to students so that each religion is treated squarely on its own terms.

It is important that students understand a particular “religion from the inside.”²¹³ This third principle invokes the old hermeneutical rule of thumb that one should seek to understand the author as the author understood himself. In other words, in presenting a particular religion, the teacher should allow the experts or adherents to speak for themselves. This, argued Haynes and Nord, required empathy on the part of the student and the teacher so that the world can be understood, to the extent that it is possible, through the consciousness of the particular religion being studied.

It is also important that the student understand a particular “religion from the outside.”²¹⁴ This principle calls for a more comparative approach so that students can see how religions relate to one another. Students ought to notice commonalities and make distinctions between different religions. They should be able to frame their studies of particular religions in their proper historical context in order to better judge for themselves the worth of such a perspective.

Both “primary and secondary sources” should be consulted in presenting a particular religion.²¹⁵ In emphasizing primary sources, Haynes and Nord again stressed the importance of authenticity and authority, but they also suggested that secondary sources may be helpful—indeed, even necessary—for a more straightforward presentation of a particular religious perspective. The ideal, they argued, was to strike a balance of both primary and secondary texts.

It is important that the student be able to distinguish between “pluralism and relativism.”²¹⁶ A pluralistic approach to

²¹² *See id.* at 49; *see generally id.* at 49–50.

²¹³ *See id.* at 50; *see generally id.* at 50–51.

²¹⁴ *See id.* at 51; *see generally id.* at 51–52.

²¹⁵ *Id.* at 53.

²¹⁶ *See id.* at 53; *see generally id.* at 53–55.

the study of various religions, the authors argued, calls for the kind of tolerance and respect for one another envisioned by our Founders. A relativistic approach, on the other hand, suggests that all religious, and non-religious, perspectives are of equal validity or invalidity, thus leaving the student with the bleak outlook of postmodernism. Teachers, when presenting religion, must remind their students of what is at stake for the religious person; namely, the truth. After all, history's greatest religious thinkers spent the better part of their lives engaged in deep conversation about truth. Haynes and Nord suggest that an objective presentation of religion involves inviting students into that conversation by showing them the arguments without making official judgments.

Finally, a truly objective presentation of religion requires "competence"²¹⁷ on the part of teachers and school officials.²¹⁸ Haynes and Nord proposed "teacher education institutions"²¹⁹ to teach teachers and other school officials the justifications and boundaries for including religion in the public school curriculum, and to impart sufficient knowledge of various religions and how they relate to the subjects they teach. The authors proposed certification standards to ensure quality and knowledgeable presentation. They also urged school boards to set and implement sound policies and to adopt sound textbooks.

Haynes and Nord then called for the kind of neutrality that the Court now employs with respect to the public school curriculum in matters relating to tax benefits, access to public property, and school aid. Such a position would require that religion, a significant part of most Americans' lives, be given equal treatment as a legitimate worldview in the nation's public schools. This treatment would take an objective form and fairly present the religious alternatives while refraining from official judgment with respect to them. This aspect of refraining from official judgment, however, is what renders the Haynes/Nord proposal problematic.

²¹⁷ *Id.* at 55.

²¹⁸ *See generally id.* at 55–57.

²¹⁹ *Id.* at 56.

V. TEACHING 'OBJECTIVELY' AND THE DANGERS OF HISTORICISM

Historicism is the ultimate outcome of the crisis . . . of modern political philosophy . . . [which] consists precisely in this, that the difference between intellectuals and philosophers—a difference formerly known as the difference between gentlemen and philosophers, on the one hand, and the difference between sophists or rhetoricians and philosophers, on the other—becomes blurred and finally disappears.

-Leo Strauss²²⁰

Does the Haynes and Nord approach resolve the problems set forth by the parents in *Mozert* and *Smith*, who feared that their children would lose their religious worldviews to those of the modern, secular, educational institution? After all, the textbooks and courses of study at issue in those cases were somewhat neutral in that they were not without the examination of religion.²²¹ Could the purely 'objective' approach outlined by Haynes and Nord actually be counter-productive to the formation and development of one's faith? Does it do justice to religion, not just as a subject of historical import and interest,

²²⁰ LEO STRAUSS, NATURAL RIGHT AND HISTORY 34 (1955). Elsewhere, Strauss explained the crucial difference between genuine philosophy and the "politicization of philosophy" in terms of the distinction between "political philosophy" on the one hand, and "political thought" on the other:

Political thought is, as such, indifferent to the distinction between opinion and knowledge; but political philosophy is the conscious, coherent and relentless effort to replace opinions about the political fundamentals by knowledge regarding them. Political thought may not be more, and may not even intend to be more, than the expounding or the defense of a firmly held conviction or of an invigorating myth A political thinker who is not a philosopher is primarily interested in, or attached to, a specific order or policy; the political philosopher is primarily interested in, or attached to, the truth.

LEO STRAUSS, "What is Political Philosophy?", in WHAT IS POLITICAL PHILOSOPHY? AND OTHER STUDIES 9, 12 (1959).

In other words, the distinction involves the difference between an authentic quest for and love of the truth on the one hand, and a constant exchange of competing ideologies on the other. The distinction is important here since, as we shall see, an 'objective' presentation of religion necessarily precludes the notion of truth. Such a presentation more closely resembles ideology than it does religion and, therefore, simply becomes one of many equally valid (or more appropriately, *invalid*) ways of understanding the world.

²²¹ See *Mozert v. Bd. of Educ.*, 827 F.2d 1058, 1062 (6th Cir. 1987); *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 693 (11th Cir. 1987).

but as a way of life? By attempting to conform to the principle of equal treatment, would the Haynes and Nord approach simply homogenize and trivialize all religious worldviews?

Again, as Haynes and Nord point out, neutrality requires one to bracket the truth question whenever religion is presented in the public school curriculum.²²² To present religion without reference to truth, however, only presents an impoverished version of religion.²²³ It is like getting rid of the architect while keeping the building or doing away with the lawgiver while claiming protection of the law.²²⁴ A merely historical presentation of a particular way of life, as one critic has forcefully argued, can sap it of its vitality.²²⁵

According to Friedrich Nietzsche,²²⁶ life and culture in the West have always been connected to human greatness.²²⁷ Greatness describes those strong-willed individuals who are assured of the righteousness and nobility of whatever cause to which they choose to wholeheartedly devote themselves. Such individuals are willing to make sacrifices and endure suffering for what they deem to be a 'higher' cause. Among the 'highest things'²²⁸ (at least in the West), truth has reigned supreme in religious and philosophical circles. Indeed, one is reminded of the Socratic dictum that "life without . . . examination is not

²²² HAYNES & NORD, TEACHING ABOUT RELIGION 48 ("We obviously cannot use the truth of a religion as our criterion for whether to include it, for we cannot assume judgments about truth if we are to be neutral.")

²²³ See *supra* note 13 and accompanying text.

²²⁴ See HUMAN RIGHTS, *supra* note 173, at 153.

²²⁵ It is interesting to note that Friedrich Nietzsche, arguably the greatest critic of religion, was also the greatest critic of the modern academic discipline of history. Nietzsche's basic hypothesis in ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE was that the discipline of history, introduced in Germany in the nineteenth century, has robbed the whole of Western culture of its vitality. See *infra* pp. 34–36.

²²⁶ Friedrich Wilhelm Nietzsche (1844-1900) is one of the most famous and controversial figures in German philosophy. His views on humanity, history, and religion have been hailed by many and condemned by others. Some of his works include HUMAN, ALL TOO HUMAN, BEYOND GOOD AND EVIL, THUS SPAKE ZARATHUSTRA, THE WILL TO POWER, and ECCE HOMO. See *Biography Resource Center*, Nietzsche, Friedrich (Wilhelm) (2000), at <http://www.biography.com/search/article.jsp?aid=9423452&search=> (last visited Mar. 22, 2004); see generally RONALD HAYMAN, NIETZSCHE: A CRITICAL LIFE 1 (1980).

²²⁷ See CLAUDE NICHOLAS PAVUR, NIETZSCHE HUMANIST 110–11 (1998).

²²⁸ "Highest things" mean the traditional ends of human desire: truth, goodness, and beauty.

worth living.”²²⁹ One is also reminded of the “Agony in the Garden” narrative, particularly as recounted in Luke’s Gospel.²³⁰ Both examples represent an utter devotion unto death to some higher cause.

Nietzsche argued, however, that the modern academic discipline of history has revealed a kind of truth that is radically different from the original philosophical or theological concept of truth.²³¹ The discipline of history replaced the speculative quest or contemplative wondering unique to the philosophical or religious enterprise with a professional philosophy of scholarship and criticism. What scholarship and criticism beget, however, is not truth, but only further scholarship and criticism. This discipline of history simply presents one with a vast survey of conflicting worldviews of the many cultures that have existed throughout space and time. The discipline of history and the truth it discloses are dangerous to human life, according to Nietzsche, because human life needs a “horizon”—a permanent object to which one can be devoted.²³² History, however, tends to teach that everything is in a constant state of flux. Thus, all of the horizons that have given civilizations their respective meanings and values are perceived to be artificial, conventional and, most importantly, without absolute significance. All horizons then collapse, since none can claim to be superior to the other. Indeed, this is the “deadly truth”²³³ that the academic discipline of history reveals.

²²⁹ PLATO, SOCRATES ON TRIAL: THE APOLOGY, *in* THE LAST DAYS OF SOCRATES 43, 72 (Hugh Tredennick trans., Penguin Books 1969). Plato also wrote:

[T]he difficulty is not so much to escape death; the real difficulty is to escape from doing wrong, which is far more fleet of foot. In this present instance I, the slow old man, have been overtaken by the slower of the two, but my accusers, who are clever and quick, have been overtaken by the faster: by iniquity. When I leave this court I shall go away condemned by you to death, but they will go away convicted by Truth herself of depravity and wickedness. And they accept their sentence even as I accept mine.

Id. at 73.

²³⁰ *Luke* 22: 39–46 (New American) (“Father, if it is your will, take this cup from me; yet not my will but yours be done.” . . . In his anguish . . . his sweat became like drops of blood falling to the ground.”).

²³¹ FRIEDRICH NIETZSCHE, ON THE ADVANTAGE AND DISADVANTAGE OF HISTORY FOR LIFE 7 (Peter Preuss trans., Hackett Publishing 1980).

²³² *Id.* at 8–14, 38–43.

²³³ *Id.* at 23 (“*fiat veritas pereat vita*”—“Let there be truth, and may life perish”).

Nietzsche pointed out that modern Western culture is not a culture in itself, but represents only knowledge of cultures.²³⁴ “[W]e moderns have nothing at all,” he wrote, “only by filling and overfilling ourselves with alien ages, customs, arts, philosophies, religions and knowledge do we become something worthy of notice.”²³⁵ Modern culture, according to Nietzsche, is dead because its indecisiveness inhibits it from moving forward; it “may well sleep like the snake which, having swallowed whole rabbits, calmly lies in the sun and avoids all movement except the most necessary.”²³⁶ The discipline of history substitutes speculation or contemplation with an overload of trivial knowledge, creating “weak personalit[ies]” or “walking encyclopedias” for whom little, if anything, is at stake.²³⁷ The same goes for historical religious knowledge:

What can one learn from Christianity, that as a result of a historicizing treatment it has become blasé and unnatural until finally a completely historical . . . treatment has resolved it into pure knowledge about Christianity and so has annihilated it, all this one can study in everything that has life: that it ceases to live when it has been dissected completely and lives painfully and becomes sick once one begins to practise historical dissection on it.²³⁸

Of course, Haynes and Nord were aware of the nihilistic dangers of historicism.²³⁹ Indeed, their exhortation to distinguish between “pluralism and relativism”²⁴⁰ appears to be an attempt to fend off the potential annihilation of religion in the historical context. Yet to learn *about* past peoples who had much at stake is one thing, but to be an actual stakeholder is something else. There is a kind of inherent arrogance in the ‘teaching *about* religion’ enterprise that makes the student believe that she is approaching the subject from some higher, unbiased, and more comprehensive viewpoint.²⁴¹ This enterprise is perceived as a vantage point of safety, transcending the dark clouds of divisive controversy, since the student can refrain from

²³⁴ *Id.* at 24.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 24–25.

²³⁸ *Id.* at 40.

²³⁹ *See supra* Part IV.

²⁴⁰ *See id.*

²⁴¹ *See id.*

making any kind of commitment with respect to a particular religion. The arrogance is naïve, however, and hardly provides protection. For, if one is to be fully consistent with the truth of history, one must acknowledge that the historical viewpoint itself is just one among many possible perspectives.²⁴²

To be sure, Haynes and Nord had noble aspirations in implementing religion into the curriculum. Religious education is enormously important both from a moral and historical perspective. However, it seems that in their valiant effort to transcend the cultural forces that have silenced religion in the public square, they have been unable to escape the burdensome yoke of historicism that tends to relativize and trivialize religion. The *objective* method by which they proposed to implement religion into the public schools is infected with the capacity to produce *subjective* fruits. The neutrality toward religion they advocated can in fact have the effect of neutralizing religious values.

The Court, too, expressed leeriness with respect to this implementation under the auspices of the Government, often times following Madison's argument that government entanglement with religion tends to produce "pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."²⁴³ Justice Black's extensive historical analysis in *Engel v. Vitale*, for example, pointed to the avoidance of the degradation of religion as the primary purpose of the Establishment Clause.²⁴⁴ The "unhallowed perversion" of religion by government, he argued, resulted in a loss of respect for religion.²⁴⁵

Justice Brennan has also been quite suspicious of the Government on these matters.²⁴⁶ In his concurrence in *Lemon*, for example, he expressed some concern over a Rhode Island program that required Catholic schoolteachers to vow not to

²⁴² HUMAN RIGHTS, note 173, at 11 ("Differently stated, if the vaunted pluralism of our liberal democratic system is to have any meaning, it must exclude its opposite; for, like every other 'ism' it, too, is a monism. Its basic premise, asserted absolutely, recoils upon itself. This leaves us with a neutrality that is more apparent than real.")

²⁴³ MEMORIAL AND REMONSTRANCE, *supra* note 14, ¶ 7, at 302. This observation, incidentally, is not unlike that of Nietzsche.

²⁴⁴ See *Engel v. Vitale*, 370 U.S. 421 (1962).

²⁴⁵ *Id.* at 431–32.

²⁴⁶ See *infra* notes 248–50 and accompanying text.

introduce religion into secular subjects.²⁴⁷ Such a program, Brennan argued, ran the risk of all-out “secularization of a creed.”²⁴⁸ This language was repeated some fourteen years later in *Aguilar* when Brennan denounced a New York statute mandating the governmental monitoring of parochial schoolteachers.²⁴⁹ Also, writing for the majority in *Ball*, Justice Brennan warned, not only of the indoctrinating effects of the State’s school aid program, but also of the effects of the “corrosive secularism” a government can impose on religion.²⁵⁰

Justice Blackmun picked up this language in his dissent in *Bowen v. Kendrick*,²⁵¹ where he expressed similar concern over the Government’s capacity to destroy the Church’s irreplaceable role in addressing social problems.²⁵² Finally, Justice Souter, in his dissent from *Zelman*, invoked Madison’s *Memorial* in pointing out the potential problems with government restrictions on the Cleveland parochial schools.²⁵³ Such schools were already forbidden, he noted, from hiring teachers and administrators of their own religious stripe.²⁵⁴ Arguably even more intrusive was the potential for the restrictions to “prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools.”²⁵⁵

Perhaps for the sake of religion, then, equal treatment in the public school curriculum is not a position the Court ought to embrace because neutrality in this context tends to denigrate rather than elevate religion. In fact, the neutrality advocated by Haynes and Nord—that is, equal treatment in the form of an objective presentation of religion—dilutes religion from its essential character and runs the risk of flattening the soul of the

²⁴⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 650 (1971).

²⁴⁸ *Id.*

²⁴⁹ *Aguilar v. Felton*, 473 U.S. 402, 414 (1985) (“[T]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental ‘secularization of a creed.’” (quoting *Lemon*, 403 U.S. at 650)).

²⁵⁰ *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985).

²⁵¹ *Bowen v. Kendrick*, 487 U.S. 589 (1988) (upholding a federal statute which granted funds for research to both secular and religious organizations in addressing the problem of teenage pregnancy).

²⁵² *Id.* at 640 n.10 (Blackmun, J., dissenting).

²⁵³ *Zelman v. Simmons-Harris*, 536 U.S. 639, 712–13 (2002).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 713.

religious child. Perhaps this is one area where the Court is on the mark in retaining its former separatist understanding of neutrality toward religion, despite the potential for hostility. In his essay, "The Regime of Separatism," the late theologian and political theorist, Ernest L. Fortin wrote:

If the state is indifferent to religion or, at the very least, to the distinction between religions, chances are that most of its citizens will be indifferent to it as well. Better in a way that the government should be straightforwardly antagonistic toward Christianity, for such antagonism usually has the effect of strengthening the resolve of believers, as it did during the early centuries and still does in some parts of the world today. . . . [B]y according the same respect to all religions, [neutrality] implicitly denies that any of them has an intrinsic claim to this respect. To that extent, it inevitably works against religion, for few people are likely to acquiesce in the stringent moral demands made on them by their religion unless they believe in it, heart and soul.²⁵⁶

One might then ask with some desperation: "What are we to do?" Again, the fundamental purpose of this article was to survey neutrality toward religion in the curricular landscape and to critique its prominent spokesmen from the point of view of religion. One might ask further what purpose such a critique could possibly serve in addressing the problem at hand. Fortin provided us with a subtly optimistic answer: "[T]he flood of books, pamphlets, and reports on education with which we are currently being inundated is as much a symptom of the decay of the contemporary educational scene as it is of its renewed vitality."²⁵⁷ This observation, while judgmental of critics, is not without hope for this age of criticism. Later on in the same essay Fortin wrote:

Hopeless as the situation may appear to be to some people, it nevertheless has a relative advantage over other, more stable situations. Insofar as it is characterized by the shaking of all traditions and cultural horizons, it allows for a reconsideration of the fundamental human alternatives in ways that would have been impossible at other moments in our history. The sense of disintegration that so many of our thoughtful contemporaries have begun to experience is itself an invitation

²⁵⁶ HUMAN RIGHTS, *supra* note 173, at 11.

²⁵⁷ *Id.* at 29.

to undertake a fresh or nontraditional assessment of these traditions The extremity into which we have fallen could indeed be our greatest opportunity.²⁵⁸

CONCLUSION

The Court's own understanding of 'neutrality' in the educational context has, in a sense, become more amicable towards religion, insofar as those associated with religion can now enjoy some of the benefits, accessibility, and aid that were once limited strictly to public institutions. When it comes to the public school curriculum, however, religion has not achieved the same elevated status warranting equal treatment. For some, this is fundamentally unjust and calls for a pro-active campaign, complete with detailed implementation strategies for introducing religion back into the public school curriculum. Nevertheless such proposals, at least as envisioned by Charles Haynes and Warren Nord, make the fatal mistake of forsaking the essence of religion; namely, truth. The result of such "objectivity" in religious education amounts to the very religious indifference that their program sets out to abolish. Therefore, the Court's separatist position on this issue is perhaps better than the proposed alternative. Whether another more prudent course of action may supercede the *status quo* is a question that remains open and one to which we must pay constant attention.

²⁵⁸ *Id.* at 43–44.

