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Public Schools and the Inevitability of Religious Inequality

*Richard F. Duncan**

I. INTRODUCTION

One of the most important articles about religious freedom in contemporary America was published a few years ago in the *Brigham Young University Law Review*. I refer to Michael McConnell's article, "*God Is Dead and We Have Killed Him!*": *Freedom of Religion in the Post-modern Age*.¹ In one respect, this is one of Professor McConnell's lesser works. It is a short commentary, not one of his legendary scholarly masterpieces.² But as important as serious scholarship is, sometimes our eyes are obscured by the dust and the artificial light of the law library. We are like the blind man healed by Jesus who at first saw "men like trees, walking."³ Then Jesus touched him a second time and his vision "was restored, and he saw everything clearly."⁴

In his *God Is Dead* article, Professor McConnell saw the world clearly and spun a compelling narrative that has the ring of truth about it. He recounts the story of Friedrich Nietzsche's

* Sherman S. Welpton, Jr. Professor of Law, University of Nebraska College of Law (rduncan@unlinfo.unl.edu). This Article is based upon my presentation at a conference entitled "A Religious Equality Amendment?" held at Brigham Young University on February 12, 1996. I wish to thank Fred Gedicks for organizing the conference and for his kind hospitality. I am also grateful to the other participants in the conference: the late Rex Lee, Richard Wilkins, Walter Dellinger, John Garvey, Steve McFarland, Cole Durham, Rod Smith, and Sandy Levinson. Special thanks to Lynn Wardle for having the courage to stand up for families and family values. Finally, there is no way to adequately express my appreciation for my wife, Kelly Duncan, who, in addition to everything else, is educating our children at home.

1. Michael W. McConnell, "*God Is Dead and We Have Killed Him!*": *Freedom of Religion in the Post-modern Age*, 1993 B.Y.U. L. REV. 163 (1993).

2. See, e.g., Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1.

3. *Mark* 8:24 (New King James).

4. *Mark* 8:25 (New Int'l).

mythic superman and alter ego, Zarathustra, who comes down from the mountains to preach the good news that "God is dead."⁵ The first person Zarathustra meets is an old hermit who lives in the forest and spends his day making and singing hymns, laughing, weeping, mumbling, and praising God.⁶ Zarathustra takes pity on the harmless old saint and spares him the news about the death of God. He allows the hermit to go on singing, weeping, mumbling, and praising his delusional deity in the solitude of the forest.⁷ Having recalled for us this story, Professor McConnell then asks:

Can we recognize in Zarathustra the enlightened attitude toward religious faith in our age? Religious freedom is to be protected, strongly protected—so long as it is irrelevant to the life of the wider community. . . . We will not interfere with solitary hermits in the forest, but they must stay out of the public square.⁸

If the public square were small and the forests of private life large, a strictly secular government would impose only a small barrier to equal citizenship for people of faith. For example, during the early years of American history, education of the young was primarily entrusted to the clergy, and one of the primary

5. FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA* 6 (Thomas Common trans., Prometheus Books 1993) (1885) [hereinafter NIETZSCHE, ZARATHUSTRA]. Nietzsche's sister and biographer, Elizabeth Förster-Nietzsche, in the introduction to a collection of her brother's works, calls *Zarathustra* his "most personal work" and notes that "[a]ll Zarathustra's views, as also his personality, were early conceptions of my brother's mind." Elizabeth Förster-Nietzsche, *Introduction* to FRIEDRICH NIETZSCHE, *THUS SPAKE ZARATHUSTRA*, in *THE PHILOSOPHY OF NIETZSCHE* at xix (Thomas Common trans., Modern Library 1954).

6. NIETZSCHE, ZARATHUSTRA, *supra* note 5, at 5.

7. *Id.* When the saint asks, "[D]ost thou bring us . . . a gift," Zarathustra declines the invitation to share the gospel of God's demise and says, "What should I have to give thee! Let me rather hurry hence lest I take aught away from thee!" *Id.* McConnell explains that:

Zarathustra's forbearance was not based on any respect for the possible truth of the saint's beliefs. Zarathustra did not entertain that possibility. He *could* not. God is dead. You cannot argue with facts. His forbearance was an act of kindness, an indulgence—not the product of a mind open to the possibility that the other possesses a truth.

McConnell, *supra* note 1, at 164.

8. McConnell, *supra* note 1, at 165. Zarathustra, who relegates God to the dustbin of history while declaring "I love mankind," NIETZSCHE, ZARATHUSTRA, *supra* note 5, at 4, is an archetype of contemporary proponents of the establishment of a strictly secular civil order. See *infra* text accompanying notes 42-68.

purposes "of elementary education was to inculcate religious beliefs."⁹ In other words, education was a matter of private choice and personal responsibility.

As the Welfare State has grown larger and more activist, however, it has pushed back the jurisdictional wall separating the realm of Caesar from the domain of private life, including religious life. Like most empires, as Caesar's empire has expanded it has dominated and colonized the territory it has conquered. Trillions of hard-earned dollars are seized as tribute through taxation and then paid back to citizens in the form of various benefits. The bargain with the Welfare State is a trade of liberty and autonomy for a measure of security. Citizens are impoverished by taxation and saddled with regulations that intrude in most aspects of their lives, but in exchange they receive their government's largess—a free education for children in schools run by the government, health benefits, food stamps, housing assistance, and state-subsidized culture guaranteed to challenge the limits of taste and decency of ordinary citizens.

Perhaps this is a fair trade for the average citizen, perhaps not. But suppose government structures its benefits in ways that make them unacceptable to subgroups of citizens due to their sincerely held religious beliefs. Suppose the government distributes to each citizen an in-kind allotment of ham, but no kosher meats. Suppose the government pays benefits to citizens who become unemployed but withholds benefits if the unemployment is caused by a Sabbatarian's non-availability for work on Saturday. Suppose government-run schools require students to be exposed to programs and materials that offend the deepest religious beliefs of some children and their families. Must the government structure its largess to accommodate religious minorities? Or must religious citizens assimilate—sacrifice part of their identity as children of God—as the price for receiving their fair share of the goods financed by their tax payments?¹⁰

This Article discusses the political and social implications of current attempts to amend the Constitution to ensure "religious equality." Two specific proposed amendments to the U.S. Consti-

9. SAMUEL W. BROWN, *THE SECULARIZATION OF AMERICAN EDUCATION* 1 (1912); see also McConnell, *supra* note 1, at 178 ("As late as the 1840's, Tocqueville reported that almost all lower schools were taught by ministers of the gospel.")

10. See Martha Minow, *The Constitution and the Subgroup Question*, 71 *IND. L.J.* 1, 2-3 (1995).

tution will be analyzed—the Istook Amendment and the Hyde-Hatch Amendment. This Article concludes that although the Hyde-Hatch Amendment is the more acceptable of the two, neither amendment achieves the elusive goal of ensuring religious equality.

II. THE PROPOSED CONSTITUTIONAL AMENDMENTS

A. *The Istook Amendment*

The Istook Amendment would allow public “acknowledgments of the religious heritage, beliefs, or traditions of the people” and “student-sponsored prayer in public schools.”¹¹ This amendment has very little to do with religious equality, since it is designed to promote a much more narrow agenda. Religious equality does not depend upon acknowledgments by bureaucrats of a non-recognizable, least-common-denominator God. Nor is the solution to the crisis of education in our country a watered-down, non-denominational prayer over students on their way *out* of the system.

In a recent article on the school prayer issue, Professor Fred Gedicks, speaking as a member of the Mormon Church, observed that public ceremonial prayer in schools seems designed to make orthodox Christianity “the preferred religious faith in the United States.”¹² My own take on school-sponsored prayer is similar, but not identical, to Professor Gedicks’ view. In my house, we do not offer prayers “to whom it may concern.” The God my family worships has a name, and we pray in His name—not to some civic deity conjured up by committee. The Istook Amendment is nothing more than a thinly-disguised school prayer amendment which would do some harm and no good to the cause of religious equality.¹³

11. The Istook Amendment reads:

To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

H.R.J. Res. 127, 104th Cong., 1st Sess. (1995).

12. Frederick M. Gedicks, *The Ironic State of Religious Liberty in America*, 46 *MERCER L. REV.* 1157, 1166 (1995).

13. See *Hearings on Proposed Religious Equality Amends. Before the Senate*

B. *The Hyde-Hatch Amendment*

1. *The problem of free religious speech in the schools*

Although state-sponsored religion in the schools is problematic, there is nothing wrong, in principle, with the mixing of religion and education. The problem is that we have structured education as a government monopoly with a one-size-fits-all program. But we are a pluralistic people whose educational needs and desires come in many different sizes. The single greatest barrier to true religious equality in contemporary America is the governmental monopoly over elementary and secondary education.

What exactly is the problem regarding religious equality in public schools? Does it have to do with the free speech rights of religious students on campus? Or is it something much deeper and much more destructive of religious freedom? I believe it is the latter.

With respect to prayer and other religious expression in public schools, Justice O'Connor had it about right in *Board of Education v. Mergens*:¹⁴ "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."¹⁵ Under current Supreme Court case law, students are free to engage in voluntary prayer or religious expression at almost any time they wish. They may pray silently in class and aloud, individually or in groups, at lunch, recess, or any other time when student speech is permissible.¹⁶ They may organize prayer and Bible study clubs and meet on an equal basis with other non-curriculum-related groups under the Equal Access Act.¹⁷

Comm. on the Judiciary, 104th Cong., 1st Sess. (1995), available in LEXIS, Nexis Library, FDCH File [hereinafter *Hearings*] (statement of Professor Douglas Laycock, University of Texas Law School). Government-sponsored prayer is always at odds with religious equality. It imposes a particular religion on dissenters in some communities. In other communities, it lends the support of government to "prayers of such little content that they take the name of the Lord in vain." *Id.*

14. 496 U.S. 226 (1990).

15. *Id.* at 250.

16. See *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969); Gedicks, *supra* note 12, at 1166.

17. 20 U.S.C. §§ 4071-4074 (1994); *Mergens*, 496 U.S. at 247. See generally

Of course, there are still many incidents in which uninformed or misinformed school officials attempt to censor religious expression on campus.¹⁸ Although current First Amendment case law probably is sufficient to protect religious expression in most of these cases,¹⁹ ratification of a religious equality amendment—and the national debate accompanying ratification—will send a clear signal to all government officials regarding the equal status of private religious expression. Thus, although I oppose the Istook Amendment because I believe it does more harm than good, I support the Hyde-Hatch Amendment and its principle of nondiscrimination on account of religious expression, belief, or identity.²⁰

2. *The problem of religious inequality in the schools*

The Hyde-Hatch Amendment, however, does not adequately address the most flagrant denial of equal citizenship for religious citizens—the use of the law's coercion to create a captive audience of impressionable children for inculcation in a strictly secular curriculum in government-run schools.²¹ The public schools have a long history of insensitivity—sometimes amounting to intentional persecution—toward religious subgroups. Historically, government-run schools inculcated students into a culture of watered-down, liberal Protestantism, a religious worldview

Richard F. Duncan, *Religious Civil Rights in Public High Schools: The Supreme Court Speaks on Equal Access*, 24 IND. L. REV. 111 (1990).

18. One case frequently cited by proponents of a religious equality amendment, the Raymond Raines case, concerns an elementary school student in St. Louis, Missouri who was disciplined for bowing his head in prayer over his lunch. See Michael W. McConnell, *The Movement for Religious Rights*, AM. ENTERPRISE, Nov./Dec. 1995, at 67, 69. Professor McConnell also provides a list of other cases demonstrating how government currently interferes with religious freedom. *Id.* at 68-69.

19. See *supra* note 16 and accompanying text. Professor Douglas Laycock, in testimony urging the Senate Judiciary Committee to reject various proposals for a religious equality amendment, stated that "[r]eligious speech is fully protected by current law, and no amendment could do anything but mischief." *Hearings, supra* note 13.

20. The Hyde-Hatch Amendment reads:

Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.

S.J. Res. 45, 104th Cong., 1st Sess. (1995).

21. Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 146, 161-62 (1986).

that might best be labeled "Christian-lite" (tastes great, less filling).²² Leading proponents of the common school movement were particularly intent on assimilating the children of Catholic and Jewish immigrants into a "unified cultural system"²³ composed of "common attitudes, loyalties, and values."²⁴ As Charles Glenn has observed, proponents of the common school wished to "shape the children of the common people to share their own values, secure in the conviction that they were thus assuring social unity and progress."²⁵

Sometimes, attempts to use government schools as a means of cultural and religious assimilation took an ugly turn. For example, Oregon's Compulsory Education Act, the voter initiative that required most children between the ages of eight and sixteen to attend public school and that was declared unconstitutional in *Pierce v. Society of Sisters*,²⁶ was passed with the active support of the Ku Klux Klan.²⁷ What do you suppose animated the Klan's support for mandatory public education?²⁸

Another narrative of religious persecution under the authority of education laws is that of the Amish. Of course, everyone knows about *Wisconsin v. Yoder*²⁹ and the ultimate vindication of parental rights and free exercise for the Amish. But before *Yoder* was decided, the Amish suffered greatly for refusing to allow their children to be assimilated into the common culture transmitted in public secondary schools. In his excellent book *Amish Roots*, John Hostetler documents what he calls the "lifeways of

22. See McConnell, *supra* note 1, at 178. Nineteenth-century educational reformers believed that the public schools should be used to inculcate children, and particularly the children of immigrants, in the ideals of "Americanism," a worldview "based on democratic patriotism, liberal Protestantism, and the virtues of hard work, self-discipline, and self-reliance." *Id.*

23. CHARLES L. GLENN, JR., *THE MYTH OF THE COMMON SCHOOL* 8 (1988).

24. *Id.* at 4.

25. *Id.* at 9. "The reason Roman Catholics and Orthodox Jews created separate schools in the nineteenth century, while Protestants did not, was that the public schools were imbued with Protestant (and not infrequently anti-Catholic and anti-Jewish) religious and moral teaching." Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 121 (1992). See generally DIANE RAVITCH, *THE GREAT SCHOOL WARS: NEW YORK CITY, 1805-1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE* (1974).

26. 268 U.S. 510 (1925).

27. See David B. Tyack, *The Perils of Pluralism: The Background of the Pierce Case*, 74 AM. HIST. REV. 74 *passim* (1968).

28. See *id.* at 79-81.

29. 406 U.S. 205 (1972).

the Amish people.³⁰ One of the selections in this documentary history tells the story of Amish children being declared wards of the state, removed from their homes, and placed in institutions because their parents had violated the compulsory schooling laws. David Luthy, an Amish writer, described this cruel persecution of his people:

So, the Amish children were declared wards of the court, were seized, and taken to the Painter Children's Home. What a terrible feeling that must have given the parents. Their children were actually taken away from them and confined in a children's home. And to make the experience even more painful the authorities at the institution cut the boys' hair short, braided the girls' hair in pigtails, and dressed the children in town clothing, setting aside their Amish garb.³¹

When I first read this story, I noticed something interesting about the way the Amish were punished for refusing to allow their children to be assimilated into the dominant culture of public schools. Not only were their children removed from home, but they were sent to government institutions at which they were literally stripped of their Amish identity. But in one sense cutting their hair and stripping them of their clothing is less intrusive than the invasion of their intellects—the molding of their minds, beliefs, and attitudes—which is both the purpose and the effect of the common school curriculum.

A final narrative concerns a case recently litigated in federal court, *Brown v. Hot, Sexy & Safer Productions, Inc.*³² This is an amazing story about a truly bizarre AIDS education program at Chelmsford High School in Massachusetts. On April 8, 1992, there was a mandatory, school-wide assembly at Chelmsford High; the program consisted of a ninety-minute presentation, entitled "Hot, Sexy and Safer," by a performance artist named Suzi Landolphi.³³ Landolphi performed a number of sexually explicit monologues and participated in several skits with children

30. John A. Hostetler, *Preface to AMISH ROOTS: A TREASURY OF HISTORY, WISDOM, AND LORE* at xi (John A. Hostetler ed., 1989).

31. David Luthy, *Children Taken into Custody*, in *AMISH ROOTS*, *supra* note 30, at 135.

32. 68 F.3d 525 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1044 (1996).

33. *Id.* at 529. A transcript of the Hot, Sexy and Safer presentation is attached as Appendix D to the Petition for Writ of Certiorari filed in the Supreme Court of the United States.

chosen from the student audience. She began her presentation by informing the students they were "going to have a group sexual experience"³⁴ and went on to crudely and graphically discuss male and female genitals, excretory functions, anal sex, oral sex, masturbation, and homosexual sex.³⁵

In one skit, Landolphi pretended first to snort cocaine and then to sit on a toilet and defecate.³⁶ In another, she made stroking motions in front of her groin, apparently pretending to be a male teenager masturbating.³⁷ She concluded her magnum opus by inviting a male and a female student, Jamie and Nicole, to take part in a demonstration about the use of condoms. Jamie was asked to lick the condom—he did so and reported that it tasted "minty"—and Nicole was asked to place the condom over Jamie's head.³⁸ Landolphi ended this educational skit by informing her captive audience of boys and girls: "Just because I put a condom on Jamie's head, that gives you no right to call him 'dick head.'"³⁹

Dissenting students and their parents brought a lawsuit, asserting claims based upon parental rights and religious freedom.⁴⁰ Without getting into the analysis too deeply for present purposes, the First Circuit basically said that we cannot allow parents "to dictate individually what the schools teach their children" because that would require schools "to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."⁴¹ In effect, the court said that if you do not like the public school curriculum you have a right to exit—you may give up the benefit of a free public education and enroll your children in private schools at your own expense.

I will not take issue here with the First Circuit's judgment or reasoning in *Brown*. Instead, I want to ask whether religious equality is compatible with a system of education that forces religious subgroups to choose between the single largest benefit

34. Petition for Writ of Certiorari at D-4, *Brown v. Hot, Sexy & Safer Productions, Inc.* (No. 95-1158), *cert. denied*, 116 S. Ct. 1044 (1996).

35. *Brown*, 68 F.3d at 529. See generally Petition at app. D.

36. Petition at D-7.

37. *Id.* at D-3.

38. *Id.* at D-59 to D-60.

39. *Id.* at D-81.

40. See *Brown*, 68 F.3d at 529-41.

41. *Id.* at 534.

most families receive in return for their tax dollars and assimilation of their children into a dominant secular culture that exists for the very purpose of inculcating dominant secular values.

Professor Kathleen Sullivan argues that nothing less is required by the Establishment Clause; the bar against an establishment of religion, she argues, "entails the establishment of a civil order—the culture of liberal democracy—for resolving public moral disputes."⁴² Thus, "the war of all sects against all" is ended by a truce which relegates all religions to the margins of public life.⁴³ The public classroom may be used to advance secular ideologies and visions of the good and, says Professor Sullivan, "[p]rotection for religious subcultures lies in exit rights . . . : the solution for those whose religion clashes with a Dick and Jane who appear nothing like Adam and Eve is to leave the public school."⁴⁴

Indeed, there is abundant evidence that religion has been cleansed from the public school curriculum.⁴⁵ The leading study of textbook bias, conducted by Professor Paul Vitz for the United States Department of Education, concluded that public school textbooks are seriously biased and that "the nature of the bias is clear: Religion, traditional family values, and conservative political and economic positions have been reliably excluded from children's textbooks."⁴⁶ For example, Professor Vitz's study of social studies textbooks for grades one through four—books designed

42. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 198 (1992).

43. *Id.*

44. *Id.* at 214. Sullivan's patronizing sneer at religious children and their families is revealing. Does she really believe that dissenters want "Dick and Jane" to resemble Adam and Eve? The problem all too often today is that Dick and Jane have been replaced in the public school curriculum by characters who resemble Roseanne Barr and Pee Wee Herman. See *supra* text accompanying notes 32-41.

45. See, e.g., ROBERT LERNER ET AL., *MOLDING THE GOOD CITIZEN: THE POLITICS OF HIGH SCHOOL HISTORY TEXTS* (1995); PAUL C. VITZ, *CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS* (1986) (hereinafter VITZ, *CENSORSHIP*); PAUL C. VITZ, U.S. DEPARTMENT OF EDUCATION, *RELIGION AND TRADITIONAL VALUES IN PUBLIC SCHOOL TEXTBOOKS: AN EMPIRICAL STUDY* (1985); McConnell, *supra* note 1, at 180. Significantly, a study of major U.S. history textbooks conducted by People For The American Way, a group that advocates a very strict separation between Church and State, concluded that "[r]eligion 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." O.L. DAVIS, JR. ET AL., *LOOKING AT HISTORY: A REVIEW OF MAJOR U.S. HISTORY TEXTBOOKS* 3 (1986).

46. VITZ, *CENSORSHIP*, *supra* note 45, at 1.

to introduce children to U.S. society—found that not one of the books contains even “one word referring to any religious activity in contemporary American life.”⁴⁷ One particular social studies book contains thirty pages on the Pilgrims without even one word or image “that referred to religion as even a part of the Pilgrims’ life.”⁴⁸ Remarkably, one sixth grade reader went so far as to censor a story authored by Isaac Bashevis Singer to eliminate references to God.⁴⁹

Professor Vitz also discovered that the textbooks present a biased view of family life in America. For example, social studies textbooks for grades one through four contain “countless references” to mothers and other women in professions and occupations in the workplace, but there is “not one citation indicating that the occupation of a mother or housewife represents an important job, one with integrity, one that provides real satisfactions.”⁵⁰

Professor Sullivan believes the establishment of a strictly secular civil order in public education will produce a lasting

47. *Id.*

48. *Id.* at 3.

49. *Id.* “In his original story the main character, a boy, prayed ‘to God’ and later remarked ‘Thank God.’ In the story as presented in the sixth grade reader the words ‘to God’ were taken out and the expression ‘Thank God’ was changed to ‘Thank goodness.’” *Id.* at 3-4. As Vitz points out, these changes transformed the story—by removing God “the boy’s prayer is blunted or negated” and the “historical accuracy of the author’s portrayal of small town Jewish life in Eastern Europe is . . . falsified.” *Id.* at 4.

50. *Id.* at 38. Vitz also discovered that not one of 40 social studies textbooks for grades one through four contained the words “husband,” “wife,” “marriage,” or “wedding.” *Id.* Commonly, a family was defined merely as “the people you live with.” *Id.* at 37. “The entire emphasis in these books is on the many types of family—all implicitly equally legitimate.” *Id.* at 37-38. But again, none of the many families described in these textbooks “features a homemaker.” *Id.* at 38. Stephen Bates recently examined over 2000 pages of internal files subpoenaed from school textbook publisher Holt, Rinehart & Winston. See STEPHEN BATES, *BATTLEGROUND: ONE MOTHER’S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* 218-25 (1993). These documents provide an interesting picture of the process of textbook development, and document the all-too-successful efforts of feminists and multiculturalists to control the content of schoolbooks. For example, under pressure from feminists, Holt adopted guidelines providing that at least 50% of characters in text and illustrations should be female. *Id.* at 219. Another guideline specified that “women should be woodworkers and truck drivers, and men should be nurses, hairdressers, and airline cabin attendants.” *Id.* at 220. When a textbook author resisted some of these politically correct guidelines, a Holt staff member complained that his “attitude . . . about the material we sent him by and about women ill befits the author of a modern reading series.” *Id.* at 222.

peace, a kind of Pax Secularis to coin a phrase, between otherwise hostile religious sects.⁵¹ But there is no peace. The public schools have become one of the primary battlegrounds in the culture war.⁵² As Professor Stephen Arons observed at the 1996 Annual Meeting of the Association of American Law Schools, the "relentless politicization of schooling" has "soured the public discourse over schooling" and is destructive of both "conscience and community."⁵³ The reason the Pax Secularis has failed in public education should be apparent. It is the one described so eloquently more than fifty years ago by Justice Jackson in *West Virginia State Board of Education v. Barnette*.⁵⁴

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.⁵⁵

Parents who take religion seriously are not fools. They understand that a secular education is neutral toward religion only in the sense that it exiles all religious understandings of reality, if not to Siberia, then to the solitude of forests and prayer clos-

51. See *supra* text accompanying note 43.

52. See generally BATES, *supra* note 50.

53. Tape of Panel Discussion on Religion, Educational Values, and Parental Rights, 1996 Annual Meeting of the Association of American Law Schools, held by the Law and Education Section of the Association of American Law Schools (Jan. 3-7, 1996) (on file with author).

54. 319 U.S. 624 (1943).

55. *Id.* at 641. Since public schools are "intentionally designed to influence the values, habits, and behavior of the rising generation," and "[s]ince people do not agree on which values, habits, and behaviors should be encouraged," public school curricula will always be controversial. RAVITCH, *supra* note 25, at 403-04. And because the education of their children is one of the things that matters most to nearly everyone, the battle for control of the curriculum will often be quite bitter indeed.

ets.⁵⁶ As Professor McConnell said in his *God Is Dead* article, "A secular school does not necessarily produce atheists, but it produces young adults who inevitably think of religion as extraneous to the real world of intellectual inquiry, if they think of religion at all."⁵⁷

Professor Sullivan argues that the "Religion Clauses enable government to pursue and endorse a culture of liberal democracy that will predictably clash over many issues with religious subcultures."⁵⁸ This means, she says, that the public classroom may be used to "inculcate commitments" on various issues that are incompatible with the religious commitments of the students who are the subject of this inculcation.⁵⁹

Professor Bruce Ackerman offers a view similar to that of Professor Sullivan. In his book *Social Justice in the Liberal State*, Professor Ackerman argues that the purpose of liberal education is to "provide the child with cultural materials with which she may forge the beginnings of an identity that deviates from parental norms."⁶⁰ In a remarkable dialogue between a character named Parent and another—apparently representing the liberal state—named Noble, Ackerman describes his vision of secondary education.⁶¹ Parent has just told his daughter to stop playing with her brother's trucks and to play with her dolls instead, when the doorbell rings and Noble appears. Noble tells Parent that he wishes to speak to the girl and tell her "that maybe she's right to play with trucks despite [Parent's] efforts to suppress her."⁶² Ackerman, speaking through Noble, believes that the child "as a citizen of a liberal state" has a right to be educated in "the least restrictive environment" and this standard "does not entitle [Parent] to deny [Noble] access to her."⁶³ Profes-

56. McConnell, *supra* note 1, at 178-81.

57. *Id.* at 181. The secularization of public education perhaps explains the following observation of Professor Allan Bloom: "There is one thing a professor can be absolutely certain of almost every student entering the university believes, or says he believes, that truth is relative." ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 25 (1987).

58. Sullivan, *supra* note 42, at 213-14.

59. *Id.* at 214. Amy Gutmann is also an advocate of using public education "to convert children away from the intensely held commitments of their parents." AMY GUTMANN, *DEMOCRATIC EDUCATION* 121 (1987).

60. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 153 (1980).

61. *Id.* at 151-53.

62. *Id.* at 152.

63. *Id.*

sor Phillip Johnson's reaction to this dialogue was to suggest that perhaps it would have been better to name the character who is seeking to undermine Parent's authority Meddler rather than Noble.⁶⁴

At a panel discussion on religion in the public square at the 1996 Annual Meeting of the Association of American Law Schools, Professor Ackerman shared his personal creed:

When we die, we die. The only meaning we will ever experience is in the here and the now. The challenge is to make this life as deep in its significance as possible. Much—not all—of received religion stands in the way of this by inviting us to avoid, evade, deny the fact of our mortality. If we are to live in the truth, the place to begin is by rejecting all false projections of life after death, all false assertions of transcendent meaning beyond those that we ourselves create. Only then can we proceed to live in the manner of Socrates by asking how best we are to live the life we actually have rather than suppose this question has been—or will be—answered elsewhere in a more authoritative fashion.⁶⁵

Professor Ackerman's creed is the second most eloquent declaration of atheism I have encountered.⁶⁶ He thinks that all beliefs about transcendent meaning are false and that religion is often an obstacle to a rational and meaningful life. Therefore, education in the liberal state must help children overcome these "false assertions" of transcendent meaning by challenging parental efforts to suppress their children's "evolving self-conception."⁶⁷ Professor Ackerman has gone so far as to describe plans

64. PHILLIP E. JOHNSON, *REASON IN THE BALANCE* 158 (1995).

65. Tape of Panel Discussion on the Religious Voice in the Public Square at the 1996 Annual Meeting of the Association of American Law Schools, held by the Jewish Law and Religion and Law Sections of the Association of American Law Schools (Jan. 3-7, 1996) (on file with author).

66. The *most* eloquent is that of Salman Rushdie's Moor, who claims his existence is nothing more than "what breathes":

In the beginning and unto the end was and is the lung: divine afflatus, baby's first yowl, shaped air of speech, staccato gusts of laughter, exalted airs of song, happy lover's groan, unhappy lover's lament, miser's whine, crone's croak, illness's stench, dying whisper, and beyond and beyond the airless, silent void.

A sigh isn't just a sigh. We inhale the world and breathe out meaning. While we can. While we can.

SALMAN RUSHDIE, *THE MOOR'S LAST SIGH* 53-54 (1995).

67. ACKERMAN, *supra* note 60, at 154. Professor Ackerman apparently does not

to provide educational choice through vouchers as legitimating "a series of petty tyrannies in which like-minded parents club together to force-feed their children without restraint."⁶⁸

Professor Ackerman is a brilliant scholar, and I respect his work very much. I also respect his right to believe in his personal creed. But I do not believe Professor Ackerman's understanding of rationality—of the examined life—is the only reasonable view. As another legal scholar has observed: "If God really does exist, then to lead a rational life a person has to take account of God and his purposes. A person or a society that ignores the Creator is ignoring the most important part of reality, and to ignore reality is to be irrational."⁶⁹

Religious equality cannot coexist with a governmental monopoly that is designed to take children in their formative years and assimilate them into a strictly secular educational culture such as that advocated by Professors Sullivan and Ackerman. Nor does a right of exit from public education cure the default. Those who can afford educational autonomy achieve it only by paying a penalty and sacrificing the single largest benefit most families receive in return for their local tax payments.⁷⁰

Moreover, most families of average means simply cannot afford to shoulder both the burden of paying taxes to support secular schools and tuition to support the schools of their choice. Stephen Arons has stated it more forcefully:

believe it is necessary for public schools to challenge the values and beliefs of atheist parents by mandating religious education for their children. See McConnell, *supra* note 1, at 179. Professor Edward Foley has argued that "[w]hile the government can maintain a position of neutrality among liberal religions, liberalism itself necessitates that the government *must disfavor and discriminate against* illiberal religions." Edward B. Foley, *Political Liberalism and Establishment Clause Jurisprudence*, 43 CASE W. RES. L. REV. 963, 974 (1993) (emphasis added). Professor Foley lists among what he calls "disfavored religious beliefs" religious objections to attempts by the liberal state to "require children to learn the principles of justice affirmed by the liberal state itself." *Id.* at 976, 977; see also JOHN RAWLS, *POLITICAL LIBERALISM* 199 (1993) (suggesting that the liberal state may require children to be prepared "to be fully cooperating members of society").

68. ACKERMAN, *supra* note 60, at 160.

69. JOHNSON, *supra* note 64, at 7.

70. "[T]o force individuals to pay education taxes but deny them education financing because they have chosen a religious school brings about a systematic transfer of wealth from the religious to the nonreligious." Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 18 (1989). In effect, the current system of financing education imposes "a 'tax' on the religious choice and a 'subsidy' for secular alternatives." *Id.* at 8.

We have created a system of school finance that provides free choice for the rich and compulsory socialization for everyone else. The present method of financing American education discriminates against the poor and the working class and even a large part of the middle class by conditioning the exercise of First Amendment rights of school choice upon an ability to pay while simultaneously eroding the ability to pay through the regressive collection of taxes used exclusively for government schools. This arrangement seems no more defensible than denying the right to vote to those who cannot afford a poll tax.⁷¹

III. CONCLUSION

More than a century ago, John Stuart Mill warned us about the danger of allowing government to direct the education of children. In his classic defense of individual freedom, *On Liberty*, Mill explained how government schools are destructive of freedom of thought:

A general State education is a mere contrivance for moulding people to be exactly like one another: and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.⁷²

Instead of schools run by the government, Mill supported what he called "diversity of education" and parental choice.⁷³

71. STEPHEN ARONS, *COMPPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING* 211 (1983).

72. JOHN S. MILL, *ON LIBERTY* 106 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859). *On Liberty* was first published in 1859 and it is generally regarded as "the single most eloquent, most significant, and most influential statement of the irreducible value of human individuality." Stefan Collini, *Introduction to MILL, supra*, at vii. What Mill deprecates as "moulding" and intellectual "despotism," modern liberals (such as Professors Sullivan and Ackerman) affirm as the establishment of the culture of liberal democracy. See *supra* notes 42-68 and accompanying text.

73. MILL, *supra* note 72, at 106.

If the government would make up its mind to *require* for every child a good education, it might save itself the trouble of *providing* one. It might leave to parents to obtain the education where and how they pleased, and content itself with helping to pay the school fees of the poorer classes of children

Id. Of course, this proposal is what Ackerman derides as creating "a series of petty

I want to make very clear I am *not* so naive as to believe the government school monopoly is in danger of being declared unconstitutional. As Professor Cass Sunstein has said, the Constitution as currently interpreted by the Supreme Court "permits nonneutrality" between public and private schools.⁷⁴ "Financial pressures that induce people to send their children to public school raise no constitutional problem."⁷⁵

But it is this constitutionally permissible nonneutrality, with respect to a matter as important as educational opportunities for children, that leads me to conclude that many children from religious subgroups are being denied equal citizenship. The Hyde-Hatch Amendment does not address this imbalance. All it does is tinker at the margins. At most, it would make clear that a neutral scheme for financing an appropriate education for all children—including those with serious religious lifeways—does not violate the Establishment Clause. However, it does not require government to provide equal educational benefits without regard

tyrannies" by parents who do not know (or do not care) what is in the best interest of their own children. See *supra* note 68 and accompanying text.

74. Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 609 (1990). Of course, if neutrality is the proper baseline for religious freedom, "there is no justification for discriminating between schools on the basis of religion." McConnell & Posner, *supra* note 70, at 20.

75. Sunstein, *supra* note 74, at 609. Of course, a powerful argument can be made that "government control of content in the education of a captive audience . . . violates the first amendment." Charles R. Lawrence III, *Education for Self-Government: Reassessing the Role of the Public School in a Democracy*, 82 MICH. L. REV. 810, 811 (1984) (summarizing the position of Professor Stephen Arons). Professor Arons argues that the First Amendment protects not only the expression of belief and opinion, but also the formation of belief and opinion. ARONS, *supra* note 71, at 205. Mill believed that "the inward domain of consciousness," the liberty of "thought and feeling," was of even greater importance than freedom of expression and publication. MILL, *supra* note 72, at 15.

In a recent and very important article on the education of children, Professor Stephen Gilles observes that the selective funding of education "raises profound free speech problems." Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1024 (1996). Gilles argues that by withholding funds from private schools, the government engages in discrimination "on the basis of viewpoint." *Id.* "The educative speech of parents who share the majority's viewpoint is subsidized in the form of free public education. The educative speech of dissenting parents is not . . . The result is powerful, though indirect, governmental pressure on dissenting parents to conform their educative speech to the majority's preferred values." *Id.* at 1024-25.

to religion.⁷⁶ The Istook Amendment does not even do this much. It is nothing more than a thinly-disguised school prayer amendment which would allow someone's idea of a civic deity to be imposed upon schoolchildren.

Thus, government schools will continue to be on the front lines of the culture war. Conscience and community will still suffer. Religious equality will continue to be elusive. And we will live with its promise unfulfilled.

76. The title Religious Equality Amendment is a misnomer. Perhaps it should be called the Religious Inequality Reduction Amendment.