University of Richmond Law Review

Volume 27 | Issue 5 Article 3

1993

# Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment

Sanford Levinson

# SOME REFLECTIONS ON MULTICULTURALISM, "EQUAL CONCERN AND RESPECT," AND THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT*

*Sanford Levinson***

## I. SOME INTRODUCTORY AUTOBIOGRAPHY

I was born and grew up in Hendersonville, North Carolina, a small town of about 6000 people in the western part of the state. There were about 30 Jewish families in Hendersonville, and I knew from a very early age that I was Jewish and, consequently, that I was different in an important way from almost all of my neighbors and classmates. The most evident way, especially to a child, involved dietary prohibitions against eating pork. I also knew that I was allowed absences from school (Rosh Hashanah and Yom Kippur) while other children were not. Inevitably, my Jewishness accounts for many of the

---

* For reasons that will become obvious in the course of this article, I wish to dedicate it to Michael McConnell and Gary Leedes, two outstanding legal academics who are unafraid to acknowledge the role that religion plays in their lives. I also want to thank both Professor Leedes for his kindness in helping to make possible my visit to the University of Richmond Law School in March-April 1993 as an occupant of the Allen Chair and participant in the Allen seminar and the entire faculty of the law school for helping to make my visit so enjoyable. Finally, I thank the Allen family for their imagination in endowing the seminar that bears their name.

I also want to thank Doug Laycock, Cynthia Levinson, Michael McConnell, Scot Powe, and James Boyd White for their responses to earlier drafts of this essay. I also appreciate the thoughtful responses of the students in the legal scholarship seminar conducted by Richard Pildes and Deborah Livingston at the University of Michigan Law School, to which I presented an earlier version of this article in October 1993. It is also worth noting that I finished the basic draft of this article before the publication of two important books that are directly relevant to it, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (1993) and STEPHEN BATES, BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS (1993). I will be reviewing both books in the 1994 book review symposium issue of the *Michigan Law Review*.

** W. St. John Garwood and W. St. John Garwood, Jr. Regents Chair in Law, University of Texas Law School.

memories—most of them, it is important to say at the outset, quite pleasant—I have of growing up in Hendersonville, and I begin this essay with two of them.

### A. *Thesis: Learning Bible and Singing Carols*

As a third-grader, I won a "Bible certificate" from the State of North Carolina for memorizing a number of Bible verses, including John 3:16, which I can summon up in my mind to this very day: "For God so loved the world that he sent his only begotten Son, and whosoever believeth in him shall be guaranteed everlasting life."[1] From the vantage point of almost 45 years later, I think that I recall finding, as a Jewish youngster, something at least odd, if not objectionable, about saying the verse aloud in front of my class (which is how we got credit for memorizing the verse of the week). After all, most Jewish children, at least in the United States, are initially taught about Judaism in terms of what it is *not*, i.e., Christianity. However difficult it may be to determine the theological tenets of traditional Judaism, it is clear that none of them recognizes Jesus as divine or as the carrier of salvation.[2] Although I can not be sure, I strongly suspect that I already knew by the third grade that, at least so far as Jews are concerned, what John was stating *I* could not affirm as the truth even as I proclaimed it aloud. But the challenge of winning the certificate (and, I suspect in retrospect, of proving myself not *so* different from my Biblically-proficient classmates) prevailed over any other considerations that might have come to my very young mind.

---

1. I have purposely left in the text what I remembered the text saying prior to "looking it up." One "official" version is "For God so loved the world that he gave his only Son, that whoever believes in him should not perish but have eternal life." *John* 3:16 (Revised Standard Version). It is this version that is quoted in Michael McConnell, *Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence*, 42 DEPAUL L. REV. 191, 215 n.136 (1992) (quoting H. RICHARD NIEBUHR, CHRIST AND CULTURE 197 (1951)).

2. It is important to recognize, though, the existence of self-described "Jews for Jesus," or "completed Jews," who proclaim the co-existence of Jewish identity and acceptance of Jesus as their Lord and Savior. Their claims, however, have not been accepted by anyone within the "mainstream" Jewish community. *See* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1585 n.20 (1993).

Far more vivid in my memory are my reactions to marching each December with other public-school students to the First Methodist Church for our annual concert of Christmas carols (which, needless to say, we had rehearsed at school). This provoked a sharper conflict in regard to my own sense of Jewish identity; though once again, I did little to set myself apart from the hegemonic majority. In retrospect, I have no idea if the concert was "compulsory." I doubt that it was; had I, or my parents, insisted on non-participation, I am quite sure that would have been acceptable. The community as a whole was quite tolerant, in its own way. Jews were well integrated into the fabric of community life and were often called on to explain Passover and other Jewish holidays. So why did I march? One answer is that, if truth be known, I rather enjoyed (and enjoy to this day) the tunes of most of the various carols.

Still, I recall feeling certain tensions about some of the lyrics we were called upon to sing. My personal resolution of any such tensions that I felt was simply to avoid singing those lines that included reference to Jesus or, even more to the point, "Christ our Lord." Thus I joined happily in calling on all of the faithful, joyful and triumphant to come to Bethlehem to adore an unnamed "him." I maintained a stony silence, however, at the last line, which seemed to suggest that I did indeed recognize "him" as "Christ our Lord." Similarly, I always enjoyed the lovely Moravian hymn, "I Wonder as I Wander," but I never joined in the words "Jesus our Savior." Again, as with John 3:16, I recall most of the words of most of the standard Christmas carols to this day.

I also believe that the elementary school day began with the Lord's Prayer. I know its text, and I remember saying it repeatedly while I was growing up. I cannot imagine where I might have learned or recited it other than the public schools. None of its overt language, of course, is offensive to a Jew—how could it be, given Jesus' own status as a Jew—and I recall little hesitation in joining in.

Later, at Hendersonville High School, I had the opportunity to take an elective course in Bible. The class was taught, I believe, by volunteers supplied by local churches. It was, most definitely, *not* a course on the Bible in Western literature or

the like. I did not enroll in that course. Instead, I happily took typing; perhaps the most useful course I ever had in high school. I am not aware that *any* Jewish student ever took the Bible course, though the low number of such students—I was one of two in my class of 70—limits the force of any generalization on this point.

As I got further along in school, I did begin to wonder about the legitimacy of all of this interaction between school and church. Certainly by the time I graduated from college (I attended Duke, a Methodist school that required two semesters of religion courses in order to graduate) I had come to the firm opinion that North Carolina had behaved not simply questionably, but unconstitutionally. I had discovered the First Amendment in political science courses and, more to the point, the "separationist" perspective identified especially with Hugo Black, Felix Frankfurter, and Robert Jackson.[3] I am quite confident that I agreed with the latter two justices that even the limited state aid accepted by Black in *Everson v. New Jersey*[4] was constitutionally illegitimate. There should indeed be a "wall of separation" between church and state that would basically cordon off the institutions of the latter from any real contact with, or encouragement of, the former. When, in my senior year of college (1962), school prayer was found constitutionally illegitimate by the Supreme Court,[5] I rejoiced. I can recall quite vividly the fantasy of becoming a lawyer, returning to Hendersonville, and using my skills as a constitutional lawyer to eliminate any reference to God from the school day.

### B. *Antithesis: Religious Pluralism in Hendersonville*

There are, however, other memories of religion connected with the important aspects of my growing up in Hendersonville.

---

3. See especially the opinions of these justices in Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1947) (invalidating in-school "released time" programs).

4. 330 U.S. 1 (1947) (upholding the provision of bus service for parochial school students).

5. Engel v. Vitale, 370 U.S. 421 (1962). *See also* Abington Sch. Dist. v. Schempp, 347 U.S. 203 (1963).

Some of them have to do with the local synagogue. The synagogue was too small to afford a rabbi, which meant that services were conducted by the lay members of the community (including myself). I have little doubt that this emphasis on lay participation was extraordinarily important in developing some of my views about the dispensability of certain hierarchical roles, including "supreme" courts, that we too often take for granted.[6]

In relation to this particular essay, however, the most important memories, and certainly among my fondest, involve what through the haze of years appear to have been "endless" discussions with a group of friends about religion. A fairly typical evening, especially in summers, would be to drink beer or play poker while at the same time energetically debate the basic questions of religion, especially those involving *theodicy* and the presence of an afterlife. Though, as children of the 1950s, we were thoroughly segregated racially,—I did not have non-white classmates until I went to graduate school at Harvard in 1962,—we were otherwise wonderfully pluralistic. My friends included a Catholic (a Massachusetts native whose father had come South when General Electric moved one of its plants to Hendersonville), several Southern Baptists, a Methodist, a Presbyterian, and myself. We argued with the particular intensity of teenagers, though never, so far as I recall, acrimoniously. (The parents of the two Southern Baptists, however, did express concern to their sons about the heretical views to which they were being exposed.)

I particularly remember my Southern Baptist friends expressing seemingly genuine regret that my failure to acknowledge Jesus as my Savior condemned me to eternal torment in hell. They would have preferred knowing that I would join them in heaven. This was said by them, and perceived by me, without the slightest personal hostility. My non-saved fate was, from their perspective, simply a statement of theological fact, and their attempt to save me from what was quite literally a fate worse than death was, consequently, an act of friendship. Imagine, for example, a friend observing someone close to him or her

6. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH ch. 1 (1988).

driving while intoxicated. Surely we would not expect the friend to remain silent and accept as dispositive, following a fatal accident, the statement: "Well, it was her life, and friends don't interfere with one another." Friends *ought* to warn one another about perceived dangers facing them.

My Baptist friends were engaged in an act of such warning, even though I chose to ignore it. I do not censure them for their concern, especially given their general courtesy and willingness to tolerate my response to their entreaties that, as a Jew, I just did not see any reason to accept Jesus as divine, though I always took care to describe him as a great man eminently worth respecting even if not worshipping. Moreover, I added that I did not believe that a God worth worshipping (or even respecting) would condemn anyone to the torments of eternal punishment. My Christian friends were scarcely monolithic on any of these points, and, among other things, I got to know the differences among Christian denominations.

In looking back and trying to determine, for better or worse, what might help to account for the development of my particular persona, I often think of those friends and of our discussions. I am convinced that they had far more to do with my becoming an academic intellectual than anything that took place during the generally dreary school days, during which my primary achievement was getting so many C's in "cooperation" that I was ineligible for the National Honor Society. It was with John, Jim, Benny Cole, and Gar that I became comfortable exploring some basic issues of life. I remain forever grateful to them.

In many ways the rest of this article is an exploration of whether it is possible to synthesize these two sets of memories, not simply in accounting for autobiographical development, but, far more importantly, in terms of general social and legal analysis. My own life was immeasurably aided by friendships, the result, with one exception, of mutual attendance at the local public school with other youngsters who, from a variety of perspectives, unabashedly took religious questions seriously. Less happily, my life was also affected by state-encouraged feelings of marginality and difference connected to such phenomena as the Bible memorization and Christmas carols. Is

there a way of putting together these memories—and, concomitantly, engaging in cogent analysis of the issues raised by them—in some way that makes sense?

## II. ON THE DIFFERENCE BETWEEN PLURALISM AND SEPARATISM

What I have celebrated, in the second set of memories, is the actuality of a certain model of *pluralism*; the ability of persons from a variety of sub-cultures to come together and encounter one another without negating those aspects that indeed make them different from each another. To use a term that was blessedly absent from the language of my youth, a kind of *multiculturalism* was present in Hendersonville, with enormous benefit. "Multiculturalism" is well defined by Robert Hughes as:

> [The] assert[ion] that people with different roots can coexist, that they can learn to read the image banks of others, that they can and should look across the frontiers of race, language, gender and age [and, presumably, religion] without prejudice or illusion, and learn to think against the background of a hybridized society.[7]

Whatever the obvious limits of my small North Carolina town's multiculturalism—the most notable certainly was racial segregation that deprived me of any real contact with African-American students—it was also a powerful reality in at least the dimension of religion, with enduring importance for my life. And what allowed these encounters across culture to take place was, in substantial part, the fact that most of us attended the same public school. (There was a Catholic elementary school, however, and some Catholic students attended a Catholic school in Asheville, 20 miles away. There was also a private boys' school, but very few local students attended it.)

It is also worth saying that I hope my friends believed (and believe now in retrospect) that they benefitted from having a Jewish friend. We too often automatically sneer at the phrase "some of my best friends are Jewish (or any other religion or

7. ROBERT HUGHES, THE CULTURE OF COMPLAINT 83-84 (1993).

race)," but surely it would be a profound social good if all of us could in fact say, with conviction, that some of our best friends *are* from groups other than those with which we most centrally identify. No heterogeneous society can long survive if it becomes truly exceptional to develop the particular intimacies of friendship with anyone other than those who are exactly like oneself. I know that I think differently, and better, of Southern Baptists because some of my best childhood friends were members of that denomination. I would hope that the same is true for them in regard to Jews.

I also know that my life in the elite legal academy has been basically devoid of contact with committed Christians, especially evangelical Protestants. One can count literally on the fingers of one hand the number of publicly visible Protestant evangelicals who hold tenured positions at America's "leading" law schools. In this respect (and, undoubtedly, many others), no elite law school even remotely "looks like America," at least if that is meant to suggest that members of the various sub-cultures of American society should actively participate in each of the institutional structures that comprise that society. And, as I have written elsewhere, it is noteworthy "that almost none of the contemporary demands for greater diversity of voices within the academy include a call for a greater presence of the almost totally absent sound of a strong religious sensibility."[8]

It should be clear that the creation of a public school system that truly brings together, in a context of mutual respect and concern, persons of different backgrounds is a high social good. Concomitantly, the adoption of policies that discourage such multicultural encounters and, instead, lead to withdrawal into separate enclaves of homogeneity is, if not an unequivocal social bad, then at least something that should scarcely be applauded without grave reservations. It is in thinking about public schools that we most directly confront the questions of social reproduction and the inculcation of values that constitute us as a distinctive social order. As the Supreme Court once put it, quoting two historians: "The role and purpose of the American

8. Sanford Levinson, *Religious Language and the Public Square*, 105 HARV. L. REV. 2061, 2062 n.7 (1992) (book review).

public school system [is to] 'prepare pupils for citizenship in the Republic.'"[9] This, one hopes, includes development of a stance of "tolerance of divergent political and religious views" and the taking into account "of the sensibilities of others."[10] My very citation of the Court's opinion in *Bethel* signifies the fact that in the United States, for better *and* worse, the kinds of questions I am raising are not merely ones of "social policy" or even political theory. Instead, what Justice Cardozo once called "[t]he great generalities of the constitution"[11] are thought to speak with sometimes surprising specificity, let the consequences be what they may. Two strands of cases are particularly important in the context of my reminiscences and subsequent reflections. The first involves the constitutionality of state aid to religious schools. The second deals with what might be termed the secularization of the public school system and consequent withdrawal of at least some Christians (and, no doubt, other sectarians as well, including Orthodox Jews) from the public schools.

There are many fine articles detailing the specific doctrinal twists and turns within these areas,[12] and this essay is not intended to compete with any of them. Instead, I want to offer some modest reflections about the interplay between current doctrinal developments and the achievement of a multicultural society whose members are nonetheless bonded by mutual respect and, if this is not too completely utopian, affection.

---

9. Bethel Sch. Dis. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, NOW BASIC HISTORY OF THE UNITED STATES 228 (1968)).

10. *Id.*

11. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 17 (1921).

12. *See* Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L. REV. 409 (1986); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COL. L. REV. 1373 (1981); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 103 HARV. L. REV. 933 (1989); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Michael McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115 (1992), *reprinted in* THE BILL OF RIGHTS IN THE MODERN STATE 115 (Geoffrey R. Stone et al. eds., 1992); Suzanna Sherry, Lee V. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123. David C. Williams and Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991). This is, of course, only the tip of the scholarly iceberg, and omission from the list should not be taken as denigrating the undoubted importance of many uncited articles.

### A. *Aid to Parochial Schools*

As already suggested, I initially had little trouble supporting the stance of "hard-core separationists" that public monies should be used little, if at all, to "support" or "subsidize" religion. People certainly had a right to be religious, but let them do so on their own time and spending their own money. They were just as certainly not entitled to even a penny of my taxes to spend in ways that furthered their religious aims. The key word in this sentence is "furthered," since, as economists teach, state provision of *any* goods, including police and fire protection, frees up funds that can now be used for other purposes, including religious indoctrination.

Few persons, though, are so relentlessly anti-clerical as to deny police and fire protection to a church. In any event, these issues were not to be settled through ordinary political debate and votes. Instead, I believed that the Court should militantly use the Establishment Clause of the First Amendment as a sword against any legislative decisions to expend public monies in ways that aided religious schools.[13] "[T]axpayers have a right," enforceable by the courts, "not to subsidize religion."[14] Religious parents *do* apparently have a constitutional right, thanks to the 1925 case *Pierce* v. *Society of Sisters,*[15] to withdraw their children from public schools and educate them privately. They should not, however, expect public aid in financing this private education. Indeed, they should realize that it is illegitimate even to ask for such aid.

---

13. For a forthright presentation of this view, see Kathleen Sullivan, *Religion and Liberal Democracy, in* THE BILL OF RIGHTS IN THE MODERN STATE 196 (Geoffrey R. Stone et al. eds., 1992).

14. *Id.* at 211.

15. 268 U.S. 510 (1925).

I have been persuaded[16] by Michael McConnell,[17] however, that this interpretation of the Constitution is profoundly wrong,[18] especially if one believes that the principle of "equal concern and respect" is a foundational predicate of our constitutional order.[19] The key here is the attitude one adopts with regard to *Pierce*. On one hand, *Pierce's* support of a constitutional right to opt out of public education could be viewed simply as the unfortunate positive law of our Constitution, to be submitted to so long as it is not formally repealed or overruled, but not to be admired. Conversely, *Pierce* could be read as a constitutional principle which should be supported and perhaps even venerated. Mark Yudof, for example, interprets *Pierce* as standing for the proposition that governments, while "free to establish their own public schools and to make education compulsory for certain age groups,"[20] cannot use state power "to eliminate competing, private-sector educational institutions that may serve to create heterogeneity and to counter the state's dominance over the education of the young."[21]

From this perspective, *Pierce* is a powerful barrier to totalitarianism through its recognition of the legitimacy of multiculturalism. The state is simply limited in its power to reinforce the hegemony of the dominant culture by prohibiting parents from engaging in at least partial "secession" from that culture and instead carefully cultivating within their children alternative ways of looking at the world.[22] *Pierce* seemingly calls for a

16. An earlier, far briefer version of this discussion can be found in my contribution to AMERICAN JEWS & THE SEPARATIONIST FAITH: THE NEW DEBATE ON RELIGION IN PUBLIC LIFE 74-75 (David G. Dalin ed., 1993).

17. My colleague Douglas Laycock, who is unusual in his ability to take with utmost seriousness the claims of the religious without, so far as I know, being religious himself, also provided a great deal of help.

18. For an especially brilliant article, see Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991).

19. The term "equal concern and respect" is probably most identified with Ronald Dworkin. *See e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180-183 (1978). However, Dworkin builds on the earlier work of John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE 511 (1971). The notion of "equal concern and respect" is also central to the important theory of John Hart Ely. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

20. MARK W. YUDOF, WHEN GOVERNMENT SPEAKS 229 (1983).

21. *Id.*

22. The "secession" image is developed by Professor Toni Marie Massaro in CON-

measure of "equal concern and respect"[23] for these alternatives, especially if parents are willing to pay the costs of the education at issue even as they pay taxes to support a public school system which they reject.

One of the key questions raised by this last sentence is what happens if parents are formally willing, but in fact basically unable, to pay the costs of private education.[24] In other words, should the putative benefits of private education, well articulated by Yudof, be limited only to the relatively affluent or to those who receive voluntary contributions from people of greater means? It is hard, at least for those of us who profess to be egalitarian in our political sympathies, to figure out how the answer to this question might be "yes."

McConnell, for example, makes very effective use of the point that most contemporary liberals support state subsidy of abortions for poor women on the ground that their formal right to enjoy reproductive freedom, labeled "fundamental" by the Court,[25] is hollow if it is rationed by a price mechanism that effectively denies indigent women access to abortions. If we secular liberals are so solicitous about ensuring the practical right of poor women to enjoy their right of reproductive choice, why then are we not equally concerned, at least as a political

---

STITUTIONAL LITERACY: A CORE CURRICULUM FOR A MULTICULTURAL NATION 99-100 (1993). The "at least partial" in the text comes from the fact that not even *Pierce* places *absolute* control in the hands of parents, for the state retains the right to make sure that some "minimal" educational goods, as defined by the state, are transmitted to children. *See* MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW 43-77 (3d ed. 1992). Whether these requirements actually apply to home schooling, for example, is doubtful, but as a formal question of constitutional power, there is little doubt that courts will reject a claim of sovereign right by parents to disregard any and all state commands with regard to the education of their children.

23. *See* DWORKIN *supra* note 19, at 180-83.

24. I put to one side the equally important question of whether it is legitimate to make parents pay for both public education they do not use and for private schools they patronize. My answer is that the general public benefits of (or, in the language of economics, the "externalities" generated by) public education are sufficient to support coerced taxation for public education. I offer a similar analysis with regard to taxing the childless, who make no direct use of public schools. The religious parent sending children to non-public schools is no different, positionally, from the childless person who is deprived of some important want because of the duty to pay education taxes.

25. Roe v. Wade, 410 U.S. 113, 152 (1973).

matter, about the equally constitutionally protected fundamental right of less affluent parents to choose religious education for their children? Attempting to defend one's lack of equal concern by reference to the Establishment Clause simply begs the central issue of how in fact the clause should be interpreted.

McConnell argues, and I (now) agree, that arguments like Professor Kathleen Sullivan's, with their blithe reference to unacceptable "subsidies" of religious education, depend on a baseline that in effect presumes the classically liberal "night-watchman" state which leaves the provision of important services, including education, to the operation of the market.[26] It is reference to this baseline that justifies the provision of publicly-funded police and fire protection to religious schools. It had simply become an accepted practice even of a relatively minimal state to provide such protection to the general public, and it would have truly appeared (and would have been) discriminatory had the state declared, in effect, that every building *except* for churches would be protected against fire or theft. Concomitantly, if the state had declared that it would provide some special protection *only* for churches, then I, and I think most analysts, would interpret this as clearly aiding religion in violation of any plausible interpretation of the Establishment Clause. Over the past half-century, the majority of the Supreme Court has tended to interpret aid to parochial schools (in the context of some general scheme of aid to private schools, for no one has ever defended providing aid only to religious schools) as in effect something very special; a deviation from a baseline of no aid.

Education, however, has for at least 140 years, been an important aspect of governmental budgets, especially (and until the 1960s, almost exclusively) at the local level. Even the classic Westerns featured the "school marm" whose state-funded task was to maintain civilization on the frontier. Like fire and police protection, education has been viewed as something the

---

26. *See* McConnell, *supra* note 12, at 184-85. McConnell's colleague, Cass Sunstein, emphasizes the importance of baselines and their ostensible (and false) "neutrality" in setting the terms of constitutional argument in CASS SUNSTEIN, THE PARTIAL CONSTITUTION (1993). *See* Sanford Levinson, *Unnatural Law*, THE NEW REPUBLIC, July 19, 26, 1993, at 40 (reviewing Sunstein).

state provides, even if from a contemporary perspective, much of the past provision was minimal. In any event, as McConnell notes, we have moved very far from the minimal state and entered the world of the contemporary welfare state. That type of state features extensive, and some would say, pervasive expenditures by the state in order to provide goods and services at less than market cost to those who could not otherwise afford them.[27] The baseline is now that of the modern welfare state, whose most substantial expenditures, particularly at the state and local levels of government, are for educating the young.

For McConnell, then, the contemporary situation is more akin to the police and fire protection example. To offer extensive aid *only* to those who will send their children to public schools or to non-religiously affiliated private schools is, in effect, to exhibit a gross lack of equal concern and respect for the non-well-off religious (and, of course, the non-well-off who desire private education for other reasons as well). Moreover, there is the reality that some parents cannot afford non-public education in part because taxes for public education continue to mount.

The question then becomes whether legislatures can vote to return some of this tax money through support for non-public education, which would, as a practical matter, be used primarily in religiously-based schools.[28] I am no longer persuaded by the argument that the Constitution deprives legislatures of the freedom to exercise such judgment. Although I generally oppose, and am often appalled by, the rightward drift of the Reagan-Bush Supreme Court, I confess to a hope that the majority would indeed reconsider what I now regard as one of the most questionable legacies of the Warren Court era—the hostility to aid to parochial schools.[29]

---

27. *See* McConnell, *supra* note 12.

28. A second important question, well beyond the scope of this informal essay, is whether the state has not just *permission*, but a *duty*, to return such money. I am decidedly more uncomfortable with this argument than with the more modest, though scarcely less controversial, view that the Constitution, correctly interpreted, does not deprive the state of the ability to aid private schools, including religious ones.

29. As I have said elsewhere, "I would . . . gladly overrule Committee for Educ. v. Nyquist, 413 U.S. 756 (1973)," one of the most important barriers standing in the way of state aid to religious schools. Sanford Levinson, *Religious Language and the*

Although there are advances in this direction,[30] it is noteworthy that the majority has been remarkably cautious in rewriting doctrine and, by and large, has been intensely fact-specific in upholding such aid. This was the case, for example, in one of this past Term's cases dealing with religion, *Zobrest v. Catalina Foothills School District*.[31] A five-justice majority, through Chief Justice Rehnquist, reversed the Court of Appeals for the Ninth Circuit holding that Arizona could not supply an interpreter to a Catholic high school in order to facilitate the attendance of James Zobrest, a deaf student who depended on the use of sign language. No one could accuse Rehnquist of cutting a wide swath, however. After first defining Arizona's payment of the interpreter's salary as "part of a general government program that distributes benefits neutrally to any child qualifying as 'handicapped,'"[32] he went on to emphasize that the Catholic school in question was "not relieved of an expense that it otherwise would have assumed in educating its students," since it presumably was not in the practice of providing interpreters to deaf students.[33] Moreover, it was declared significant that "the task of a sign-language interpreter seems to us quite different from that of a teacher or guidance counselor," for the interpreter ostensibly exercises no discretion in communicating with his or her charge.[34] "[E]thical guidelines," stated Rehnquist, "require interpreters to transmit everything that is said in exactly the same way it was intended."[35] There is, therefore, more than enough doctrinal "wiggle-room" in the opinion to authorize the Court to strike down more expansive aid to religious schools or to their students.

---

*Public Square*, 105 HARV. L. REV. 2061, 2078 n.72 (1992).

30. *See, e.g.*, Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986).

31. 113 S. Ct. at 2462.

32. *Id.* at 2467.

33. *Id.* at 2469.

34. *Id.*

35. *Id.* Were this an essay on theories of interpretation and postmodernism, one could certainly debate whether this guideline, in fact, is capable of being complied with (and how one might conceivably know of this). Fortunately, this is not such an essay, and I am assuming that most of us agree with Rehnquist that it is indeed cogent to view the interpreter as being in a different position from the overtly choice-making teacher.

Given the extraordinarily limited reach of Rehnquist's opinion, I was especially disappointed that Justices Blackmun and Souter, two Justices I generally admire, dissented on the merits.[36] They rejected the claim that Arizona should be able to provide funds to Salpointe High School so that James Zobrest could enjoy, as a practical matter, his constitutional right to attend a religiously-based school. Instead, they accused the majority of "authoriz[ing] a public employee to participate directly in religious indoctrination," presumably through the signing of material with religious content.[37]

For me, especially as tutored by McConnell, this conclusion seems to tread dangerously close to an "unconstitutional condition"—that is, the forced waiver of a constitutional right as consideration for some valuable governmental benefit.[38] Here, the availability of the valuable benefit of a state-funded interpreter making it possible for a deaf child to be "mainstreamed" in regard to receiving an education, requires the waiver of his right to attend a religious school. Although such conditions can be imposed on any citizen, it is obvious that the poor are especially vulnerable to the blandishments held out by the welfare state, whose "safety net" may be the only thing between the recipient and a hard fall.

It is, of course, a rich irony that the Chief Justice has been generally unsympathetic either to the plight of the poor or to the more general "unconstitutional condition" analysis,[39] while Justice Blackmun has, in recent years, proved himself quite sensitive both to the general needs of the poor and to the potential for abuse of governmental largesse.[40] In *Zobrest*,

---

36. Justices Blackmun, Stevens, O'Connor and Souter dissented on technical grounds from the Court's reaching the substantive issue.

37. 113 S. Ct. at 2471.

38. *See, e.g.*, Richard Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Kathleen Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989).

39. *See, e.g.*, Rust v. Sullivan, 111 S. Ct. 1759 (1991); Federal Communications Comm'n v. League of Women Voters of California, 468 U.S. 364 (1984); Regan v. Taxation With Representation of Wash., 461 U.S. 540 (1983).

40. Justice Blackmun dissented, for example, in the abortion funding cases, Harris v. McRae, 448 U.S. 297 (1980) and Maher v. Roe, 432 U.S. 464 (1977) as well as in Rust, 111 S. Ct. at 1759.

though, Blackmun seems sublimely uninterested in the fact that the Zobrest family paid $7000/year to hire an interpreter for their son following the decision of the Ninth Circuit Court of Appeals invalidating Arizona's provision of aid.[41] But what if another family in the same position as the Zobrests, but unable to afford the extra $28,000 to send their child to a religious school, had in effect been compelled to send her to a public school (or to a non-sectarian private school) in order to receive the necessary services of a state-funded interpreter? Why should we complacently accept this as "required" by the Establishment Clause? I (now) see no good reason to do this. As should be obvious, I see good reason to be more understanding of the plight of families like the Zobrests.

I am especially mystified how anyone devoted to any extent to one or another of the contemporary defenses of "multiculturalism" could oppose on principle the kind of legislative discretion at issue in *Zobrest* or the other classic parochial school funding cases. It is a deep irony that at least some of the Christian supporters of non-public education are vehemently opposed to "multiculturalism," which, by ostensibly promoting a kind of relativism, in their opinion attacks the one true view of the world.[42] Yet surely the strongest arguments likely to persuade secularists to tolerate (and perhaps even to support) the various Christian academies and other religious schools that dot the landscape are precisely those that emphasize the importance of nurturing a vibrant and, therefore, contentious cultural pluralism. This means, almost by definition, that we exhibit a measure of concern and respect for cultural perspectives that one not only does not identify with, but even finds abhorrent in significant aspects.[43]

---

41. See Linda Greenhouse, *Court Says Government May Pay for Interpreter in Religious School,* N.Y. TIMES, June 19, 1993, at 1, 8. One assumes that, as a result of the Supreme Court's decision, they will be remunerated for their expenditures.

42. *See, e.g.,* the description of Vicki Frost's views in Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1060-62 (6th Cir. 1987), discussed *infra* section II.B.

43. No doubt there are limits to the tolerance due truly pernicious subcultures, especially if, as matter of social fact, they potentially threaten the maintenance of liberal democracy itself. Fortunately, that is a topic beyond the scope of this particular essay. *See, e.g.,* STEPHEN MACEDO, LIBERAL VIRTUES (1990).

All of this being said, though, I find myself lamenting the retreat from public education by groups who increasingly feel alienated from the culture of the public schools. That I have been persuaded by McConnell's arguments as to what the Constitution allows (and what a serious commitment to egalitarianism may require, at least as a matter of political theory) is not the same thing as saying that it is an affirmative social good that children be educated in homogeneous environments free from the taint of contact with children who may be quite different. Indeed, I have no hesitation in counting it as an overall social evil that the challenge of coming to terms with our multicultural reality is increasingly taking on a frankly separatist dimension.[44]

To this extent, I disagree with McConnell when he argues that "[t]he common school movement has run its course and no longer can establish a coherent position in the face of the conflicting demands of a diverse nation."[45] For McConnell, the American public school has in effect become estopped, either because of constitutional interpretations of the Supreme Court or simply acquiescence to the fragmented nature of American society, from "teach[ing] any god because it would have to teach all gods; it cannot teach any culture because it would have to teach all cultures . . . . The common school movement now teaches our children, unintentionally, to be value-less, culture-less, root-less, and religion-less."[46] Thus, he says, "[i]t can no longer achieve its crowning purpose of providing a unifying moral culture in the face of our many differences."[47] For McConnell, the answer is to adopt educational financing systems which would maximize the "freedom of choice" of the parents by providing them with vouchers, even if the likely consequence is the flourishing of individually homogeneous schools.[48]

---

44. See HUGHES, *supra* note 7 for an eloquent polemic on this point.

45. Michael McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?* 1991 U. CHI. LEGAL F. 123, 149.

46. *Id.* at 148-50.

47. *Id.*

48. *Id.* at 126.

At some point, the nurturance of "pluralism" requires the toleration of "separatism." This is exemplified most clearly in our constitutional law by *Wisconsin v. Yoder*,[49] where the state was required to subordinate its general educational policy of compulsory education to the interests of a minority community in maintaining its own distinctive way of life apart from the surrounding society. In Amy Gutmann's terms, the "family state," predicated on emphasizing a common membership in an overarching political community, was subordinated to a "state of families" in which the primary unit is the particularistic community and the wider polity more a confederation of these communities than a genuine community in its own right.[50]

All of this being said, and conceding the importance of nurturing pluralism, I think it important that we try, as much as is reasonably possible, to resist the development of the separatism to which it can too easily lead. The "resistance," it is important to say, should be based on force of argument rather than force of law. I hope I have made clear the extent to which I would rewrite some of our current doctrines interpreting the Establishment Clause in order to allow more state funding of non-public, including religiously-based, schools. But one can also, at the very same time, support strengthening public schools in ways designed to encourage (even if not to *require*) persons from all sorts of backgrounds, and with all sorts of views, to attend them and to interact with one another.

### B. *On School Prayer and Similar Matters*

How might one go about the task of bringing about what seems to be the increasingly utopian dream[51] outlined in the last paragraph? To answer this question adequately would obviously require a book. My goals here are considerably more modest. I want to address the question of what types of "concessions" (if this is the proper word) I am willing to make in

49. 406 U.S. 205 (1972).

50. *See* AMY GUTMANN, DEMOCRATIC EDUCATION 19-41 (1987).

51. As one reader suggested, some persons (including, presumably, the parents who brought the *Mozert* litigation discussed *infra*) might well regard this as a dystopian nightmare instead.

order to allow self-consciously religious parents to feel more comfortable in sending their children to public schools. I am assuming, of course, that my own sensibility is not unique and that I can speak to, even if not for, others who share my own self-definition as a secularist in at least two somewhat different senses. First, I possess no "religious" beliefs, as conventionally defined. Though I continue strongly to identify myself as Jewish, this has little, if anything, to do with embracing any theological propositions myself. Secondly, I reject the propriety of the states overtly articulating any theological propositions. I read the Establishment Clause as prohibiting "in God we trust" from the coinage. I thus remain militantly opposed (as do many non-secularists) to any endorsement, direct or indirect, of the United States as a "Christian" (or even "Judeo-Christian") nation.

It should be no surprise, then, that my initial delight with *Engel v. Vitale*,[52] the first Supreme Court decision striking down state-sponsored school prayer, has never entirely dissipated. Officially composed prayers, even with an opt-out provision for those who wish not to participate, easily count as a violation of my version of the Establishment Clause. I was pleased when a slender majority struck down, in *Wallace v. Jaffree*,[53] an Alabama "moment of silence" law which was passed at the behest of religious groups and involved teachers overtly informing their students that one (presumably preferred) use of the moment of silence would be "prayer." Similarly, I rejoiced last year when the Court, to many analysts' surprise, struck down in *Lee v. Weisman*[54] the Rhode Island school district's practice of inviting members of the clergy to deliver prayers (albeit "nonsectarian") at the official baccalaureate ceremonies that are part of graduation from high school. Again, it seemed to me that the state was in effect trying to extract an "unconstitutional condition"—the waiver of one's right not to be subjected to official state-organized prayer in order to attend the public baccalaureate ceremonies of graduation week.

52. 370 U.S. 421 (1962).
53. 472 U.S. 38 (1985).
54. 112 S. Ct. 2649 (1992).

On reflection, though, I am reminded of the curse of the monkey's paw—being granted what (one thinks) one wishes. It is hard to believe that this triumvirate of cases has in fact made this a better society overall. Instead, I suspect they have made their own contribution to the perception of a *kulturkampf*—a cultural war—between secularism and sectarianism and, concomitantly, to the further fraying of any remaining social bonds that might once have linked these elements of society.[55] Not the least contributor to the fraying is precisely the treatment of the issue of prayer in the public schools as one of high legal principle, and subject, therefore, to resolution by the analytical techniques mastered by lawyers. This seems increasingly dubious as a picture of social reality, even if one accepts the perhaps even more dubious portrait of lawyers as truly skilled in the working out of principled doctrinal arguments.

As Stephen Carter has written in a recent review of Ronald Dworkin's new book,[56] which purports to settle the questions of abortion and euthanasia by reference to consistent principles, society sometimes (perhaps often) is far more in need of compromise than of rigorous adherence to principles. As Carter points out, "[c]ompromises, by their nature, possess the internal inconsistencies and contradictions that scholars, by their nature, abhor. Scholars want arguments to *make sense*; but politicians know that arguments have to *work*—which means, in the long run, that they must form the basis for a stable consensus."[57] Therefore, what I offer now is not a refinement of the doctrinal arguments so ably made by others as a discussion of possible terms of compromise. That is, what am I willing to offer, by way of compromise, in order to still some of the cannon- (and canon-) fire in the *kulturkampf*?

I begin with the set of issues raised in *Mozert v. Hawkins County Board of Education*,[58] in which several fundamentalist

---

55. *See, e.g.*, JAMES D. HUNTER, CULTURE WARS (1991).

56. Stephen L. Carter, *Strife's Dominion*, THE NEW YORKER, August 9, 1993, 86 (reviewing RONALD DWORKIN, LIFE'S DOMINION (1993)).

57. *Id.* at 92.

58. 827 F.2d 1058 (6th Cir. 1987). See generally the important article by Nomi Maya Stolzenberg, *"He Drew a circle that Shut Me Out": Assimilation, Indoctrination,*

"born-again Christian"[59] parents claimed a constitutional right to have their children exempted from certain reading assignments in the local public schools because these assignments purportedly encouraged beliefs that ran contrary to the version of biblical literalism embraced by the parents. Two parents testified, in the language of the court, that they "objected to passages that expose their children to other forms of religion and to the feelings, attitudes and values of other students that contradict the plaintiffs' religious views without a statement that the other views are incorrect and that the plaintiffs' views are the correct one."[60]

To put it mildly, I do not share the world view of these parents. Taken seriously, they represent nothing less than an attack on the very notions of independent analysis and self-reflection to which I would like to think I have dedicated my own life.[61] Moreover, one notes that the readings at issue ostensibly were chosen by Tennessee to carry out the statutory duty of public schools "to help each student develop positive values and to improve student conduct as students learn to act in harmony with their positive values and learn to become good citizens in their school, community, and society."[62] For ease of argument, let it be stipulated that the readings in fact did these desirable things. Does this combination of desirable readings and questionable, perhaps even appalling parental values conclude the discussion?

To answer this question requires returning to *Pierce* and its protection of private education. For all of the emphasis placed

---

*and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993). Also essential for any student of *Mozert* is STEPHEN BATES, BATTLEGRARD (1993).

59. By no means are all "born again Christians" either "fundamentalists" or committed to the kinds of views articulated by the plaintiffs in this case.

60. 827 F.2d at 1062.

61. In these post-modernist times, it is necessary to note that "independence" and "self-reflection" are highly problematic notions, for we are *always* embedded within the presuppositions of a given culture, and our "self" is substantially a creation of that culture. One can, therefore, never gain a leverage point of "independence" from culture *per se*, nor, obviously, can one engage in out-of-self experiences in order to reflect in a thoroughly detached way on the object that goes under one's name. All of this can be conceded, I believe, without giving up all allegiance to the Enlightenment value of "thinking for oneself" that remains the core of a liberal education.

62. 827 F.2d at 1060 (quoting TENN. CODE ANN. 49-6-1007 (Supp. 1968)).

by the court on the importance of public schools as the molder of democratic citizens, it readily embraces the legitimacy of fleeing from the public school and the presumed inculcation of quite different values. Judge Lively, for the majority in *Mozert*, sets out his view of the choices facing the parents:

> The parents in the present case want their children to acquire all the skills required to live in modern society. They also want to have them excused from exposure to some ideas they find offensive. Tennessee offers two options to accommodate this latter desire. *The plaintiff parents can either send their children to church schools or private schools, as many of them have done, or teach them at home. Tennessee law prohibits any state interference in the education process of church schools.*[63]

So the choice is (deceptively) clear: One can attend the public schools on one's terms, or place one's children in church or home schools, which can apparently be operated entirely on the parents' (or a religious school's) terms. Are we stuck with these two alternatives?

I think not, precisely because *Pierce,* at least as interpreted by the court and substantiated by Tennessee law, seems sublimely indifferent to the universal inculcation of "positive" values. That is, once the state tolerates, either out of constitutional necessity or political ideology, what might be termed counter-hegemonic schools, then it seems hard, if not impossible, for the very same state to say that it has a "compelling state interest" justifying the burden placed on religious students by disallowing them from opting out of certain aspects of the public school curriculum. If the interest is truly "compelling," then one would think that the state would act aggressively to make sure that no child is denied its enjoyment.

---

63. *Id.* at 1067 (emphasis added). Judge Lively quotes Tennessee Code Annotated § 49-50-801(b) (Supp. 1968): "The state board of education and local boards of education are prohibited from regulating the selection of faculty or textbooks or the establishment of a curriculum in church-related schools." If this statute means what it appears to say on the surface, then the state does indeed seem to have ceded sovereignty to the parents (or at least to the administrators of a church school). *See supra* note 22.

However, once the state allows parents to withdraw their children entirely from the public schools and to inculcate views and values that might be quite antagonistic to the interests of the liberal democratic state, then why not allow these parents to enjoy the public schools on at least some of their own terms, including the opting out from offensive curricular requirements? There is an easy answer to this question which involves the potentially high administrative costs attached to tolerating the opting out and, for example, preparing tests on reading material different from that read by most of the students. I do not in the least deny the reality of these and other costs that undoubtedly make the already hard work of the public school teacher more burdensome. I do offer two observations, though. First, there is no indication in the *Mozert* opinion of precisely what these costs, as a practical matter, would be. Secondly, there is a whole body of constitutional law, most of it admittedly from the Warren Court days, denigrating administrative ease and low costs as counterweights to "fundamental" constitutional interests. It seems hard to gainsay, for example, that protection of religious free exercise is at least equal in fundamentality as a constitutional value to the "right to travel" of indigents so vigorously protected by the majority in *Shapiro v. Thompson* against Connecticut's attempt to impose a one-year residency requirement, justified by reference to administrative and fiscal convenience, prior to the receipt of welfare.[64]

Moreover, liberals who often are properly quick to label as an "unconstitutional condition" the state's attempts to "buy up" important constitutional rights through the provision of public assistance, seem all too acquiescent here.[65] Surely, at least if one is even modestly egalitarian, *Pierce* cannot stand for the proposition that the state can exact any requirement it wishes from those who attend publicly financed schools so long as individuals with enough money or ideological zeal are free to withdraw and attend non-public schools.

---

64. 394 U.S. 618 (1969).

65. See Justice Douglas's dissent in Wyman v. James, 400 U.S. 309, 327 (1971) ("[T]he central question is whether the government by force of its largesse has the power to 'buy up' rights guaranteed by the Constitution.").

Whatever else might be said about these parents, they were willing to reject the option of separatism that the Constitution, and the laws of Tennessee, granted them. To this extent, they should be praised rather than discouraged and made to feel ever more marginal. For better or worse, one cannot compel these students to attend public and multi-cultural schools; that is the meaning of *Pierce*. By definition, this means that they must be lured, and this requires offering them at least some of what it will take to keep them within the public schools. As a practical matter, *only* attending public (or what used to be called "common") schools will offer the possibility of contact being made with persons significantly different from themselves. Although one certainly should not over-estimate the importance of such contact—Catholics, Eastern Orthodox, and Moslems, after all, used to live next door to one another in Bosnia—it seems to me better than the alternative of ever-more separatism.

Candor compels me to state that I am considerably less willing to compromise in terms of the curriculum foisted on *non-religious* students. That is, I am certainly disinclined, as a matter of politics, to support the entry into the general curriculum of "creation science." That is easy (at least for me). What is harder is deciding whether the Constitution is best interpreted as foreclosing a state legislature or local school board from requiring that "creation science" be taught as an alternative account of the origins of life to evolution.[66] I personally doubt that exposure to "creation science" arguments is all that important, and it is even possible that a gifted teacher could use the conflict between such accounts and those of more traditional evolutionary biology to teach students, including religious students, something about the way scientific arguments are actually conducted in terms of evidence, hypotheses, the handling of anomalous data, etc.

I suspect that the conflict, like so much legal strife, is of primarily *symbolic* importance. It has to do precisely with the

66. *See* Edwards v. Aguillard, 482 U.S. 578 (1987) (striking down a Louisiana law that required the teaching of "creation science" together with evolution, because passage of the law was motivated by the illegitimate purpose of aiding religion).

determination of religious parents that the public school system pay them some formal respect by acknowledging the "thinkability" of some of their cherished views about the creation of life. To say that it is primarily a symbolic issue is not meant to denigrate it; after all, as Justice Holmes once pointed out, "[w]e live by symbols."[67] No one who has drunk from the (post)modern well of semiotics can be blind to the importance of symbolism. It is in the very nature of a *kulturkampf* that the issues of maximum strife will have far less to do with the division of material resources—the basic issue of class warfare—than with the valence to be placed on certain cherished myths and symbols by which the cultural combatants give meaning to their otherwise literally meaningless lives. No less than the Godfather do most human beings yearn for "respect," and woe to the society that systematically denies respect to any large (and mobilizable) subset of its population.

The universal desire for respect, incidentally, suggests why it is important that offers of compromise be two-way, including the acceptance by the "religious right" of a substantially more secular, culturally-pluralistic, school system than they might otherwise prefer. There is certainly reason for secularists to believe that they are fundamentally disrespected by many of the so-called "new religious right." As with tangos, it takes two to engage in a *kulturkampf.* If there is no alternative to a *kulturkampf,* then I have no hesitation in lining up with the opponents of religious orthodoxy. The question, though, is whether there is indeed an alternative to such a grim prospect.

All of these issues come together with regard to prayer in the public schools. To the extent that religious students continue to attend public schools, school prayer will undoubtedly continue to be a minefield. What am I willing to offer here? From one perspective, undoubtedly, the answer is not much. I still unequivocally applaud both *Engel* and *Lee*; the state has no business either composing or arranging for the offering of prayers in public events. On the other hand, I find myself much less enamored of *Wallace,* even conceding that the purpose of the Alabama legislators, who passed the statute was to sneak

67. OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 270 (1920).

prayer, at least somewhat, back into the schoolroom and that the teacher would state the magic word in calling the class to silence. Is it worth it, even from a secularist perspective, to prohibit such a law if the cost—and one must, of course, see this as a cost and not as a benefit—is to alienate yet more religious parents (and possibly their children) from the public schools and, in some cases, to drive them from the public schools into one or another religious "academy?"

My answer, as one can readily gather, is no. The loss of such students, should it in fact be occurring, deprives the public school of an important "different voice" that enhances the diversity so important to education. If one can keep some students simply by allowing a moment of silence, and allowing a teacher to say that at least some students might use this moment for prayer while others contemplate the meaning of life, last night's date, or whatever, it is a cheap price to pay. To insist on stamping out such moments in the name of the "wall of separation" is to fall victim to an ideological zeal that is little better, I am now convinced, than the zealotry exhibited by those who would wish to absorb the state as an ally in endorsing and/or enforcing a specific theological program. It is, therefore, my hope that *Wallace*, if not flatly overruled, will in the future be restricted to its specific facts. State-imposed moments of silence and contemplation, unaccompanied by state-composed prayers or entreaties from the teacher to engage in prayer, ought not to be viewed as presenting threats to the values underlying the Establishment Clause.

I want to conclude this section by trying to answer a series of questions asked by Professor McConnell in a recent letter. They both capture the kinds of controversies increasingly being litigated and, more importantly, present just the kinds of questions that anyone concerned with the practice (and not simply the theory) of multiculturalism must grapple with. The challenge offered by McConnell was as follows:

> [W]hat would you do if the graduating class is allowed to vote on whom to invite to give the graduation address, and the class votes for a person whose principal appeal is religious (the local bishop, perhaps—or a religious writer)? Would you allow a separate, voluntary baccalaureate ser-

> vice, organized by the school (or, better yet, a committee of the student government)? Would it be permissible for the student government to allow a representative sampling of the viewpoints in the class each to speak for five minutes at the graduation ceremony—and include an evangelical type? And what about non-school settings? Presumably, for the President to include prayers at his inauguration is permissible on the ground that it is done in his "private" capacity; presumably the same would be true of a joint swearing-in of a group of congressmen; why isn't the same principle applicable to graduating seniors from high school?[68]

Would I allow the graduating class to pick the speaker, even if the basis of the selection is presumably the (likely) religious content of the address? I distinguish this, incidentally, from a class vote to have a student-led prayer, which I would strike down in an instant.[69] One might want to know the background that provides a "baseline" for consideration. *If* students traditionally chose the speaker, and *if*, over many years, speakers had been drawn from a variety of places on the intellectual spectrum, and *if* speakers had taken advantage of the opportunity offered them to make controversial speeches challenging conventional views (conditions that I would be absolutely astonished to find met in more than a handful of high schools), *then* I would be inclined to describe as "censorship" the refusal by a school to honor a class's choice to hear, as in McConnell's example, the local bishop and the likely invocation of religious themes.

I would analogize the example to the situation presented before the Supreme Court this past Term in *Lamb's Chapel v. Center Moriches Union Free School District*,[70] where a unanimous Court struck down the refusal of a New York school board to grant permission to Lamb's Chapel, an evangelical church in the local community, to "show a six-part film series containing lectures" on the family and arguing the necessity of

---

68. Letter from Michael W. McConnell to Sanford Levinson (July 7, 1993).

69. *Cf.* Jones v. Clear Creek Ind. Sch. Dist., 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) (holding student-initiated prayer acceptable). I would, of course, reverse the Fifth Circuit.

70. 113 S. Ct. 2141 (1993).

"returning to traditional, Christian family values instilled at an early state."[71] The Board was applying its rule prohibiting the use of public school facilities, even after school hours, for "religious purposes," even though other rules allowed access to a multitude of nonreligious groups.[72] The Court properly found this content-based distinction in violation of the First Amendment.

An obvious distinction is that the Lamb's Chapel program is not formally sponsored or otherwise endorsed by the school board, whereas the graduation ceremony, even if not compulsory, is a central public ritual, and it would be unfortunate indeed if a member of the non-hegemonic minority was reluctant to attend such an important occasion because of the anticipatory discomfort produced by the prospect of a religiously-oriented speech. But, of course, the discomfort could well be produced by inviting the local member of Congress or anyone else identified with any controversial stance on public issues.[73] If, however, as I suspect is almost certainly going to be the case, student selection of the speaker is a brand-new option, adopted at least in part to evade the strictures of *Weisman* and other similar decisions, then I have little hesitancy in striking down McConnell's first example.

Would I permit a separate, voluntary baccalaureate service, organized by the school (or, better yet, a committee of the student government) at which prayer(s) would be offered? No to the school-organized service. After all, the "official" baccalaureate service is "voluntary," and that properly made no difference to the *Weisman* majority. The school system should not be in the business of organizing "separate-but-equal" services, regardless of the basis of the separation. I am inclined to give the same answer for the service organized by the student government.

---

71. *Id.* at 2149.

72. *Id.* at 2148.

73. Consider, for example, the demonstrations mounted this past June at Harvard in protest of the selection of General Colin Powell, who opposed proposals by President Clinton to integrate gays and lesbians fully into the armed forces, as the graduation speaker there.

Far different is a separate ceremony organized by a group of students, including, for example, the president of the student council and the captain of the football team, and held "off-campus," perhaps at a local church. I can see no argument for enjoining students from announcing their desire to offer thanks to God upon completion of their high school careers and inviting their classmates to join them. What if the "supplementary" ceremony in fact became the principal one, so that most of the students and parents showed up at the local church and relatively few bothered to come to the high school auditorium? (I assume, for ease of argument, that the two services are not scheduled at the same time.) I would regard this as most unfortunate, but again I cannot imagine any reading of the First Amendment that would bar students and parents from organizing a religious service to which the public is invited. Only if the organizing committee included school officials might there be a genuine dilemma, though even here one should be wary of forcing public employees to waive their own rights of free expression as a condition of accepting public employment.

Could the student government allow a representative sampling of the viewpoints in the class to speak for five minutes each at the graduation ceremony, and include an evangelical type? This strikes me as an easy case: The answer is yes, again assuming that there is no ground for viewing this simply as a pretext to evade *Weisman*. It becomes especially easy if the "representative sampling" includes students expressing non-religious views likely to get under the skin of many of those in attendance, such as endorsements of gay and lesbian rights, attacks on welfare recipients, support (or denunciation) of capital punishment, and the like. *Weisman* properly bars the state from asking students to "join in" a prayer, even if they have the option of refusing the invitation. Hearing an evangelical student, one among many other students, witness his or her faith in Jesus, is simply not the same thing.

Indeed, the evangelical student need not necessarily be "balanced" with non-religious counterparts. If, for example, the valedictorian is evangelical and wishes to begin her speech with thanks to God, then that is acceptable. She earned her right to speak on grounds wholly separate from her religious identity,

and, generally speaking, the state ought not be able to extract a "bleaching out"[74] of her religious identity as a condition for enjoying what all valedictorians have enjoyed before her—the right to speak to her classmates and parents. Things get far trickier, of course, if, as is common, valedictory speeches are in effect subject to censorship via submission to the principal for review. However, I confess that I find the idea of review itself to be far more constitutionally suspect than the prospect of the speaker "slipping in" some prayer. The valedictorian should have the same freedom as the President of the United States to include religious references in her speech.[75]

## III. CONCLUSION: TOWARD SYNTHESIS?

I have tried in this essay to offer reflections on some implications of the reality of religious multiculturalism within America. I have also tried, quite self-consciously, to present myself as a wonderfully tolerant person who genuinely wishes to reach out to persons of decidedly different sensibility from my own. Yet candor requires me to admit that one reason I would prefer the children at issue in *Mozert* to attend the public schools is precisely to increase the likelihood that they might be lured away from the views—some of them only foolish, others, alas, quite pernicious—of their parents. Perhaps *they* will meet and begin talking with, and learning from, more secular students.

Here we see the underside of terms like "tolerance," for, generally speaking, one who self-consciously "tolerates" opposing views or ways of life is unlikely to offer them "equal concern and respect." Instead, the tolerator only holds back from exercising certain kinds of force that would make the lives of the tolerated even worse. I do not mean to denigrate "toleration." There can be no doubt that the move from a society in which

74. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1578, 1601 (1993).

75. This being said, I must add a strong desire that presidents in fact choose to omit opening and closing benedictions at inaugurations. These should come, I believe, under the strictures announced in *Weisman*, though I scarcely expect any court to enjoin the President from inviting ministers, priests, and rabbis (and, in the near future, Islamic and Buddhist prelates), to take part in inaugural rituals.

one is actively suppressed to one in which one is tolerated is an important gain, and much of the world would be better off if toleration were more widespread. Still, no one should confuse this full and complete acceptance. It is this difference that is at the heart, I believe, of the contemporary debate about the public stance regarding gays and lesbians. Many straight Americans are far more willing to "tolerate" gays and lesbians than to acknowledge that there is really nothing at all objectionable about gay and lesbian behavior. Similar tensions are present when sectarians are asked to grant full legitimacy to secular perspectives and, of course, vice versa.

In any event, I find myself far more in a "tolerationist" than a genuinely "accepting" posture vis-a-vis persons like Vicki Frost. Thus I confess my hope that her children, by attending public schools, will in fact meet and begin talking with (and learning from) more secular students. My anger at the Hawkins County School Board is derived as much from their driving the children away, and thus, from my perspective, contributing, albeit indirectly, to the reinforcement of their parents' worldview, as it is from the Board's exhibiting antagonism to the worldview itself. To push these students from the public schools, by refusing to make the kinds of concessions their parents demanded—which, after all, went only to *their* education and not to the materials assigned all of the other children—will assure that they will in fact be educated within institutions that are, from my perspective at least, far more limiting and, indeed, "totalitarian" than anything likely to be found within a decent public school. My desire to "lure" religious parents back to the public schools thus has at least a trace of the spider's web about it.

I recognize, of course, that in a genuinely religiously multicultural school some secular students will be led to accept the students' religious understanding. Isn't this what education is all about—to present alternative views of the world and thus potentially transform the lives of individuals who had not heretofore dreamt of these possibilities? But, as already indicated, I am, perhaps optimistically, assuming that the transformation is far more likely to run from the religious to the secular than vice versa, and I cannot honestly say I know what I would be

arguing if I were persuaded that the likelihood, as a practical matter, ran in the opposite direction.

Do the last several paragraphs undercut the professed aim of this essay and thus deny the possibility of a synthesis of the initial thesis and antithesis presented at the beginning? Or, to adopt a question posed by James Boyd White,[76] do I reveal myself to be fundamentally uninterested in truly encountering the Others who do not share my own secular sensibility? And if that is the case, then why should they trust me truly to adjudicate their claims, anymore than I would be inclined to trust one of them to adjudicate my own?

My professed aim is to call upon fellow secularists to think of possible grounds of compromise with religious sectarians, especially in regard to the extraordinarily complex issue of education. I would like to think that is my real aim as well. But it is altogether possible that what this essay ultimately reveals is the difficulty, if not outright impossibility, of finding a common ground on which secularists and the religiously orthodox can walk together. After all, as the prophet Amos asked more than two millennia ago, "Do two people travel together unless they have agreed to do so?"[77] Perhaps I simply have not taken sufficient account of, and I may even illustrate, the deep chasm separating these two parts of the American social community. But we will not know this for a fact unless we at least make good faith attempts to understand the positions of the combatants in America's *kulturkampf* and to see if there are indeed ways to prevent the conflicts from becoming ever more deadly to the hope of achieving some kind of *unum* among the *pluribus* of American society.

---

76. "I think it less important," he wrote in a very thoughtful letter commenting on an earlier draft, "how a particular judge or scholar comes out than who he manages to make himself--and his audience, and the law--in the way in which he thinks and talks about the case." Letter from White, to Levinson (October 13, 1993) (on file with the author of this article). I am not at all sure that this conclusion, rewritten as a result of White's letter, fully meets his point, but I am grateful to him for pushing me to think more deeply about what I hope to do (and to reveal) by writing this article.

77. Amos 3:3 (New Jerusalem 1985). Of course, much of the major political theory of our time is structured by the obvious reality that society has become radically pluralistic, which by definition means substantial disagreement about basic issues.