

# THE PROBLEM OF RELIGIOUS LEARNING

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**Abstract:** The problem of religious learning is that religion—including the teaching about religion—must be separated from liberal public education, but that the two cannot be entirely separated if the aims of liberal public education are to be realized. It is a problem that has gone largely unexamined by courts, constitutional scholars, and other legal theorists. Though the U.S. Supreme Court has offered a few terse statements about the permissibility of teaching about religion in its Establishment Clause jurisprudence, and scholars frequently urge policies for or against such controversial subjects as Intelligent Design or graduation prayers, insufficient attention has been paid to the nature and depth of the problem itself. As a result, discussion about religion's place in public schools often exhibits a haphazard and under-theorized quality. But in an area so fraught with constitutional complexity and high emotion, no edifying policy solutions are likely without a deeper understanding of the relationship between religious learning and liberal public education. This Article aims to fill that gap by giving the problem of religious learning its due. It offers a detailed theoretical account of the relationship between religious learning and the cultivation of the civic and moral ideals of liberal democracies. It then draws on that account to develop a unique model of religious learning within liberal learning which takes its cue from the historic purpose of the public school. Since even today it is widely supposed and insisted that public schools still serve a vital role in developing civic and moral ideals in young people, this Article's comprehensive examination of the problem of religious learning is both timely and necessary if the seemingly intractable skirmishes over religion, education policy, and constitutional law are capable of even a modest reconciliation.

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*Le plus fructueux et naturel exercice de nostre esprit, c'est à mon gré la conference.*<sup>1</sup>

## INTRODUCTION

Religious learning—education about the intellectual, historical, and ethical influence of religious traditions—presents liberal public education with a problem. The problem is that religious learning must be separated from liberal public education, but that the two cannot be separated if the aims of liberal public education are to be realized.

It is a problem that has gone largely unexamined by constitutional scholars and other legal theorists. It is true that recommendations for teaching about religion in public schools abound.<sup>2</sup> These views often are informed by the earnest conviction that good and useful citizens “need to know” something about religion for more effective living in the world.<sup>3</sup> Likewise, the U.S. Supreme Court has offered a few terse statements in its Establishment Clause jurisprudence which suggest that teaching about religion may have its civic instrumental uses.<sup>4</sup> Yet insufficient attention has been paid to the nature and depth of the problem itself. As a result, discussion about religion’s place in public schools often exhibits a scattered quality, as rival policies untethered to any cogent or sufficiently developed theoretical frame vie for supremacy.<sup>5</sup> This haphazard approach has the unfortunate tendency to flatten the problem of religious learning, reducing it to subject-specific squabbles over, for example, the constitutionality of Intelligent Design,<sup>6</sup> the secular

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<sup>1</sup> MICHEL DE MONTAIGNE, *De l'art de conferer*, in *ESSAIS*, LIVRE III 136, 137 (Garnier-Flammariion 1969) (1588). “The most fruitful and natural exercise of our minds is, in my opinion, conversation.” MICHEL DE MONTAIGNE, *Of the Art of Conversation*, in 2 *THE ESSAYS OF MICHEL DE MONTAIGNE* 1253, 1254 (George B. Ives trans., Heritage Press 1946) (1925).

<sup>2</sup> See, e.g., 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 122–56 (2008) (listing a variety of approaches and proposals for inclusion and exclusion of particular policies aimed at teaching about religion); see also WARREN A. NORD, *RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* 249–51 (1995). See generally WARREN A. NORD & CHARLES C. HAYNES, *TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM* (1998).

<sup>3</sup> See, e.g., STEPHEN PROTHERO, *RELIGIOUS LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW—AND DOESN'T* 5–10 (2007); Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 WM. & MARY L. REV. 1159, 1164 (2002); Caroline Elizabeth Branch, Comment, *Unexcused Absence: Why Public Schools in Religiously Plural Society Must Save a Seat for Religion in the Curriculum*, 56 EMORY L.J. 1431, 1433 (2007).

<sup>4</sup> See *infra* notes 39–83 and accompanying text.

<sup>5</sup> See *infra* notes 6–7.

<sup>6</sup> See, for example, the animated thrust in David K. DeWolf et al., *Intelligent Design Will Survive Kitzmiller v. Dover*, 68 MONT. L. REV. 7 (2007), parried spiritedly in Peter Irons,

value of Bible reading or graduation prayers,<sup>7</sup> and similar hot topics of the American church/state *kulturkampf*. But in an area so fraught with controversy, constitutional complexity, and high emotion, no edifying policy solutions are likely without a deeper understanding of the relationship between religious learning and liberal public education.

This Article aims to give the problem of religious learning its due by offering a detailed theoretical account of the relationship between religious learning and the cultivation of the civic and moral ideals of liberal democracies.<sup>8</sup> It then draws on that account to develop a model of religious learning within liberal learning that takes its cue from the historic purpose of the public school.<sup>9</sup> Since even today it is widely supposed and insisted that public schools still serve a vital role in developing liberal ideals in young people, this Article's comprehensive examination of the problem of religious learning is both timely and necessary if the seemingly intractable legal skirmishes over religion, constitutional law, and education policy are capable of even a modest reconciliation.<sup>10</sup> It should go without saying that this Article's account of the problem of religious learning, and the theory of liberal education that it offers, is entirely consistent with the aim of the Establishment Clause:

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*Disaster in Dover: The Trials (and Tribulations) of Intelligent Design*, 68 MONT. L. REV. 59 (2007), and followed by a predictably offended riposte in David K. DeWolf et al., *Rebuttal to Irons*, 68 MONT. L. REV. 89 (2007). The repartée between Professors Francis Beckwith and Jay Wexler on this question is to like effect. See generally Jay D. Wexler, *Intelligent Design and the First Amendment: A Response*, 84 WASH. U. L. REV. 63 (2006) (recounting the details of the exchange). I do not mean to imply that these debates are unimportant; in fact, this Article considers the question of Intelligent Design and other curricular issues that implicate Establishment Clause concerns. See *infra* notes 198–252 and accompanying text. The point is merely that the theoretical commitments (particularly those that concern liberal education) that lie beneath these discussions too often remain tacitly simmering beneath the surface.

<sup>7</sup> See, e.g., JOAN DELFATTORE, *THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS* 7–8 (2004) (justifying the contemporary constitutional approach toward school prayer, for example, as deriving from the changing understanding of religion in "individualistic," as opposed to "majoritarian" or "collective," terms); Robert Audi, *Religion and Public Education in a Constitutional Democracy*, 93 VA. L. REV. 1175, 1177 (2007) (reviewing KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* (2005)) (breezily approving, with no discussion, "nonconfessional readings of the Bible that constitute teaching about religion or are essential in, for example, a literature class").

<sup>8</sup> See *infra* notes 74–82 and accompanying text.

<sup>9</sup> See *infra* notes 84–197 and accompanying text.

<sup>10</sup> See *infra* notes 27, 74–76 and accompanying text; see also GREENAWALT, *supra* note 2, at 154; MARTHA C. NUSSBAUM, *LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY* 233 (2008) ("It is widely agreed today that the mission of the public schools involves building character and imparting values, especially those essential for good democratic citizenship.").

to prevent government promotion of a particular religion or religion generally.<sup>11</sup>

The problem of religious learning might be fruitfully approached by considering the following story. Not long ago, there were news reports about Lincoln Hall, a mountain climber who collapsed at 28,500 feet while descending from the summit of Mt. Everest.<sup>12</sup> The day after he fell, Hall was spied by another climber who stopped and discovered that, against all odds, Hall had survived the night.<sup>13</sup> He gave Hall hot tea and oxygen, alerted the base camp, and continued his climb.<sup>14</sup> Media accounts marveled at the improbability of Hall's survival, Everest's particularly "high death toll,"<sup>15</sup> and the rescuing climber's "sacrifice."<sup>16</sup> Hall's case was contrasted with that of another stricken climber who was ignored by approximately forty others who walked right by him on their way up and down the mountain.<sup>17</sup> There was talk of the "practical case for callousness"<sup>18</sup> alongside righteous fulminations by none other than Sir Edmund Hillary, who considered it "horrifying" to refuse assistance to a dying human being.<sup>19</sup> "Moral philosophy," one paper quickly concluded, "offers questions but not necessarily answers."<sup>20</sup>

It has long been thought that American public schools ought to foster reflection and discussion about just the sort of ethical problems that these stories pose.<sup>21</sup> Indeed, the public school's historic charge was, perhaps above all else, to cultivate civic and moral character.<sup>22</sup>

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<sup>11</sup> See *infra* notes 39–52 and accompanying text.

<sup>12</sup> Alan Cowell, "Dead" Climber's Survival Impugns Mount Everest Ethics, N.Y. TIMES, May 28, 2006, at A10.

<sup>13</sup> *Id.*

<sup>14</sup> Bernard Lagan, *Alive—The Climber Left for Dead on Everest for 24 Hours*, TIMES (London), May 27, 2006, at 9.

<sup>15</sup> *Id.*

<sup>16</sup> Cowell, *supra* note 12; Matt Lauer, *Dateline NBC: Miracle on Mount Everest* (NBC television broadcast Sept. 2, 2007), available at <http://www.msnbc.msn.com/id/13543799>.

<sup>17</sup> Editorial, *Everest Ethics*, TIMES (London), May 27, 2006, at 23.

<sup>18</sup> *Id.* ("Regrettably, rescue at high altitudes is often against the odds."); Binaj Gurubacharya, *Everest Climber's Death Sparks a Debate*, WASHINGTONPOST.COM, May 26, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/26/AR2006052601637.html> (reporting the comments of climber Lydia Bradey: "If you're going to go to Everest . . . I think you have to accept responsibility that you may end up doing something that's not very ethically nice. . . . You have to realize that you're in a different world." (first omission in original)).

<sup>19</sup> See Gurubacharya, *supra* note 18.

<sup>20</sup> Editorial, *supra* note 17.

<sup>21</sup> See *infra* notes 27, 74–82 and accompanying text; see also KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 13–26 (2005).

<sup>22</sup> GREENAWALT, *supra* note 21, at 14, 24–26; STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 49–50 (2000).

Early on and for some time thereafter, Protestant beliefs were felt to be the sole authoritative moral font, to be incorporated wholesale into the educational program.<sup>23</sup> For the Public School Society, which in the 1820s distributed most of New York City's public school funds, public schools existed to "inculcate the sublime truths of religion and morality contained in the Holy Scriptures."<sup>24</sup> But by the mid-twentieth century, the conviction that Protestant Christianity was the exclusive wellspring of rectitude had quite properly been by and large repudiated, at least by the Supreme Court.<sup>25</sup> And yet a robust civic and moral education remained one of the public schools' *raison d'être*.<sup>26</sup> Justice Robert Jackson's dissent in the Supreme Court's 1947 decision in *Everson v. Board of Education*, with its insistence on the duty of the public school to "inculcate all needed temporal knowledge" and "worldly wisdom," reflected a commitment to the public school's enduring role as civic and moral tutor.<sup>27</sup> Time and again, the Supreme Court has reaffirmed that role as one of the core functions of public schooling.<sup>28</sup>

Religious learning, however, now was felt to fall outside the public school's ken.<sup>29</sup> The deliberate "disjunction" between religious and secular learning that Justice Jackson emphasized in his dissent in *Everson*, and which the Supreme Court later implemented, was borne from the long overdue condemnation of the idea that all students confess a single faith.<sup>30</sup> But in the process of ridding the public school of coerced creedalism, something of value was lost to view. Although the public

<sup>23</sup> PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 219–29, 412–19 (2002).

<sup>24</sup> *Id.* at 220.

<sup>25</sup> See, e.g., *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 217, 231 (1948) (Frankfurter, J., concurring) ("This development of the public school as a symbol of our secular unity was not a sudden achievement nor attained without violent conflict."); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947). Professor Hamburger observes:

The *McCollum* case made clear, as the *Everson* case had not, that the justices would go far beyond the Protestant version of separation of church and state. Whereas in *Everson* Protestants had sought to prevent children in Catholic schools from receiving state aid for busing, in *McCollum* an atheist aimed to prevent mostly Protestant children from receiving released-time religious instruction in public schools.

HAMBURGER, *supra* note 23, at 476–77. The separation of Protestant Christianity from public education took more definite shape in the Court's later decisions finding school prayer and mandatory Bible reading unconstitutional. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>26</sup> See GREENAWALT, *supra* note 21, at 24–26.

<sup>27</sup> See 330 U.S. at 24 (Jackson, J., dissenting).

<sup>28</sup> See *infra* notes 74–76 and accompanying text.

<sup>29</sup> See GREENAWALT, *supra* note 2, at 16; NORD, *supra* note 2, at 63.

<sup>30</sup> See 330 U.S. at 23–24 (Jackson, J., dissenting).

school's "strict and lofty neutrality as to religion" removed the blight of religious compulsion, it did not have the effect that Justice Jackson had hoped—that of rendering the student "better fitted to choose his religion," whatever choice that might mean.<sup>31</sup> What it created, as John Stuart Mill had understood nearly a century before, is an educational lacuna.<sup>32</sup> But far more important, and apart from Mill's concern to enhance the capacity for autonomous religious choice, the public school's religious neutrality deprived it of an important mode of human experience from which to draw in initiating the student into civic and moral life. These are the fundamental challenges posed by the problem of religious learning.

In probing the problem, Part I of this Article first considers the constitutionality of religious learning in public schools and concludes that the Supreme Court's distinctions between the "secular" and the "religious," and their respective relationship to civic and moral education, are unsatisfying and insufficiently textured.<sup>33</sup> Drawing from the work of the political theorist Michael Oakeshott, Part II clarifies the conceptual muddle by explaining civic and moral learning in terms of an ongoing "conversation"—one with both external and internal modes.<sup>34</sup> It is through these two modes of learning that religious learning relates to the conversation of civic and moral education.<sup>35</sup> Part III then tests the modal theory of religious learning in several curricular contexts with significant constitutional implications.<sup>36</sup> After considering several objections,<sup>37</sup> Part IV concludes that at a time when more is demanded of public schools than perhaps ever before, a public school that ignores religious learning impairs its capacity to offer its students an education that is truly liberal.<sup>38</sup>

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<sup>31</sup> See *id.* at 24. Indeed, Jackson himself was unsure about the effect of the disjunction that he proposed: "Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer." See *id.*

<sup>32</sup> See JOHN STUART MILL, *On Liberty*, in *THE BASIC WRITINGS OF JOHN STUART MILL* 1, 111 (Modern Library ed. 2002) (1863) ("[E]xaminations on religion, politics, or other disputed topics, should not turn on the truth or falsehood of opinions, but on the matter of fact that such and such an opinion is held, on such grounds, by such authors, or schools, or churches. Under this system, the rising generation . . . would be brought up either churchmen or dissenters as they now are, the State merely taking care that they should be instructed churchmen, or instructed dissenters.").

<sup>33</sup> See *infra* notes 39–83 and accompanying text.

<sup>34</sup> See *infra* notes 84–197 and accompanying text.

<sup>35</sup> See *infra* notes 84–197 and accompanying text.

<sup>36</sup> See *infra* notes 198–252 and accompanying text.

<sup>37</sup> See *infra* notes 253–314 and accompanying text.

<sup>38</sup> See *infra* notes 315–328 and accompanying text.

## I. RELIGIOUS LEARNING AND THE CONSTITUTION

The Establishment Clause is the obvious benchmark by which to assess whether religious learning trenches on the Constitution.<sup>39</sup> The familiar pattern of inquiry focuses on whether the state seeks to privilege a particular religious content.<sup>40</sup> Religious learning in public schools seems to pass that test, as teaching or learning about a belief system or set of practices need not entail their sponsorship.<sup>41</sup> But the Establishment Clause question reasserts itself in a more interesting way in those cases requiring that government action have a "secular purpose."<sup>42</sup> Secular purpose is the first element of the well known test laid out in the Court's 1971 decision in *Lemon v. Kurtzman*,<sup>43</sup> but it was first developed in the Court's pre-*Lemon* public school decisions in *School District of Abington Township v. Schempp*<sup>44</sup> and *Board of Education v. Allen*.<sup>45</sup> In *Schempp*, which struck down mandatory Bible reading and recitation of the Lord's Prayer as unconstitutional, Justice Clark, writing for the Court, famously observed that "one's education is not complete without a study of . . . the history of religion and its . . . advancement of civilization" and that the study of the Bible "for its literary and historic qualities" was permissible.<sup>46</sup> The key, in Justice Clark's view, is to present

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<sup>39</sup> See U.S. CONST. amend. I, cl. 1. This is not to say that the Free Exercise Clause is in no way implicated, see *id.* cl. 2, only that the question of whether the state may include religious learning primarily concerns the Establishment Clause. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1986) (holding that a Louisiana law requiring that creationism be taught in conjunction with evolution violated the Establishment Clause).

<sup>40</sup> See GREENAWALT, *supra* note 2, at 157–93.

<sup>41</sup> See GREENAWALT, *supra* note 21, at 41.

<sup>42</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963); see also Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 95 (2002); L. Scott Smith, *Constitutional Meanings of "Religion" Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 100–02 (2004).

<sup>43</sup> 403 U.S. at 612.

<sup>44</sup> 374 U.S. at 225.

<sup>45</sup> 392 U.S. at 243. Other pre-*Lemon* public school decisions in which the concept of secular purpose figured prominently were *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (unanimously striking down an Arkansas statute making it a crime to teach evolution in public schools); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948) ("The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered."); and *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

<sup>46</sup> 374 U.S. at 225.

the material "objectively as part of a secular program of education."<sup>47</sup> In its tacit effort to distinguish the "secular" from the "religious," *Schempp* was emphasizing the purpose of religious teaching.<sup>48</sup> A school that requires children to read passages from the Bhagavad Gita or the Book of Job in order to appreciate their aesthetic qualities and learn about the historical context in which they were written acts permissibly.<sup>49</sup> A school that requires children to read from those texts to inculcate their substantive truth does not.<sup>50</sup> If that is all that the secular/religious distinction involves then we have again reached the uncontroversial dichotomy of sponsorship,<sup>51</sup> one which religious learning, as noted earlier, can accommodate.<sup>52</sup>

Five years later, in *Allen*, the Court considered the constitutionality of a statute that required public school authorities to lend textbooks free of charge to all students, whether in public or private schools.<sup>53</sup> Justice White's majority opinion is a straightforward application of *Schempp*'s dualistic sponsorship paradigm.<sup>54</sup> In upholding the statute,

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<sup>47</sup> See *id.* This represents a more sanguine echo of Justice Jackson's statement in an earlier case that "I should suppose it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind." See *McCollum*, 333 U.S. at 236 (Jackson, J., concurring). Similar remarks appear in a few subsequent cases. See, e.g., *Aguillard*, 482 U.S. at 606-08 (Powell, J., concurring) ("As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. . . . In fact, since religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events. . . . The [Bible] . . . [has] undoubted literary and historic value apart from its religious content."); *Stone v. Graham*, 449 U.S. 39, 42 (1980).

<sup>48</sup> See 374 U.S. at 225.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> To say that the injunction against sponsorship is uncontroversial is not necessarily to say that the concept of sponsorship is uniformly understood. In a recent conflict in Texas, for example, where seventh and eighth graders learned at an assembly that Muslims are "expected to avoid pork" and "dress modestly," that they believe that "Allah is God for all human beings," and that "Islam" means "peace and submission," irate opponents of the presentation opined that by discussing the Muslim faith, "school officials were promoting a particular religion." Jennifer Radcliffe, *Controversy Highlights Pitfalls to Teaching Faith*, HOUSTON CHRON., June 9, 2008, at 1. In response to the criticism, Kathy Miller, director of the Texas Freedom Network, stated, "Clearly this incident and the surrounding debate illustrates how explosive the issue of religion in public schools is. . . . What on earth could be wrong about educating students about the diverse faith traditions in our society?" *Id.*

<sup>52</sup> See GREENAWALT, *supra* note 21, at 41 ("*Schempp* sets the outlines of Establishment Clause doctrine for public schools. They can neither sponsor devotional religious exercises nor instruct that religious propositions are true or false, but they may teach about religious understandings, and they may teach religious texts in the course of secular education."); Koppelman, *supra* note 42, at 108.

<sup>53</sup> 392 U.S. at 238.

<sup>54</sup> See *id.* at 243-45; see also *Schempp*, 374 U.S. at 225.



Justice White identified the statute's secular purpose as "furtherance of the educational opportunities available to the young."<sup>55</sup> He then distinguished "religious books" from "secular books" and held that only the latter were covered by the statute and that the differences between the two should be obvious.<sup>56</sup> Justice White did not explain precisely what a "secular textbook" contains that a "religious textbook" does not, or vice versa.<sup>57</sup> After all, under *Schempp*, a secular textbook could contain religious doctrines, provided that the school did not sponsor them.<sup>58</sup>

Justice Douglas perceived this point in his dissent in *Allen*.<sup>59</sup> Building from Justice Jackson's observation that it is difficult to know "where the secular ends and the sectarian begins in education,"<sup>60</sup> Justice Douglas wondered which books should be chosen to teach subjects such as the Reformation and the Inquisition.<sup>61</sup> Even when particular subjects are not imbued with religious histories or meanings, they may have "certain shadings":

The Crusades . . . may be taught as a Christian undertaking to "save the Holy Land" from the Moslem Turks . . . or as . . . a series of wars born out of political and materialistic motives.

. . . .

Is the slaughter of the Aztecs by Cortes and his entourage to be lamented for its destruction of a New World culture, or forgiven because the Spaniards "carried the true Faith" to a barbaric people . . . ?

. . . Is the expansion of communism . . . a manifestation of the forces of Evil campaigning against the forces of Good?<sup>62</sup>

Stripped of its rhetoric, Justice Douglas's point is sound.<sup>63</sup> Textbooks (particularly those that deal with literature and history, but not only those) often approach their subject matter with subtle theoretical and ideological emphases that color the presentation.<sup>64</sup> Since there was no

<sup>55</sup> *Allen*, 392 U.S. at 243.

<sup>56</sup> *Id.* at 245.

<sup>57</sup> *See id.*

<sup>58</sup> *See* 374 U.S. at 225.

<sup>59</sup> *See* 392 U.S. at 260-62 (Douglas, J., dissenting).

<sup>60</sup> *See id.* at 262 (quoting *McCollum*, 333 U.S. at 237-38 (Jackson, J., concurring)).

<sup>61</sup> *Id.* at 260.

<sup>62</sup> *Id.* at 260-62 (citations omitted).

<sup>63</sup> *See id.*

<sup>64</sup> *See* GREENAWALT, *supra* note 21, at 175 (describing, for example, a sixth grade reader containing stories selected "to stimulate imagination, critical understanding, and tolerance for diversity").

statutory standard by which to distinguish religious from secular textbooks, Justice Douglas would have held the statute unconstitutional because parochial schools would inevitably choose textbooks that, though lacking an official religious imprimatur, contain the "seeds of creed and dogma."<sup>65</sup>

The difficulty is that Justice Douglas does not account for the far reaching implications of his own point.<sup>66</sup> The history of the Crusades, the slaughter of the Aztecs, and the rise of communism all form part of the history of religion, just as religion forms part of their histories. In treating these subjects, a textbook or a teacher may cast religion's role in those histories in favorable or unfavorable hues, but if by "secular" one intends "unengaged with religion," then a secular textbook merely offers an artificial intellectual truncation.<sup>67</sup> Furthermore, for certain disciplines—literature, music, and art history are examples—part of the beauty or ugliness of the subject matter lies precisely in the object of its treatment. What we respond to in Giotto, Dante, or Bach is in part the beauty (or horror) of the representation of religion,<sup>68</sup> just as the beliefs, images, and practices of religious traditions inspired these and scores of other artists.<sup>69</sup> The pain expressed in musical settings of the *Stabat Ma-*

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<sup>65</sup> *Allen*, 392 U.S. at 257 (Douglas, J., dissenting). Justice Douglas's motivation for invalidating the statute probably stems from his interest in church-state separation rather than from doubts that he himself would be able to distinguish between religious and secular textbooks. See *id.* at 256. Philip Hamburger has documented the remarkably similar motivations, if not the specific views, of various supporters of compulsory public education in early twentieth century Oregon: "[A]ny sectarian school . . . has a tendency to shape the plastic mind of the child into a molded path from which there is small chance to escape at maturity." HAMBURGER, *supra* note 23, at 418 (quoting A.G. Fries, Letter to the Editor, *Sectarian Schools Rapped. Menace to Nation's Progress* . . . , MORNING OREGONIAN, Nov. 5, 1922, at 9).

<sup>66</sup> See *Allen*, 392 U.S. at 260-62 (Douglas, J., dissenting).

<sup>67</sup> I am not recycling the argument, rejected by Justice Clark in *Schempp*, that when textbooks fail to mention religion they establish de facto a "religion of secularism." See 374 U.S. at 225. My claim is that religion is simply part of what is being taught. I take this objection to the secular purpose requirement to be different in kind than any of the four paradigm objections to it addressed by Professor Koppelman. See Koppelman, *supra* note 42, at 113-25.

<sup>68</sup> See JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* 14 (1984) ("An upsurge of [artistic] interest in some particular saints, for example in Jerome around the time of Caravaggio, manifests an interaction between art and devotion that is unintelligible without the study of the tradition upon which both art and devotion drew."); see also NORD & HAYNES, *supra* note 2, at 120 (stating that "art is a dimension of religion"). It is of course true that one need not know anything about St. Jerome in order to be moved by Caravaggio's painting. But Pelikan's observation gestures toward the subtler point that one's appreciation for Caravaggio's painting is enriched and deepened by an understanding of the religious tradition that inspired it. See PELIKAN, *supra*, at 14.

<sup>69</sup> See PELIKAN, *supra* note 68, at 79-80.

ter—whether that of Palestrina, Vivaldi, Stanford, Poulenc, Gounod, or so many others—is not the sorrow of a hypothetical everywoman mother whose hypothetical everyman son was executed. It is the apotheosis of that anguish, reflected in art that took itself to be divinely inspired and that in turn aspired to *beau idéal*. So the “literary and historic” value in reading the Upanishads, in Schempp’s locution, implicates Justice Douglas’s religious shadings in complex and diffuse ways, extending much further and more subtly than the rather ridiculous question of whether the Crusades should be taught as the righteous vindication of the one true faith.<sup>70</sup> Indeed, the pervasiveness of these shadings cries out for a more refined methodology than what the Supreme Court has offered.

At the first, and simplest, level of religious shadings, there is obviously a clear distinction between religious instruction explicitly intended to sponsor a religious view and religious instruction designed to enhance students’ understanding and engagement with poetry, art, work, literature, music, and other fields that treat religious themes.<sup>71</sup> To be sure, religious learning of the latter sort will likely have some effect on students’ impressions of religion.<sup>72</sup> But public schools do not violate

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Anyone who supposes that tradition must inhibit creativity need only listen, one after another, to two or three settings of the Mass, to hear how the composer has been able to find . . . a vehicle for an utterly personal and subjective voice in this eminently public and thoroughly traditional text of the Latin Mass. So idiosyncratic is each of them that some superficial interpreters have been tempted to dismiss the common element in all of them, which is the text of the Mass, as no more than a pretext which allowed the composers to say what they would have said anyway, since, after all, that text was ‘merely traditional.’ But tradition is not so ‘mere’ as all that, even when the Mass is composed by Mozart the Catholic Freemason or Bach the orthodox Lutheran or Beethoven the believer/unbeliever.

*Id.*

<sup>70</sup> See 374 U.S. at 225.

<sup>71</sup> See GREENAWALT, *supra* note 21, at 80.

<sup>72</sup> See *id.* at 85 (“One can certainly imagine [teaching about a variety of religious beliefs] indirectly leading students to the opinion that no particular religion has a monopoly on truth or lies at the center of human understanding, that all religions make some extravagant claims that reasonable, enlightened minds will reject.”); see also MARTIN E. MARTY, EDUCATION, RELIGION, AND THE COMMON GOOD: ADVANCING A DISTINCTLY AMERICAN CONVERSATION ABOUT RELIGION’S ROLE IN OUR SHARED LIFE 53 (2000) (“Take students to an art museum and let them learn to appreciate Buddhist art, under the guidance of a teacher or docent who may be Buddhist, and they will be richer for it. Exposing students to Buddhist art will not make them Buddhist . . .”).

Developing a child’s religious sensibilities in this way may give rise to parental and student objections on various grounds. Some of these are discussed *infra* in the text accompanying notes 294–314.

the Establishment Clause if in teaching about religion they aim to deepen students' intellectual engagement with these traditions.<sup>73</sup>

At the second, and more complex, level of shadings, there is the question of the relationship between religious learning and the public school's cultivation of "civic" and "moral" ideals in students. Both the history of American public schools and several towering Supreme Court decisions have established that public schools ought to impart *civic* ideals.<sup>74</sup> Though the Court has not specified exactly what those ideals include, the list probably comprises those that "[go] to the heart of representative government,"<sup>75</sup> and can be plausibly reduced to, at the least, the belief in human equality, a respect for and allegiance to freedom, the uninhibited discussion of ideas, respect and tolerance for others and their beliefs, and independent, creative, and critical thinking.<sup>76</sup>

Public schools also have a role in cultivating other ideals that are not, strictly speaking, political—character traits and beliefs about what is valuable or worthwhile in life. It is not especially controversial, for example, that schools should teach children to be honest, respectful of authority, hardworking, patient, courageous, thoughtful, and caring toward others, even when those qualities do not bear directly on their political lives.<sup>77</sup> Likewise, schools should convey that knowledge and the

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<sup>73</sup> See *Schempp*, 374 U.S. at 225. Of course, nothing in *Schempp* requires teaching about religion to meet these ends. See GREENAWALT, *supra* note 21, at 80.

<sup>74</sup> See, e.g., *Aguillard*, 482 U.S. at 584 (quoting *McCollum*, 333 U.S. at 231); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925). Congress has stressed civic ideals as well. See, e.g., Goals 2000: Educate America Act of 1994, Pub. L. No. 103-227, § 102(3)(a), 108 Stat. 129, 131 (codified as amended at 20 U.S.C. § 5812(3)(a) (2000)) ("[E]very school in America will ensure that all students learn to use their minds well, so that they may be prepared for responsible citizenship . . .").

<sup>75</sup> See *Ambach*, 441 U.S. at 75–76 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

<sup>76</sup> See GREENAWALT, *supra* note 21, at 24; see also WILLIAM GALSTON, *LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE* 220 (1991) (writing that civic education is the teaching of skills and dispositions required in "a community possessing to a high degree the following features: popular-constitutional government; a diverse society with a wide range of individual opportunities and choices; a predominantly market economy; and a substantial, strongly protected sphere of privacy and individual rights"); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 423 (2000) (citing MACEDO, *supra* note 22, at 51–130) (suggesting that the public school fosters and forges a "shared civic culture").

<sup>77</sup> One scholar has observed that the British Education Reform Act of 1988 requires that schools promote students' "spiritual development . . . alongside their moral, cultural, mental and physical development." Colin Wringle, *Is There Spirituality? Can It Be Part of Education?*, 36 J. PHIL. EDUC. 157, 157 (2002). Because it would no doubt be controversial to

arts are inherently valuable and that students should be intellectually curious.<sup>78</sup> This obviously incomplete miscellany could be called (for lack of anything better) "moral ideals."<sup>79</sup> The role of public schools in developing moral ideals has not received the type of explicit support that the Supreme Court has accorded to civic ideals, if only because their content has been even less concretely detailed.<sup>80</sup> Still, one would be hard pressed to argue that courts do not view moral ideals as important.<sup>81</sup> And because moral and civic ideals overlap so often and are not feasibly separable,<sup>82</sup> they are often conceived as part of the general, normative deposit that public schools are charged to cultivate. The question then becomes how, if at all, religious learning, whose teaching in public school has received little or no support, relates to civic and moral learning.<sup>83</sup>

## II. RELIGIOUS LEARNING WITHIN LIBERAL LEARNING

It makes little sense to address that question, however, without first attending to the question of what it means for public schools to culti-

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suggest that "spiritual development" is an educational desideratum in the United States, it is not included here.

<sup>78</sup> See GREENAWALT, *supra* note 21, at 26; see also Rosemary C. Salomone, *Common Schools, Uncommon Values: Listening to the Voices of Dissent*, 14 YALE L. & POL'Y REV. 169, 225 (1996).

<sup>79</sup> Some question whether aesthetic sensitivity is primarily a "moral value." See, e.g., AMY GUTMANN, *DEMOCRATIC EDUCATION* 51 (1987). Professor Gutmann understands "moral values" as those which give "cultural coherence" to a child's life. See *id.* Though I believe that this view is altogether on the wrong track (for reasons explained below), the admittedly imprecise phrase "moral ideals" is intended more as a catch-all than as terminologically ideal.

<sup>80</sup> See *Fraser*, 478 U.S. at 681 (explicitly endorsing the teaching of civic ideals).

<sup>81</sup> See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1071 (6th Cir. 1987) (Kennedy, J., concurring) (noting that public education's role in teaching students to think about "social and moral issues" is as important as teaching civic virtues). In *Mozert*, a group of parents complained that the use of certain textbooks taught their children "evolution, moral relativism, internationalism (rather than patriotism), witchcraft, and idolatry, and also 'denigrate[d] the differences between the sexes,' [and] disparage[d] parental control of children." See George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863, 866 (1988); see also *Mozert*, 827 F.2d at 1062. In challenging the school's curricular choices, the plaintiffs in *Mozert* did not distinguish between the "civic" and "moral" ideals expressed in the textbooks. See *Mozert*, 827 F.2d at 1062. Many of their objections pertain to both civic and moral ideals, as those terms are used here. See *id.*

<sup>82</sup> See Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557, 573 (1995) ("[M]ost (if not all) of the same skills and virtues that are necessary and sufficient for educating children for citizenship in a liberal democracy are also those that are necessary and sufficient for educating children to deliberate about their way of life, more generally (and less politically) speaking.").

<sup>83</sup> See *infra* notes 119-197 and accompanying text.

vate civic and moral, let alone religious, learning.<sup>84</sup> There are of course practical limits—of resources, time, expertise, inclination, and so on—to what any public school can teach.<sup>85</sup> But I am more interested here in exploring the theory of education that should inform civic and moral learning. That is, by what methodological light should public schools educate students for civic and moral life? It may seem that this inquiry is “hopelessly empirical,” but it has been suggested that educational theory has a crucial role to play in understanding what it means to “have,” to teach, and to learn a civic or moral ideal.<sup>86</sup> Only after that theoretical work is done will it be possible to consider the role of religious learning within the larger structure.

### A. *The Metaphor of Conversation*

To cultivate civic and moral ideals is obviously not merely to provide a list of attributes and personal character traits (the civic and moral ideals listed earlier, for example) for students to absorb or commit to memory. Students cannot be dragooned into believing that abstract ideals such as honesty or equality are worthwhile by inculcation or even simple exhortation, as if they were jars to be filled or empty rooms to be decorated with value-laden furniture. It is also not to engage in an examination of ourselves or others with a narrowly tendentious eye toward distilling the civic and moral ideals from the welter of the world's histories and traditions, for the purpose of hammering them home dogmatically. The goal of the school should not be to reach, by persuasion or debate, the formulaic truth or wisdom of these ideals or to prove them unassailably.

The metaphor that I propose is a conversation—one that goes on both publicly and within each student.<sup>87</sup> The conversation of education

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<sup>84</sup> See Christopher L. Eisgruber, *How Do Liberal Democracies Teach Values?*, in *MORAL AND POLITICAL EDUCATION* 58, 71 (Nomos No. 43, Stephen Macedo & Yael Tamir eds., 2002).

<sup>85</sup> See *infra* notes 253–293 and accompanying text (touching upon some of these difficulties).

<sup>86</sup> Eisgruber, *supra* note 84, at 71.

<sup>87</sup> The view offered here owes much to Michael Oakeshott's philosophy of education, though it differs in several important features. I have relied especially on *MICHAEL OAKESHOTT, EXPERIENCE AND ITS MODES* (1933) and Oakeshott's essays in *ON HUMAN CONDUCT* (1975); *RATIONALISM IN POLITICS AND OTHER ESSAYS* (Timothy Fuller ed., Liberty Press 1991) (1962); *RELIGION, POLITICS AND THE MORAL LIFE* (Timothy Fuller ed., 1993); and *THE VOICE OF LIBERAL LEARNING* (Timothy Fuller ed., 1989). Secondary sources on Oakeshott's work in this area that have proven particularly valuable include *ELIZABETH CAMPBELL COREY, MICHAEL OAKESHOTT ON RELIGION, AESTHETICS, AND POLITICS* (2006); *PAUL FRANCO, MICHAEL OAKESHOTT: AN INTRODUCTION* (2004); *TERRY NARDIN, THE PHILOSOPHY OF MICHAEL OAKESHOTT* (2001); *EFRAIM PODOKSIK, IN DEFENSE OF MODERNITY:*

is a deliberate initiation of a learner into "an inheritance of human understandings," of which civic and moral learning forms a vital part.<sup>88</sup> It demands that students learn certain procedural skills—certain habits and arts of intellectual and social engagement—as well as a body of substantive knowledge.<sup>89</sup>

The habits of attention and self-expression, the ability to participate in and submit to immanent criticism,<sup>90</sup> "the art of indicating assent or dissent in graduated terms,"<sup>91</sup> the awareness of and patience to consider the minute particulars and subtleties of a math problem, a history, a poem, or an ethical dilemma—all of these and more may be called "procedural" qualities of the conversation of education whose cultiva-

VISION AND PHILOSOPHY IN MICHAEL OAKESHOTT (2003); ANDREW SULLIVAN, INTIMATIONS PURSUED: THE VOICE OF PRACTICE IN THE CONVERSATION OF MICHAEL OAKESHOTT (2008); KEVIN WILLIAMS, EDUCATION AND THE VOICE OF MICHAEL OAKESHOTT (2007) [hereinafter WILLIAMS, EDUCATION]; Geoffrey Hinchliffe, *Education or Pedagogy?*, 35 J. PHIL. EDUC. 31 (2001); Chris Lawn, *Adventures of Self-Understanding: Gadamer, Oakeshott and the Question of Education*, 27 J. BRIT. SOC'Y FOR PHENOMENOLOGY 267 (1996); David McCabe, *Michael Oakeshott and the Idea of Liberal Education*, 26 SOC. THEORY & PRACTICE 443 (2000); and Kevin Williams, *The Gift of an Interval: Michael Oakeshott's Idea of a University Education*, 37 BRIT. J. EDUC. STUD. 384 (1989) [hereinafter Williams, *The Gift*].

<sup>88</sup> MICHAEL OAKESHOTT, *Education: The Engagement and Its Frustration*, in THE VOICE OF LIBERAL LEARNING, *supra* note 87, at 63, 75–76.

<sup>89</sup> It may be objected that Oakeshott wrote about and was interested in university education, not elementary or secondary schooling. It is true that in what has been called Oakeshott's "middle period" (from about the late 1940s through the mid-1960s), his essays on education focus primarily on universities. See PODOKSIK, *supra* note 87, at 212. But his essays on education of the "late period" (from the late 1960s through the 1970s) deal with more general concepts of education that are equally applicable to high schools and often enough to grade schools as well, as he himself sometimes suggested. See *id.*; see also MICHAEL OAKESHOTT, *Learning and Teaching*, in THE VOICE OF LIBERAL LEARNING, *supra* note 87, at 62; MICHAEL OAKESHOTT, *The Study of "Politics" in a University*, in RATIONALISM IN POLITICS, *supra* note 87, at 188–90. Naturally, Oakeshott's interests in education overlap significantly in these periods.

There also are at least two independent reasons to explore whether Oakeshott's philosophy of education is appealing at the primary and secondary school level. First, it is possible to criticize Oakeshott's position as elitist and anti-democratic—as a belittlement of the urgencies of the quotidian and a suggestion that only those who attend universities are capable of leading truly fulfilling lives. That objection is neutralized if his understanding of education as a conversation is salient in the elementary and secondary school context. Second, learning according to the model offered here cannot be simply "turned on" sometime between year seventeen and eighteen. It is an ongoing endeavor whose success demands an early initiation and a regular engagement.

<sup>90</sup> See JEFFREY STOUT, *DEMOCRACY AND TRADITION* 70–73 (2004). Stout demonstrates how the capacity to participate in and be subjected to immanent criticism is a crucial component of showing respect for other people and their views. See *id.*

<sup>91</sup> MICHAEL OAKESHOTT, *The Voice of Poetry in the Conversation of Mankind*, in RATIONALISM IN POLITICS, *supra* note 87, at 488, 491 n.1.

tion officially begins in the public school.<sup>92</sup> Both civic and moral learning depend on what Oakeshott has called "a habit of affection and behavior," an unselfconscious adherence to the customs (or manners, in the least fussy sense of the term)<sup>93</sup> of the educational conversation that is gained not by self-consciously confessing any civic or moral creed but by observing and interacting with others who manifest the procedural virtues habitually.<sup>94</sup>

But students must also encounter the substantive ideas contributed by the voices of the past to the conversation of learning—the "expressions of thought, emotion, belief, opinion, approval and disapproval, of moral and intellectual discriminations, of enquiries and investigations"<sup>95</sup>—and be challenged to understand and respond to them. This is not necessarily a call to emphasize the "Great Books,"<sup>96</sup> nor is it merely an appeal to an instrumental "cultural literacy" or "core knowledge" of the sort once advocated by E.D. Hirsch.<sup>97</sup> The "substantive" component of the educational conversation operates in tandem with its technical counterpart and is essentially inseparable from it.<sup>98</sup> "Judgment" and "information" are not communicated or acquired independently.<sup>99</sup> To par-

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<sup>92</sup> "Officially," because education of this sort generally begins much earlier in life.

<sup>93</sup> Kevin Williams has criticized Oakeshott's conversational metaphor for demanding too much *politesse* on the part of the participants to be a genuine dialogue. See WILLIAMS, EDUCATION, *supra* note 87, at 184. Whatever the merit of this criticism with respect to Oakeshott's work, the conversational model proposed in this Article contemplates the necessity of critical, if respectful, discursive engagement as a vital component of civic and moral development.

<sup>94</sup> See MICHAEL OAKESHOTT, *The Tower of Babel*, in RATIONALISM IN POLITICS, *supra* note 87, at 465, 467. The ability to "write well," for example, is in large part—though not exclusively—a reflection of one's mastery of the procedural virtues. See Eisgruber, *supra* note 84, at 72. Yet those procedural virtues necessarily exist and are exercised within a tradition of practice. See MICHAEL OAKESHOTT, *Rational Conduct*, in RATIONALISM IN POLITICS, *supra* note 87, at 99, 111 ("'Good' English is not something that exists in advance of how English is written (that is to say, English literature); and the knowledge that such and such is a sloppy, ambiguous construction, or is 'bad grammar,' is not something that can be known independently and in advance of knowing how to write the language.").

<sup>95</sup> MICHAEL OAKESHOTT, *A Place of Learning*, in THE VOICE OF LIBERAL LEARNING, *supra* note 87, at 17, 32.

<sup>96</sup> It is not the sort of nostalgic and suppositious longing to recapture an unadulterated, "classical" education that one finds in Allan Bloom's famous polemic. See generally ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

<sup>97</sup> See E.D. HIRSCH, JR., *CULTURAL LITERACY: WHAT EVERY AMERICAN NEEDS TO KNOW* 12-18 (1987). On the differences among Oakeshott, Bloom, and Hirsch, see FRANCO, *supra* note 87, at 123-24.

<sup>98</sup> See MICHAEL OAKESHOTT, *Learning and Teaching*, *supra* note 89, at 58-60.

<sup>99</sup> See *id.* at 59-60 ("[J]udgment may be taught; and it belongs to the deliberate enterprise of the teacher to teach it. But, although a pupil cannot be explicitly instructed in how to think (there being, here, no rules), 'judgment' can be taught only in conjunction



ticipate in the conversation is to harness its procedural and substantive components into an experiential unity. The public school begins to cultivate civic and moral ideals in its students by facilitating their participation when the conversation's substantive component turns to the practical relationships among human beings.<sup>100</sup> The procedural component enables reflection on the substantive, just as the substantive enriches and refines the procedural, creating in the student an intimacy with civic and moral learning as it has developed in the voices of past traditions.

The familiar multicultural challenge is lurking. The objection is that education conceived in this fashion reflects an indefensible bias for established, "Western" civic and moral traditions. Many have persuasively argued that liberal education has in the past focused insufficiently on the traditions and achievements of persons from non-Western societies or of historically powerless or oppressed persons within those societies. A theory of education as a conversation threatens to obscure the more important question: whose traditions get transmitted? Indeed, it might seem as if the very idea of a "common" school carries with it the outdated assumption that there is a common culture about which all students ought to be educated.<sup>101</sup> It is true that the choice of which tradition to transmit cannot itself be made except from within some tradition of thought with its own criteria (or, perhaps, "prejudices") of worth.<sup>102</sup> Still, even conceding that no choice can be made from within a perspectively chaste cocoon, an educational approach that emphasizes openness to development, refinement, and revision is surely in sympathy with the observation that many existing traditions have been all too narrowly circumscribed. And mere "diversity" in the curriculum

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with the transmission of information."). Andrew Sullivan explains, "Pure judgment is for Oakeshott not simply undesirable, but meaningless. Judgment and information are both separate but intrinsic in all practical conduct." SULLIVAN, *supra* note 87, at 75.

The distinction between judgment and information involves the manner of their respective communication to students "rather than in a dichotomy of what is known." See OAKESHOTT, *Learning and Teaching*, *supra* note 89, at 57. Judgment, as suggested above, is imparted through an unreflective modeling of behaviors, habits, and dispositions. Information, by contrast, is deliberately chosen, organized, and conveyed (by the teacher). See *id.*

<sup>100</sup> See Eisgruber, *supra* note 84, at 72–74.

<sup>101</sup> See Walter Feinberg, *Culture and the Common School*, 41 J. PHIL. EDUC. 591, 593 (2007) (pointing out that the "colonialist" conception of "cultural hierarchy has been flattened out").

<sup>102</sup> See generally HANS-GEORG GADAMER, *TRUTH AND METHOD* 269–71 (Joel Weinshenker & Donald G. Marshall trans., Crossroads, 2d rev. ed. 1989) (discussing the idea of "prejudice" as a necessary "forestructure" of understanding).

is an inadequate criterion for choice, chiefly because it vastly underdetermines what might be chosen. Most importantly, there is an adventurous component to education conceived as a conversation—that “one does not know where it will end because education is not an end product”—which is entirely compatible with the multicultural critique.<sup>103</sup> It would be an unfortunate misapprehension to accuse this educational model of entrenching a blindly uncritical traditionalism, as it holds out the development of individual, not communal, civic and moral sensibility as paramount.<sup>104</sup>

### B. *The Internal and External Modes of the Conversation*

The conversation of civic and moral learning is carried on in both external and internal modes.<sup>105</sup> The external mode concerns the ways in which people address and respond to one another *viva voce*—in a public fashion that can be overheard by others.<sup>106</sup> Schools offer an ideal structure for the external mode to flourish. They supply a curriculum that orders students’ initiation into the conversation, a forum for the procedural virtues of the conversation to flourish, and a

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<sup>103</sup> See Lawn, *supra* note 87, at 275–76.

<sup>104</sup> WILLIAMS, EDUCATION, *supra* note 87, at 171–73.

<sup>105</sup> A “mode” is a manner of understanding; the term is used to suggest that worlds of experience (such as history, natural science, and religion) are understood partially, personally, and conditionally within a specific framework—“at the point of arrest” and from a limited perspective. See OAKESHOTT, EXPERIENCE AND ITS MODES, *supra* note 87, at 73–74.

Nevertheless, there is a tension between this Article’s modal theory of learning and Oakeshott’s views. Although Oakeshott mentions a “conversation which goes on both in public and within each of ourselves,” OAKESHOTT, *Voice of Poetry*, *supra* note 91, at 490, he does not elaborate on the specific features and functions of what I have called the “external” and “internal” conversational modes, and he does not tie these modes to civic and moral learning. Oakeshott was firmly opposed to the idea that the purpose of education was to convey “useful” information or that education ought in any sense to “reflect” the larger world. See, e.g., OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 98; MICHAEL OAKESHOTT, *The Universities*, in *THE VOICE OF LIBERAL LEARNING*, *supra* note 87, at 105, 126–27; Williams, *The Gift*, *supra* note 87, at 387 (“As with education at its primary and secondary levels, [for Oakeshott] university education has no function in the sense of having a purpose extrinsic to the initiation of students into the conversation of education.”).

The account of the external and internal modes offered here takes the different and more moderate view that civic and moral learning, as it involves the relations among human beings, is of necessity in some sense practical. Still, there is an important difference between urging “religious literacy” solely (or even primarily) for its instrumental utility or for its power to “reflect” the world and its problems, and acknowledging that such utility may be a byproduct (but should never be the purpose) of an education that takes conversation as its model. See PROTHERO, *supra* note 3, at 5–10 (offering a contrary view more in line with Hirsch).

<sup>106</sup> This need not be “in public,” as in a public park or street. A “private” discussion between two people alone in a room may reflect the external mode.

partial physical and psychological detachment from the concerns of students' immediate worlds. Of particular value for the external mode, however, schools provide teachers and other students as conversation partners. Teachers, all of whom have mastered certain procedural and substantive elements of the conversation—"in whom some part or aspect of this inheritance is alive"—represent students' primary guide to the process of initiation into the world of civic and moral understandings.<sup>107</sup> Students who are undergoing the same initiation begin to engage one another in interpreting and understanding civic and moral ideals, as presented after the fashion of their teacher and within the "specific formal relationship between the participants" that school provides.<sup>108</sup> It is in this way that schools cultivate civic and moral learning in the external mode, not by providing students with "an outfit of moral ideas, a new reach-me-down suit of moral clothing," but by enlarging their moral sensibilities through the ability to think and feel by listening and responding to one another.<sup>109</sup>

There is also an internal mode of this conversation, one that may be carried on within the structures of school but that can occur elsewhere as well. The internal mode is manifested in private reflection—though no less in conversation—on the learning that the student has acquired in the external mode, which can enlarge, modify, and subtract from it. "[T]he advantage of being able to converse with [one-self]," writes Oakeshott, quoting Antisthenes, "is the chief advantage a [person] may hope to get from education."<sup>110</sup> Students engage in the

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<sup>107</sup> See OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 71; Eisgruber, *supra* note 84, at 77 ("It seems inevitable that the teacher will in fact matter more than the text she assigns. Her attitude and insights will determine whether students approach the text with enthusiasm or boredom, sympathy or hostility, imagination or torpor.").

<sup>108</sup> See MICHAEL OAKESHOTT, *On the Theoretical Understanding of Human Conduct*, in *ON HUMAN CONDUCT*, *supra* note 87, at 1, 59.

<sup>109</sup> See MICHAEL OAKESHOTT, *The Idea of a University*, in *THE VOICE OF LIBERAL LEARNING*, *supra* note 87, at 103; MICHAEL OAKESHOTT, *On the Civil Condition*, in *ON HUMAN CONDUCT*, *supra* note 87, at 115–16; OAKESHOTT, *Voice of Poetry*, *supra* note 91, at 489. Lawn observes,

Something is disclosed or opened up to the participants [in a conversation]; they are modified in the process of mutual interrogation. . . . [T]he purpose is not to reach hard and fast conclusions but to open up lost or repressed lines of enquiry. In genuine conversation we do not arrive at an objective truth or establish hard and fast conclusions: we learn something about ourselves as we enter sympathetically the horizon of the other.

Lawn, *supra* note 87, at 272.

<sup>110</sup> OAKESHOTT, *The Universities*, *supra* note 105, at 133. It is no accident that Oakeshott draws from the Cynic tradition to make a point about the highly personal, non-conventional,

internal mode of conversation when they reconceive themselves through an internal dialogue, grappling with the world of human understandings in order constantly to redefine themselves. Indeed, one of the core functions of education understood as a conversation is "to make th[e] world more transparent for the student . . . and to enable her to engage with it mindfully."<sup>111</sup>

Civic and moral learning, on this account, is interminable.<sup>112</sup> There is no point at which the student of civic and moral learning is satisfied because

[m]orality is this endless search for the perfect good; an endless, practical endeavour resulting in momentary personal failures and achievements and in a gradual change of moral ideas and ideals, a change which is perhaps more than mere change, a progress towards a finer sensibility for social life and a deeper knowledge of its necessities.<sup>113</sup>

The internal mode of the conversation of civic and moral learning enables the student to realize, if only fleetingly, the "intimations and intuitions" that he has about himself as these come to reflect his own self understanding.<sup>114</sup> And it is only through an initiation into the habits of civic and moral thought and expression that have occupied previous conversants that the student "acquir[es] the ability to throw back upon the world his own version of a human being in conduct which is both a self-disclosure and a self-enactment."<sup>115</sup>

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and interior nature of education. See DENIS LAWTON & PETER GORDON, *A HISTORY OF WESTERN EDUCATIONAL IDEAS 19-20* (2002).

<sup>111</sup> See McCabe, *supra* note 87, at 447.

<sup>112</sup> See COREY, *supra* note 87, at 77-78.

<sup>113</sup> See MICHAEL OAKESHOTT, *Religion and the Moral Life*, in RELIGION, POLITICS AND THE MORAL LIFE, *supra* note 87, at 39, 44-45. Oakeshott took the metaphor of conversation from Hobbes, who first used it to describe the "Science" of morality: "For Morall Philosophy is nothing else but the Science of what is *Good*, and *Evill*, in the conversation, and Society of mankind." THOMAS HOBBS, *LEVIATHAN* 216 (C.B. MacPherson ed., Penguin Classics 1968) (1651). The metaphor was famously employed by Richard Rorty for epistemological purposes of his own. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 389-94 (1979) ("If we see knowing not as having an essence, to be described by scientists or philosophers, but rather as a right, by current standards, to believe, then we are well on the way to seeing *conversation* as the ultimate context within which knowledge is to be understood.").

<sup>114</sup> See COREY, *supra* note 87, at 76.

<sup>115</sup> See OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 67; see also WILLIAMS, *EDUCATION*, *supra* note 87, at 11; McCabe, *supra* note 87, at 448 ("These skills do not develop naturally and are no essential part of the physiology of human beings. They arise

As a general matter, the role of religious learning within a conversational theory of education is not difficult to appreciate. Many religious traditions represent, in part, a series of voices in the conversation of civic and moral learning with complex and penetrating meanings.<sup>116</sup> It seems plausible that cultivating an awareness of and an inclination to engage those meanings will enrich the student's experience of civic and moral learning.<sup>117</sup> But one might well wonder how, as a practical matter, religious learning in either of its modes contributes to this conversation and how its value is manifested. What follows is an attempt to probe the nature of religious learning's contribution to the conversation of civic and moral education.<sup>118</sup>

### 1. The External Mode of Religious Learning

First, religious learning enables fuller participation in the external mode of the conversation of civic and moral education because many students remain firmly committed to particular religious traditions and practices.<sup>119</sup> If students who do not share that commitment (or whose parents do not) have any chance of tolerating, understanding, and perhaps even appreciating and befriending their devout peers, they must learn about what would otherwise be totally alien religious traditions. The value of developing a sensitive understanding of the way that religion affects the global political scene, as well as the role of the United States in it, is also self-evident. Jay Wexler has convincingly argued that religious learning directly fosters the "secular" aims of civic learning:

[S]chools should teach about religion so that students can make fully informed decisions about laws and other government actions affecting religious belief and practice and so they can understand the myriad ways that religious beliefs

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only through a relation of close and careful attention between teacher and learner of the sort that characterizes institutions of liberal learning.").

<sup>116</sup> This is not to deny that "religion," whether or not it admits any definition, comprehends much more than this. For an objection that the educational outlook offered here privileges certain kinds of religious experience, as well as a response, see *infra* notes 303–304 and accompanying text.

<sup>117</sup> Kevin Williams has noted Matthew Arnold's characterization of "culture in terms of multifaceted 'voices of human experience' made up of 'art, science, poetry, philosophy, history, as well as of religion.'" WILLIAMS, *EDUCATION*, *supra* note 87, at 9 (quoting MATTHEW ARNOLD, *CULTURE AND ANARCHY* 47 (J. Dover Wilson ed., 1966)).

<sup>118</sup> See *infra* notes 119–197 and accompanying text.

<sup>119</sup> See *infra* notes 120–122 and accompanying text.

affect the way that many Americans think and talk about issues of public importance, including law . . . .<sup>120</sup>

Though teaching a particular religion as true and to the exclusion and denigration of other religions no doubt would prove divisive and foolish (as well as unconstitutional), avoiding the topic altogether in the name of a glassy neutrality will create deep divisions and misunderstandings as well, as students will come to ridicule and fear religious traditions that seem odd or idiosyncratic.<sup>121</sup>

Ignoring or repudiating religious learning thus damages students' ability to participate in the external conversation of civic and moral education because it stunts a certain kind of public educational exchange. The orientation of this external mode of religious learning is political because it derives from the reality, not only that there are many people in school and the larger world whose faith gives them a revealed political life-plan, but also that religious beliefs are often a subsurface current in the complex waterways of a human being's political beliefs. In either of these cases, one's political commitments may not overlap precisely with those of secular modernity, and Americans must possess the conversational wherewithal—both procedural and substantive—to engage that reality fruitfully.<sup>122</sup>

Yet it is worth emphasizing that the value of the external mode is *not* to equip young people with a few modest bits of information so that they may be "better citizens" or "by virtue of which they might become an asset rather than a liability to the nation."<sup>123</sup> Proposals urging "religious literacy" (echoing Hirsch's call for cultural literacy) because religious information is instrumentally useful for more effective living in

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<sup>120</sup> Wexler, *supra* note 3, at 1170.

<sup>121</sup> See Hanan Alexander & Terence H. McLaughlin, *Education in Religion and Spirituality*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF EDUCATION* 356, 362 (Nigel Blake et al. eds., 2003) ("Despite . . . [the] justification [of the exclusion of religious learning in public schools] in terms of neutrality, such a policy tends to lead *de facto* to a lack of understanding and sympathy for religion and spirituality . . .").

Note that my account of internal and external modes of the conversation of education, and of religious learning's relationship to them, is entirely different than the "from the outside" and "from the inside" model of religious education offered by Alexander and McLaughlin. See *id.* at 361–72. Different again from each of these is the "from the inside/from the outside" approach toward teaching about religion discussed by Warren Nord. See *infra* notes 214–218 and accompanying text.

<sup>122</sup> See STOUT, *supra* note 90, at 73. This does not mean that American citizens must simply accept this reality as an unalterable fact. But it does mean that American citizens must learn more about alien belief systems so that they may better understand and engage with traditions at variance with their own.

<sup>123</sup> OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 81.

the world miss the educational impetus of religious learning.<sup>124</sup> This vital point is often completely lost by commentators who call for greater inclusion of religion in the curriculum because it is "relevant," or will help soothe "current hatreds and antagonisms,"<sup>125</sup> or so that rising citizens may get a better sense of "public priorities" or achieve some skill that will enable them to be better voters, soldiers, or public policy mavens.<sup>126</sup> Although civic and moral learning provides certain knowledge, the character of education as a conversation is always essentially individual, open, and developing.<sup>127</sup> It resists the easy and flaccid acquiescence in the stock social roles and prefabricated sentiments toward which American children are relentlessly swept.<sup>128</sup> Not the smallest part of what makes a liberal education liberal is that it induces alienation and foreignness, and there are indeed few areas of human experience as disconcertingly mysterious to American cultural sensibilities as the potent claims of religion. Jeffrey Stout has acutely observed that perhaps the crucial social practice in a democracy—the discursive practice of ethical and political deliberation—demands the cultivation of a delicate balance in which "people learn to think of themselves as individuals while identifying with a broader ethical inheritance and political community."<sup>129</sup> The external mode of religious learning operates within just this discursive—or conversational—equilibrium, speaking to students' obligations as political and social beings and reconciling the artificial polarities of the "secular" and the "religious."

## 2. The Internal Mode of Religious Learning

Because many children (like their parents) are uncertain about their religious commitments, rigid distinctions between the "religious"

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<sup>124</sup> See, e.g., PROTHERO, *supra* note 3, at 5–10; David Carr, *Religious Education, Religious Literacy and Common Schooling: A Philosophy and History of Skewed Reflection*, 41 J. PHIL. EDUC. 659, 670 (2007).

<sup>125</sup> Carr, *supra* note 124, at 671.

<sup>126</sup> See Branch, *supra* note 3, at 1433.

<sup>127</sup> See Hinchliffe, *supra* note 87, at 31.

<sup>128</sup> See OAKESHOTT, *A Place of Learning*, *supra* note 95, at 41. Stout, discussing David Hollinger's *Postethnic America*, considers three such "constituencies": the "business elite," the "proponents of diasporic consciousness," and the "cultural Right." STOUT, *supra* note 90, at 291–92. Stout argues provocatively that the standard social roles to which so many young people are required to conform—"jock, nerd, babe, Goth, straight edge, homeboy, and skate-boarder"—by and large ultimately bottom out in these three entrenched adult constituencies. *Id.*

<sup>129</sup> See STOUT, *supra* note 90, at 292–93.

and the "moral" are unsustainable.<sup>130</sup> The religiously uncertain may be "confused,"<sup>131</sup> but that is not necessarily a matter of regret. Confusion is the result of the partial loss of a particular religious tradition. There have been enormous benefits to that partial loss.<sup>132</sup> And uncertainty was the inevitable response to the "secularization" of ethical discourse under the pressures of religious pluralism, as direct appeals to apodictic religious authority no longer commanded general, let alone universal, assent.<sup>133</sup>

What is regrettable is the renunciation of any desire to understand the history of one's own religious tradition or others', the reasons for its (partial) abandonment, and what, if anything, it can continue to offer in the development of one's civic and moral sensibilities. These traditions of belief and practice ought not to be repudiated unthinkingly

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<sup>130</sup> See Steven D. Smith, *The "Secular," the "Religious," and the "Moral": What Are We Talking About?*, 36 WAKE FOREST L. REV. 487, 487-88 (2001). It is frequently said that the United States is a very religious nation; polls consistently indicate that roughly ninety percent of Americans believe in God and that church attendance and membership continue to be relatively high. See BARRY A. KOSMIN & SEYMOUR P. LACHMAN, *ONE NATION UNDER GOD: RELIGION IN CONTEMPORARY AMERICAN SOCIETY* 9 (1993) (noting that approximately 58% of Americans believe that religion is "very important" and approximately 94% believe in God or a "universal spirit"); NORD, *supra* note 2, at 2; NORD & HAYNES, *supra* note 2, at 1; Wexler, *supra* note 3, at 1161. Professor Robert Putnam has pointed out, however, that although "religion is today, as it has traditionally been, a central fount of American community life and health," "[c]areful comparisons of survey responses with actual counts of parishioners in the pews suggest that many of us 'misremember' whether we actually did make it to services last week." ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 71, 79 (2000). Whatever the statistical reality, these studies point to a substantial number of citizens who are uncertain about their religious commitments.

<sup>131</sup> Smith, *supra* note 130, at 503.

<sup>132</sup> See MACEDO, *supra* note 22, at 132-38 (discussing the "transformative ends" of liberal democracy with respect to certain commitments of Roman Catholicism). I disagree with Professor Macedo, however, when he seems to argue that all "vertical" patterns of authority—such as those found in Roman Catholicism (but certainly not only there)—are inconsistent with liberal democracy. See *id.* at 132-33. Liberal democracy depends upon such patterns to a degree that Macedo seems unwilling to concede. And it is also true that individual liberty often does *not* increase as religious belief becomes more "individualistic" and less hierarchical. See HAMBURGER, *supra* note 23, at 484-85 ("That American majorities used the separation of church and state to impose their vision of their religion and their Americanism upon religious minorities is a sober reminder that as religious liberty becomes more individualistic, it does not necessarily increase individual liberty."). Nevertheless, Macedo's general claim that liberal democratic values have had a moderating force on certain unappealing religious commitments seems to be an accurate account of a positive development. See MACEDO, *supra* note 22, at 132-38.

<sup>133</sup> STOUT, *supra* note 90, at 93-100. Stout helpfully distinguishes between "secularization"—the fact that people can no longer take religious premises for granted in ethical discourse—and "secularism"—the ideological commitment to a state insulated from the effects of religious convictions. See *id.* at 97.



because of unexamined assumptions that religion simply has no place in public schools, or that it is too difficult to teach about it constitutionally. This is not to deny that someone may ultimately decide that one's own or others' religious traditions should be rejected; on the contrary.<sup>134</sup> Yet even more so than for those that have already unequivocally rejected or embraced religion, religious learning is valuable for the uncertain who depend *in pectore*, perhaps even in ways that they would not consciously acknowledge, upon religious concepts to support their moral intuitions and commitments. Religious learning is, therefore, a vital component of the internal mode of the conversation of civic and moral learning.

It may be helpful to provide two examples of the relationship of religious learning to the internal mode. These examples, both of which discuss Christian beliefs, are merely illustrations. As a historical matter, Christianity has been the dominant religion with which liberal democracies have engaged. Analytically, however, other religious traditions may be capable of illustrating this relationship equally well or better.

Professor Michael Perry has argued controversially that the liberal democratic commitment to the essential dignity of every human being can *only* be adequately justified through the prism of religious belief.<sup>135</sup> "Why do all human beings have inherent dignity?" asks Perry.<sup>136</sup> "In virtue of what do all human beings have it?"<sup>137</sup> Perry answers from the perspective of an ecumenical Christian: "By becoming persons who love one another, we fulfill—we perfect—our created nature and thereby achieve our truest, deepest, most enduring happiness."<sup>138</sup> Perry claims that this response provides an adequate ontological foundation—"authentic well being"—for the commitment to intrinsic human dignity because it "specif[ies] the source of normativity—the source of the 'should' in the claim that no one should violate any human being."<sup>139</sup>

<sup>134</sup> This was Mill's point. See *supra* note 32.

<sup>135</sup> See generally Michael J. Perry, *The Morality of Human Rights: A Nonreligious Ground?*, 54 EMORY L.J. 97 (2005) [hereinafter Perry, *Morality of Human Rights*]. Professor Perry has addressed this particular concern before and since. See, e.g., Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, 27 U. RICH. L. REV. 1023, 1035–50 (1993); Michael J. Perry, *Morality and Normativity*, 13 LEGAL THEORY 211, 218–30 (2007); Michael J. Perry, *What is "Morality" Anyway?*, 45 VILL. L. REV. 69, 74–88 (2000); see also MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 11–41 (1998). As will become clear, I doubt that one need accept a position as strong as Perry's to see the value of religious learning for the development of one's civic and moral sensibilities.

<sup>136</sup> Perry, *Morality of Human Rights*, *supra* note 135, at 105.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 114.

<sup>139</sup> *Id.* at 114–15.

Perry is not out to show that only religious believers are capable of affirming the commitment to human dignity; surely this is not true, as many atheists and agnostics affirm just this belief.<sup>140</sup> Nor is Perry arguing that all religious believers affirm human dignity in virtue of being religious; again, that plainly would be false, as there is no necessary connection between religious belief and human dignity.<sup>141</sup> "The point," says Perry, "is that the ground one who is not a religious believer can give for the claim that every human being has inherent dignity is obscure."<sup>142</sup>

In elaborating upon that obscurity, Perry probes Ronald Dworkin's arguments for human dignity. Professor Dworkin claims that every person is a "creative masterpiece" of both "natural and human creation," and that this status translates to a norm of inviolability.<sup>143</sup> For Dworkin, the source of the status is "the value 'we' attach to every human being understood as a creative masterpiece."<sup>144</sup> But, says Perry, Dworkin's "we" is a fiction founded on a consensus that has never existed.<sup>145</sup> And even if one agrees that every human being is a creative masterpiece, one need not attach much value to that person in consequence.<sup>146</sup> A "masterpiece" is generally associated with aesthetic, not moral, excellence (as Dworkin recognizes).<sup>147</sup> Some people, moreover, seem much more like masterpieces than others, and it is unclear on this account why their differences should be ignored in measuring their essential dignity.<sup>148</sup>

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<sup>140</sup> See generally *id.*

<sup>141</sup> See generally Perry, *Morality of Human Rights*, *supra* note 135.

<sup>142</sup> *Id.* at 126.

<sup>143</sup> *Id.* at 136 (quoting RONALD DWORGIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 78, 82-83 (1993)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* ("Many people do not attach much or even any value to every human being; indeed, many people disvalue some human beings."). Of course, Perry's own religiously anchored, ecumenical Christian approach to the inviolability of every human being is not shared universally, but he does not make such ambitious claims for it. See *id.* at 103-18.

<sup>146</sup> See Perry, *Morality of Human Rights*, *supra* note 135, at 136-37.

<sup>147</sup> See DWORGIN, *supra* note 143, at 83-84.

<sup>148</sup> Professor Dworkin writes that human life demands respect because of the

complex creative investment it represents and because of our wonder at the . . . processes of nation and community and language through which a human being will come to absorb . . . cultures and forms of life and value, and, finally, when mental life has begun and flourishes, at the process of internal personal creation and judgment by which a person will make and remake himself . . .

*Id.* at 84. Dworkin emphasizes this "mental" cultivation as "the most powerful and inevitable source of empathy and communion we have with every other creature who faces the

The second example is developed by Jeremy Waldron in his book, *God, Locke, and Equality: Christian Foundations of John Locke's Political Thought*.<sup>149</sup> Professor Waldron's topic is the "character of our deeper commitment to treating all human beings as equals."<sup>150</sup> He explores it by sedulously examining Locke's views on the equality of the sexes,<sup>151</sup> the implications of the idea of a human "species" for Locke's conception of equality,<sup>152</sup> the relationship between reason, natural law, philosophy, and the human intellect,<sup>153</sup> and others. Waldron argues that Locke's commitment to human equality is premised on a deeply

theological content [that] . . . shapes and informs the account through and through; the range property on which Locke relies<sup>[154]</sup> is simply unintelligible apart from these religious concerns. . . . Lockean equality is not fit to be taught as a secular doctrine; it is a conception of equality that

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same frightening challenge," but he does not clarify why human beings who are less "mentally" cultivated than others inspire equal "empathy and communion." See *id.* In fact, Dworkin carves out an exception for "pathological cases," but it is difficult to see on his account why one should stop there. See *id.* at 83.

<sup>149</sup> See generally JEREMY WALDRON, *GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF JOHN LOCKE'S POLITICAL THOUGHT* (2002).

<sup>150</sup> *Id.* at 2.

<sup>151</sup> *Id.* at 21–43.

<sup>152</sup> *Id.* at 44–82.

<sup>153</sup> *Id.* at 83–107.

<sup>154</sup> Borrowing from Rawls, see JOHN RAWLS, *A THEORY OF JUSTICE* 508 (1972), Waldron introduces the concept of a "range property":

The idea is that although there is a scale on which one could observe differences of degree, still once a range has been specified, we may use the binary property of *being within the range*, a property which is shared by something which is in the center of the range and also by something which is just above its lower threshold.

WALDRON, *supra* note 149, at 76–77. For Locke, Waldron claims, the relevant range property that warrants the belief in human equality is the intellectual power of abstraction to reason to the existence of God:

So Locke's position seems to be this. Anyone with the capacity for abstraction can reason to the existence of God, and he can relate the idea of God to there being a law that applies to him both in his conduct in this world and as to his prospects for the next. The content of that law may not be available to everyone's reason, but anyone above the threshold has the power to relate the idea of such law to what is known by faith and revelation about God's commandments . . . .

*Id.* at 79–80.

makes no sense except in the light of a particular account of the relation between man and God.<sup>155</sup>

To this, one may object that Locke lived long ago and his religious justifications for equality cannot simply be transplanted into our modern, pluralistic society. One ought today to endeavor to produce reasons that will appeal to everyone and by which everyone may be reasonably bound. Waldron has several responses. First, with respect to the particular argument about human equality premised on an intellectual range property, Waldron claims that someone who denies or is indifferent to the existence of God cannot make the same arguments that Locke makes.<sup>156</sup> Second, Waldron argues that though Locke's bottom-line conclusion that atheists should be excluded from political life is obviously intolerable, that does not vitiate the power of Locke's arguments about the nature of the problem.<sup>157</sup>

Standing in the shadows is the important question of Rawlsian public reason and its injunction against appealing to religious convictions in making political judgments.<sup>158</sup> Waldron claims that "[i]f the Lockean view that I have been outlining is correct, it may be impossi-

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<sup>155</sup> WALDRON, *supra* note 149, at 82. That universal "relation between man and God" bears a substantial resemblance to what Calvin described as the tendency or urge ("nisus") to believe in God:

There is within the human mind, and indeed by natural instinct, an awareness of divinity. This we take to be beyond controversy. To prevent anyone from taking refuge in the pretense of ignorance, God himself has implanted in all men a certain understanding of his divine majesty. . . . Therefore, since from the beginning of the world there has been no region, no city, in short, no household, that could do without religion, there lies in this a tacit confession of a sense of deity inscribed in the hearts of all.

JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 43-44 (Ford Lewis Battles trans., 1960) (footnotes omitted).

<sup>156</sup> WALDRON, *supra* note 149, at 81 ("An atheist may pretend to talk about the equality of all members of the human species, but his conception of the human species is likely to be . . . chaotic and indeterminate . . . . The atheist may pretend to ground our equality in our rationality, but he will be at a loss to explain why we should ignore the evident differences in people's rationality.").

<sup>157</sup> *Id.* at 235 (arguing that "[w]e must not reason from rejection of Locke's solution to the non-existence of the problem he identified" — "namely, his conviction that a society inhabited by a significant number of people who deny the existence of God is running a grave risk with its public morality").

<sup>158</sup> I do not intend (and am not qualified) to delve into the many debates between Rawls and his critics, and I leave to the side the controversy over the implications of Rawls's "proviso." See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 783-84 (1997), reprinted in JOHN RAWLS, *POLITICAL LIBERALISM* 462-63 (expanded ed. 2005); see also SAMUEL FREEMAN, *RAWLS* 411-14 (2007).

ble to articulate certain important egalitarian commitments without appealing to what one takes to be their religious grounds."<sup>159</sup> But at all events, without an effort to "get to the bottom" of our commitment to human equality (for fear of causing offense, division, or intellectual discomfort), we foster not only shallowness of thought but also potential error on questions of great importance. Waldron concludes that we should not

congratulate ourselves on having left the religious issues behind us, so far as the defense and elaboration of basic equality is concerned. . . . It may seem to us now that we can make do with a purely secular notion of human equality; but as a matter of ethical history, that notion has been shaped and fashioned on the basis of religion.<sup>160</sup>

Perry and Waldron are obviously after big game. It is ambitious indeed to challenge the possibility of freestanding, secular justifications for the continuing commitment to two fundamental, liberal democratic ideals.<sup>161</sup> Yet their arguments need not be accepted wholesale in order to see the relevance of religious learning for the public school student. In fact, the position I have in mind is comparatively

<sup>159</sup> WALDRON, *supra* note 149, at 237.

<sup>160</sup> *Id.* at 241–42.

<sup>161</sup> For another perspective on the religious roots of the idea of human equality, see George P. Fletcher, Essay, *In God's Image: The Religious Imperative of Equality Under Law*, 99 COLUM. L. REV. 1608, 1608–29 (1999). For a critique of Perry's position, see the comments of August 13, 21, and 23, 2007, by Brian Tamanaha, Jack Balkin, and Andrew Koppelman at <http://balkin.blogspot.com> (last visited Aug. 5, 2008).

Universal human dignity and equality are obviously not the only ideals held dear by liberal democratic states; others—tolerance, for example—may be more amenable to purely secular justification. See WALDRON, *supra* note 149, at 237–38. But see STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 163–84 (2001) (arguing for a conception of tolerance with explicitly religious foundations). Nevertheless, these are certainly not the only liberal ideals the understanding of which might be deepened by religious learning. Waldron has himself examined the problem of distance and the obligation to render assistance to others in need by reconsidering the familiar story of the Good Samaritan. See Jeremy Waldron, *Who Is My Neighbor: Humanity and Proximity*, 86 MONIST 333, 333–54 (2003). The Everest stories discussed earlier raise these very concerns. See *supra* notes 12–20 and accompanying text. Likewise, Robert Ferguson has observed the dependence on "a spiritual level of explanation" for the justification and defense of the ideal of "liberty." See Robert A. Ferguson, *The Dialectic of Liberty: Law and Religion in Anglo-American Culture*, 1 MODERN INTELL. HIST. 27, 51–52 (2004). And William James famously argued that there is a powerful connection between the religious virtue of "poverty"—particularly, he felt, as an Islamic ideal—and "the mystery of democracy." See WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE 324 (Martin E. Marty ed., Penguin Books 1982) (1902).

modest and does not depend on controversial judgments about the grounds of moral ideals.

It is this. Even if one is skeptical of Perry's and Waldron's respective claims that human dignity and equality can only or best be understood by exploring the religious beliefs that support them, one still should grant that religious beliefs are and continue to be *an important source* for understanding and reflecting upon those commitments. They represent a unique category of experience and understanding that have, through history, exerted a "moral pull" more deeply embedded than the elegant intellectualism of other accounts.<sup>162</sup> And again, even if Perry is wrong that "there is no way" to address these sorts of questions satisfactorily without reference to religion (and he may well be wrong),<sup>163</sup> religious learning is germane to the conversation of civic and moral learning: it is a complicated and highly textured part of the inheritance of moral and civic understandings, and one into which students ought to be initiated for the sake of their own moral development.<sup>164</sup>

In specific, religious learning represents an important contribution to the internal conversation of civic and moral education. If the moral uncertainties of the religiously unsure about ideals such as human equality or intrinsic human dignity can be, even to a limited extent, better or more insightfully understood, the nature of their moral intuitions and commitments should be considered and explored in an atmosphere of open, civil, and critical inquiry.<sup>165</sup> But that type of carefully guided reflection can occur only if public schools are willing to broach religion's moral valence. The claim, often repeated by the U.S. Supreme Court, that such an initiation into the world of religious be-

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<sup>162</sup> Smith, *supra* note 130, at 506; cf. GREENAWALT, *supra* note 21, at 28 ("[R]eligious perspectives commonly provide support for ideas, such as human equality, that may also be reached on other grounds; and an understanding of religious perspectives helps us to grasp the political currents of our society.").

<sup>163</sup> Perry, *Morality of Human Rights*, *supra* note 135, at 121.

<sup>164</sup> See GREENAWALT, *supra* note 21, at 143 ("Schools often take definite positions—for example, that all people should be treated equally by government—that are powerfully supported by the great majority of religious views in the community."). Greenawalt surely means that religious beliefs often overlap with fundamental liberal democratic commitments, offering implicit support. *See id.* It is not as clear how powerful he believes those religious justifications are or the degree to which they should be explored in public schools. *See id.*

<sup>165</sup> See PELIKAN, *supra* note 68, at 19 ("For even if—or especially if—the tradition of our past is a burden that the next generation must finally drop, it will not be able to drop it, or to understand why it must drop it, unless it has some sense of what its content is and of how and why it has persisted for so long.").

liefs and understandings carries with it the threat of "divisiveness"<sup>166</sup> or social danger is worth remembering, but it is in the end both myopic and, more importantly, beside the point. Myopic, because it masks the divisiveness and social danger that festers in the superficial cultivation of civic and moral ideals.<sup>167</sup> And beside the point, because the very idea of civic and moral cultivation as an educational enterprise is ultimately not a pat program of "socialization" or the infusion of a *Volksgeist*, let alone a "civil religion,"<sup>168</sup> but the awakening and development of a personal sensibility.<sup>169</sup> This is the internal mode of religious learning; it aspires to reconcile the artificially rigid categories of the "moral" and the "religious" as they are manifested over time in the layered personality of the individual.<sup>170</sup>

In undertaking the type of guided reflection about religion suggested by these two modes of religious learning, the public school should strive to be inclusive. Majority and minority religious traditions should be represented, and familiar and unfamiliar traditions should be taught and discussed with the same open and intellectually curious

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<sup>166</sup> See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring) (observing that the religion clauses "seek to avoid that divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike"); *id.* at 709 (Stevens, J., dissenting) (commenting on "[g]overnment's obligation to avoid divisiveness" by erecting a "wall of separation between church and state"); *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971) (discussing the "divisive political potential" of state-sponsored religious institutions and activities). For a cogent critique of the Supreme Court's argument about divisiveness, see Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1705, 1708–24 (2006) (noting that the argument "appears to have revived somewhat in recent years").

<sup>167</sup> An overly acute fear of religion's political divisiveness might result in superficial civic and moral cultivation in the sense either that it would be insubstantial or, what is just as likely, that it would be partial. See HAMBURGER, *supra* note 23, at 453–54 (describing charges of divisiveness leveled at Roman Catholics, and in particular at parochial schools, in the mid-twentieth century and the aspirations toward "ecumenical harmony" motivating them).

<sup>168</sup> See JEAN-JACQUES ROUSSEAU, *The Social Contract*, in *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 149, 252–53 (Susan Dunn ed. & trans., 2002) ("There is, therefore, a purely civil profession of faith, the articles of which it is the duty of the sovereign to determine, not exactly as dogmas of religion, but as sentiments of sociability, without which it is impossible to be a good citizen or a faithful subject." (footnote omitted)).

<sup>169</sup> See OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 71. The occasional agitation about whether to declare the United States a "Christian nation," like the "cult of Christentum und Deutschtum" in pre-World War I Germany, is a paradigm of civic, moral, and religious learning as "socialization." See REINHOLD NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY: A STUDY IN ETHICS AND POLITICS* 97 (Scribner 1960) (1932).

<sup>170</sup> The internal mode of religious learning in part reflects Reinhold Niebuhr's skepticism about the power of "religious resources" to effect large-scale social transformation, and conversely his sense that those resources were vital wellsprings of individual moral development. See NIEBUHR, *supra* note 169, at 51–82.

attitudes.<sup>171</sup> Nevertheless, it is important to distinguish between beliefs that can be understood as at some level compatible with the fundamental commitments of liberal democratic society and other beliefs that are incompatible with or unequivocally repudiate them. Though discussion and reflection within the conversational model is always open-ended, it is not wedded to a kind of bloodless, noncommittal multiculturalism.<sup>172</sup> Religious views may fare poorly or well in the eyes of students within that framework, but the public school's obligation to initiate the student into the conversation of civic and moral learning demands that it take religious learning, in as much of its complexity as practicable, within its gaze.<sup>173</sup>

Stephen Macedo has suggested that authoritarian and "totalistic religious or moral views" are undesirable from a civic perspective and

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<sup>171</sup> Still, I agree with Nord and Haynes that "[i]n choosing the less influential religions, it is wise and just to give attention to those that are practiced locally to give all children the sense that their traditions are taken seriously." NORD & HAYNES, *supra* note 2, at 48.

<sup>172</sup> This point raises important questions of teaching style. Teachers should not require students to ask themselves directly, for example, "Do I agree with the Roman Catholic view on women in the ministry?" or "Do I disagree with the Muslim requirement to wear the Hijab?" Instead, teachers should approach these topics one step removed. For example, "How would an observant Catholic think about the question of women in the ministry?" This approach, which Mill first suggested, see MILL, *supra* note 32, at 111, reflects Nord and Haynes' argument that "[t]he key skill [a] . . . teacher needs when teaching about religious traditions is the ability to teach through attribution." See NORD & HAYNES, *supra* note 2, at 71. The "attribution argument" also applies when teachers introduce criticisms of religious beliefs. See Wexler, *supra* note 3, at 1258.

<sup>173</sup> Greenawalt addresses the problem of "spillover effects," the influence of liberal instruction on students' religions:

Because potential spillover effects may often be desirable from a civic standpoint (and because teachers cannot confidently say when tensions between perspectives are serious), teachers should counter these effects only when doing so does not undercut the educational policy that may cause the spillover and when they need not decide whether an arguable tension is genuine. By way of illustration, students should be shown how a believer in authoritarian religion can accept liberal democracy; they should not be told that ideas of secular tolerance and respect have no relevance for religion.

GREENAWALT, *supra* note 21, at 32-33. Greenawalt is of course correct that students should not be told that secular ideals have no relevance for religion since some religious beliefs are not only consistent with but also offer substantial justifications for certain secular values. See *id.* But it is preferable to let the religious beliefs stand on their own merits (after proper explanation), just as other contested ideas do. Greenawalt is also correct to observe that teachers may be uncomfortable discerning areas of possible tension, see *id.* at 32, but this is precisely a reason to voice those tensions, enabling students to learn about and reflect on them, without offering definitive conclusions. Some of the difficulties of teacher competence and bias are discussed *infra* in the text accompanying notes 256-276.



should never be accommodated,<sup>174</sup> while other religious views compatible with that perspective are praiseworthy.<sup>175</sup> He is correct that conversational engagement may show that particular religious beliefs are too far outside the mainstream because of their "resistance to basic civic values."<sup>176</sup> But if carried out with the requisite delicacy, it is likely to show the complex structure, history, and development of religious beliefs and practices as well. It will therefore often be the case that religious beliefs and liberal civic and moral ideals will be interconnected in complicated ways. Thus, some religious beliefs and practices may be attractive even for those who may not accept the whole of the tradition upon which the belief is based.<sup>177</sup> A kind of religious *bricolage* might well be the result,<sup>178</sup> in which religious beliefs may bring different perspectives to one's commitment to liberal democratic ideals; or they may modify those ideals; or they may show themselves to be incompatible with them.<sup>179</sup>

An example may be helpful.<sup>180</sup> The Catholic Church maintains that only males can be priests.<sup>181</sup> In her public school comparative religion class,<sup>182</sup> Eve learns about the theoretical justifications for this belief from the Roman Catholic point of view and its relationship to her existing moral and civic ideals. Eve is struck by the practice's apparent in-

<sup>174</sup> See MACEDO, *supra* note 22, at 196–97.

<sup>175</sup> See *id.* at 38–39.

<sup>176</sup> See *id.* at 210. Religious views that, for example, promote slavery or hateful attitudes toward others fall into this category. I discuss a more difficult case—ordination of women as Roman Catholic priests—*infra* in the text accompanying notes 180–194.

<sup>177</sup> See MICHAEL J. PERRY, RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES 80 (1997) ("[T]he moral insight, the insight into the requirements of human well-being, achieved over time by a religious tradition, as the yield of a lived experience of an historically extended human community, might well have a resonance and indeed an authority that extends far beyond just those who accept the tradition's religious claims.").

<sup>178</sup> The idea of "moral *bricolage*" is developed in JEFFREY STOUT, ETHICS AFTER BABEL: THE LANGUAGES OF MORALS AND THEIR DISCONTENTS 74–77, 293–94 (1988).

<sup>179</sup> See MACEDO, *supra* note 22, at 172.

<sup>180</sup> Before proceeding, it is worth emphasizing that I cannot do justice to the range of religious understandings even on a comparatively limited and familiar question germane to a single tradition. The point of the example is to demonstrate how learning about religious beliefs, even those that may form part of a tradition other than one's own, contributes to one's initiation into the ongoing conversation of civic and moral learning.

<sup>181</sup> See 1983 CODE c.1024 (Canon Law) ("A baptized male alone receives sacred ordination validly."); see also Sacred Congregation for the Doctrine of the Faith, Inter Insigniores: Declaration on the Admission of Women to the Ministerial Priesthood ¶ 6 (Oct. 15, 1976) [hereinafter Inter Insigniores]. See generally Terrance R. Kelly, *Canaanites, Catholics and the Constitution: Developing Church Doctrine, Secular Law and Women Priests*, 7 RUTGERS J. L. & RELIGION 3 (2005) (documenting the historical prohibition against female priests).

<sup>182</sup> Assume that this is an elective, high-school class. See *infra* note 309 and accompanying text.

compatibility with other ideals that she holds dear—human equality, for example. She may note that the government prohibits employment discrimination against women in a variety of other contexts, and she may wonder what arguments, if any, support the continued exclusion of women from the Catholic priesthood.<sup>183</sup> Eve may observe several historical Catholic claims about the native inferiority of women, as well as the arguments of contemporary women (some of them Catholic) that “religion, in general, and the Catholic Church, in particular, have not sufficiently recognized the talents and contributions of women.”<sup>184</sup>

One argument for the exclusion of women from the priesthood is that crucial religious figures in the Christian tradition—for example, God, Christ, the archangels, the apostles, and many of the prophets—have always been represented as male.<sup>185</sup> Far fewer key figures have been female.<sup>186</sup> Believers have for centuries associated the gender of these figures with their particular roles so that, as C.S. Lewis once remarked upon hearing that the Church of England was considering a proposal to ordain women priests,

Christians think that God Himself has taught us how to speak of Him. To say that it does not matter [whether women are ordained] is to say either that all the masculine imagery is not inspired, is merely human in origin, or else that, though inspired, it is quite arbitrary and unessential. And this is surely intolerable: or, if tolerable, it is an argument not in favour of Christian priestesses but against Christianity. . . . [A] child who has been taught to pray to a Mother in Heaven would have a religious life radically different from that of a Christian child.<sup>187</sup>

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<sup>183</sup> Professor Douglas Laycock has argued that, constitutionality aside, Title VII “forbids the requirement that Catholic priests be male.” Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1375 (1981). The inquiry here is not about government-imposed limitations on religious institutions but instead about how moral positions underlying certain religious practices may or may not support and be supported by other fundamental moral commitments, including those of liberal democracies.

<sup>184</sup> See Susan J. Stabile, *A Catholic Vision of the Corporation*, 4 SEATTLE J. SOC. JUST. 181, 187 n.45 (2005).

<sup>185</sup> See C.S. LEWIS, *Notes on the Way*, 29 TIME & TIDE 830 (1948), reprinted as *Priestesses in the Church?*, in GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 234, 237 (Walter Hooper ed., 1970).

<sup>186</sup> See *id.*

<sup>187</sup> *Id.*

On this view, because priests (as well as bishops, cardinals, and popes) stand in a unique, hierarchical relationship between the religious faithful and God—one in which God's nature is reflected imperfectly in the priest—to ordain female priests is to alter fundamentally what it is to be a Catholic both as a matter of revelation and tradition.<sup>188</sup>

Eve may accept Lewis's argument. She may recognize the importance of hierarchical structure within the Catholic Church and she may be able to reconcile the commitment to that structure with her belief in the basic equality of men and women. Perhaps she will be aided in that reconciliation by the recognition that hierarchies of various kinds—of education, wealth, social status, family structure, and political power, to name only a few—not only inhere in but are constitutive of American democratic social life. Those hierarchies lend a valuable stability to the institutions that they structure. The seeming tension may also demand of Eve that she explore the contours of her belief in the equality of the sexes. "Human equality" is not an obvious and self-applying ideal; it invites individual interpretation that is likely to be the subject of vigorous disagreement.<sup>189</sup>

Eve may also reject Lewis's argument, or she may reject it selectively—expressing her assent or dissent, as Oakeshott had it, "in graduated terms."<sup>190</sup> For example, she may not equate the ordination of women with the subversion of all gender in the Christian tradition. Eve might agree with Lewis that the masculinity of God, Christ, and St. Michael is an important doctrinal and hierarchical feature of Catholi-

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<sup>188</sup> See *Inter Insigniores*, *supra* note 181, ¶ 30 ("Christ is a man. . . . [T]herefore . . . actions . . . in which Christ himself . . . is represented . . . must be taken by a man.").

<sup>189</sup> Pope John Paul II offered an elegant, though deeply contestable, interpretation of human equality:

The personal resources of femininity are certainly no less than the resources of masculinity: they are merely different. Hence a woman, as well as a man, must understand her "fulfillment" as a person, her dignity and vocation, on the basis of these resources, according to the richness of the femininity which she received on the day of creation and which she inherits as the expression of the "image and likeness of God" that is specifically hers. The inheritance of sin suggested by the words of the Bible—"Your desire shall be for your husband, and he shall rule over you"—can be conquered only by following this path. The overcoming of this evil inheritance is, generation after generation, the task of every human being, whether woman or man. For whenever man is responsible for offending a woman's personal dignity and vocation, he acts contrary to his own personal dignity and vocation.

Pope John Paul II, *Apostolic Letter Mulieris Dignitatem* ¶ 10 (Aug. 15, 1988).

<sup>190</sup> OAKESHOTT, *Voice of Poetry*, *supra* note 91, at 491–92 n.1.

cism,<sup>191</sup> but she might disagree that the connection between God and his priests must necessarily be one of gender. In that context, Eve may instead be more persuaded by the claim that men and women are equal in their mutual subjection to one another in Christ, and that this basic human equality is a powerful argument for ordaining women—i.e., that women and men, being fundamentally equal before God, are both capable of representing and reflecting Christ as priests.<sup>192</sup> Another possibility is that Eve, after considering the Catholic Church's position on the ordination of women, simply will not be able to reconcile the tension between that view and her belief in human equality. She will therefore reject the prohibition on the ordination of women because it is overly "resistan[t] to [the] civic values" that she holds dear,<sup>193</sup> and, if she is inclined toward religious reform, she may work to change official Catholic doctrine to reflect her own moral understandings. Disagreement, even when voiced in the strongest terms, is still expressive: it presupposes a wish to continue to engage in a conversational exchange with the community of others with whom one disagrees.<sup>194</sup>

Eve's particular conclusions may be interesting in their own right, but it is far more important to recall that Eve is a high school student who is only beginning to learn and think about these questions. Her

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<sup>191</sup> See LEWIS, *supra* note 185, at 237. But see Pope John Paul II, *supra* note 189, ¶ 8 ("If there is a likeness between Creator and creatures, it is understandable that the Bible would refer to God using expressions that attribute to him both 'masculine' and 'feminine' qualities.").

<sup>192</sup> See Susan J. Stabile, *Can Secular Feminists and Catholic Feminists Work Together to Ease the Conflict Between Work and Family?*, 4 U. ST. THOMAS L.J. 432, 436-37, 442 (describing the Catholic concept of freedom as one of equal subjection to the God who gives all lives purpose and meaning); see also Elizabeth A. Johnson, *Responses to Rome*, COMMONWEAL, Jan. 26, 1996, at 11 (noting that Jesus himself never ordained the twelve apostles, and did not thereby create a priesthood as such, whether male or female, and that "women were among the most active and faithful of apostles and disciples").

<sup>193</sup> See MACEDO, *supra* note 22, at 210.

<sup>194</sup> See STOUT, *supra* note 90, at 299. According to Stout:

Many Christians have faced hard decisions over whether they could continue in good conscience to remain members in good standing of a group that, say, bans women from the priesthood . . . . But this should remind us that no social body, including the church, provides immunity from the dilemmas and conflicts of membership. . . . The only alternative is full-fledged separatism, which involves commitment to a group that is small enough and uniform enough to eliminate ambivalence altogether, at least for a while. But why would I want to confine my *discursive* community to the people who already agree with me on all essential matters? Isn't part of the point of trying to hold one another responsible discursively that we do not agree on everything and therefore *need* to talk things through?

conclusions are likely to change—indeed, one hopes that they *will* change, many times—as the circumstances of her life add layers of experience and wisdom and as she continues to participate in the conversation of civic and moral learning. The point of religious learning is neither to arm Eve for more dexterous socio-political combat with a hostile world nor to fix certain views in the imagined amber of her moral personality. Whatever conclusions a high school student may reach, the aim of religious learning must always be to enrich her civic and moral conversational engagements. Religious learning is therefore imparted—taught about, studied, discussed, and reflected upon—within the same educational *mise-en-scène* as are other kinds of civic and moral understandings. When difficult religious questions arise, teachers should avoid arriving at firm conclusions, but they should not shy away from presenting arguments, pointing out areas of tension with other moral ideals, and offering persuasive and less persuasive ways to reconcile those tensions. All of this must be done delicately, to avoid the impression that the teacher is pronouncing judgment on questions open to reasonable disagreement. But the primary objective remains educational: the teacher should cultivate in his students the ability to engage with and explore the voices of religious traditions for their own moral development.<sup>195</sup> The aim must be to make Eve feel the insoluble conflicts of values—the discomforts, the complexities, the tragic choices, losses and predicaments—that make a liberal education liberal.

This modal theory of religious learning within the metaphor of conversation is undeniably abstract, and it would be naïve to claim that it is the only conceptual resource needed to guide the cultivation of religious learning in public schools, or that it will resolve all of the sundry and murky questions of constitutional law and education policy that await.<sup>196</sup> No theory can do that in an area as contested as this one. But the external and internal modes of religious learning provide a

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<sup>195</sup> See *id.* at 112.

In a religiously plural society such as ours, it is even more important than in other circumstances to bring into reflective expression commitments that would otherwise remain implicit in the lives of the religious communities. Members of a religious communion can benefit from such expression by learning about themselves and putting themselves in a position to reflect critically on their commitments. Outsiders can benefit from listening in, so as to gain a better grasp on the premises that our fellow citizens rarely have an opportunity to articulate in full.

*Id.*

<sup>196</sup> For convenience, I will simply refer to the modes of religious learning respectively as the “external mode” and the “internal mode.”

useful starting point in analyzing the relationship of religious learning to the cultivation of the civic and moral ideals of liberal democracies. The sections that follow test the theory against various practical concerns.<sup>197</sup>

### III. APPLYING THE MODAL THEORY OF RELIGIOUS LEARNING

Thus far, this Article has aimed to give a full account of the problem of religious learning, in the belief that no policy movement is possible without a thorough understanding of the relationship between religious learning and liberal education.<sup>198</sup> This Part applies the Article's modal theory of religious learning to several curricular questions with significant Establishment Clause implications to explore how the two modes might manifest the value of religious learning in public schools.<sup>199</sup>

#### A. *Religious Learning and History/Social Studies*

Kent Greenawalt has observed that "[a]ny history of humankind is woefully incomplete without serious attention to religion. A fair survey of world history must include consideration of the place of religions, including ones that are relatively unfamiliar to most Americans . . . as central aspects of diverse cultures."<sup>200</sup> Greenawalt's argument seems most germane to the external mode: it claims that teaching about religion can broaden students' conversational horizons by cultivating their political personae.<sup>201</sup> As previously discussed, the U.S. Supreme Court has held that the history of religion can be studied as a part of the history of humanity without running afoul of the First Amendment.<sup>202</sup> Jay Wexler has developed a more instrumental claim that the ability to consider and express arguments from a variety of perspectives, including religious perspectives, is a valuable skill for

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<sup>197</sup> See *infra* notes 198-252 and accompanying text.

<sup>198</sup> See *supra* notes 1-197 and accompanying text.

<sup>199</sup> See *infra* notes 200-252 and accompanying text. The situations examined in this Article are highly selective; they are intended as an initial test of the theory's application to a handful of concrete cases, not as an exhaustive study.

<sup>200</sup> GREENAWALT, *supra* note 21, at 127. Much of the discussion in this Part reacts to Greenawalt's important and illuminating recent treatment of these curricular questions.

<sup>201</sup> See *id.*; NORD & HAYNES, *supra* note 2, at 8.

<sup>202</sup> See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963); see also *Edwards v. Aguillard*, 482 U.S. 578, 607 (1987) (Powell, J., concurring) ("[S]ince religion permeates our history, a familiarity with the nature of religious beliefs is necessary to understand many historical as well as contemporary events.").

future citizens: "[T]he citizen must be able to think about the relevant public issue from a perspective different from his or her own and to reason about the desirability of the proposed government action from within a different world view."<sup>203</sup> Teaching about religion promotes these abilities by broadening students' fund of knowledge.<sup>204</sup>

Yet these perspectives, including the Supreme Court's, fail to recognize that religious learning, as part of the study of history and social studies, contributes to the conversation at the heart of civic and moral learning. Wexler writes, for example:

[A]nyone considering the issue of whether religious communities ought to take a public stand on civil rights issues would . . . naturally try to remember what he or she knows about how religious communities have participated in civil rights issues in the past. . . . Thus, a student who never learned about the role of Christianity in the civil rights movement of the 1960s or in the abolitionist movement of the mid-nineteenth century would have no choice but to rest his opinion on this very important public issue on a radically incomplete knowledge of the facts that are necessary to the problem's resolution.<sup>205</sup>

But to render this sort of argument plausible—that is, to explain *why* it is important that a student learn the history of religious involvement in political enterprises—more is necessary than simply acknowledging the usefulness of being able to recall historical events to support present policy commitments. That type of recitation might prove instrumentally useful as a rhetorical ploy, but by itself it says relatively little about the moral and civic worth of the religious belief. For that, the student would also need to reflect upon whether a particular religious belief ought to be used to support (or oppose) a past policy commitment, as well as why that or another religious claim should do so for his present purposes. The point is not only that learning and thinking about religious beliefs "promote[s] mutual understanding and civic peace"<sup>206</sup> but also that the same engagement with religious ideas may enrich one's own internal discursive understanding of the particular moral ideal at issue. The value of religious learning is educational: it contributes an additional voice to the external and internal conversation of the student's civic and moral development.

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<sup>203</sup> See Wexler, *supra* note 3, at 1200.

<sup>204</sup> See *id.*

<sup>205</sup> *Id.* at 1202–03 (footnotes omitted). To like effect is Branch, *supra* note 3, at 1433.

<sup>206</sup> See Wexler, *supra* note 3, at 1214.

An important practical consideration is how deeply a textbook or a teacher should engage with religious perspectives in a history or social studies class. One of the primary difficulties is "descriptive accuracy in the face of complex nuances,"<sup>207</sup> as there are few religions, if any, with a single, distinctive, and monolithic point of view. And yet decisions about emphasis and focus inhere in the teaching of history generally. In providing an account of the American Civil War, will texts emphasize the economic causes of southern secession? The importance of immigration in the northeast? Competing understandings of federalism? Or will teachers focus on the question of slavery? Or will they concentrate on particular battles and military strategy? Or will teachers instead highlight the views of particularly important historical figures—Abraham Lincoln and Jefferson Davis, for example? Considerations of descriptive accuracy and proper emphasis apply nearly equally to many other complex, multifaceted historical events and eras.<sup>208</sup> The fact that choices must be made about what and what not to teach, and that in consequence something meaningful may be omitted or something may be said with which somebody disagrees, does not distinguish religious learning from historical instruction generally.<sup>209</sup> The U.S. Court of Appeals for the First Circuit has held that parents have no constitutional right "to dictate the curriculum at the public school to which they have chosen to send their children."<sup>210</sup> Presumably that principle would apply

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<sup>207</sup> GREENAWALT, *supra* note 21, at 129.

<sup>208</sup> One might claim that although the issues of slavery, Southern secession, Northern immigration, and so on are all relevant to a full understanding of the causes of the Civil War, a teacher who presents a certain view of, for example, Buddhism, might actually be teaching about views that some Buddhists utterly reject. Admittedly, the parallel between religious learning and teaching about the Civil War is not exact. Yet someone who claims that the slavery question is singularly important, and that when studying the Civil War, most if not all instructional time should be devoted to it, might object to spending any time on what for him are other comparatively minor issues. Or someone might take an especially dim view of the influence of particular figures like Lincoln, favoring instead a focus on broad demographic and economic forces.

The point is that teaching about any complicated historical event involves making decisions about areas of emphasis that will inevitably displease someone. It is true that in the case of disciplines with little direct religious connection, these choices are far less likely to implicate the constitutional prohibition on sponsorship of religious ideas; but it is possible to explore certain religious understandings and not others without necessarily implying anything about sponsorship. *See, e.g., Schempp*, 374 U.S. at 225; *see also supra* notes 50–51 and accompanying text; *infra* notes 209–211 and accompanying text.

<sup>209</sup> *See* text accompanying *supra* notes 101–104 for the related point about the multicultural challenge to education conceived as a conversation.

<sup>210</sup> *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995).



to curricular issues that implicate religious learning but that do not violate the Establishment Clause.<sup>211</sup>

Another complex question is how deeply a teacher or textbook should probe religious beliefs in describing a particular history and how much should be said. Professor Warren Nord has provided a spectrum of eight possible approaches to instruction about religion, the range of which spans avoiding any mention of religion at one extreme to arguing for a particular religious point of view as true at the other.<sup>212</sup> The most interesting of Nord's possible approaches fall in the middle.<sup>213</sup>

Option four involves teaching about religion from "the inside"—immersing students in primary and secondary sources in order "to make sense of the world in a particular religious way," and not merely to know certain basic facts about a religion or to recite its central tenets.<sup>214</sup> Option four also demands instruction about religion from "the outside," considering what is common to religions and the differences among religions, as well as subjecting religious claims to questioning and discussion in an open and respectful atmosphere.<sup>215</sup> Thus, for example, when Puritan history is studied, Nord and Charles Haynes argue that educators should present both the sense of religious mission that informed the Puritans' desire to establish a "holy commonwealth," and how the Puritans' missionary political zeal impacted early colonial history.<sup>216</sup> If the topic is a religious faith itself, such as Islam, students should be taught about the central theological conceptions, the emphasis on the transcendence and oneness of Allah, and the basis for the Muslim belief in the Qur'an as revelation, as well as about the character of Muslim life and the spiritual example of Muhammad.<sup>217</sup> Once students are able to understand Islam from the "inside," it is then appro-

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<sup>211</sup> See *id.* A recent report by the American Textbook Council, for example, found that social studies textbooks used by Baltimore-area public schools contained disputed, but not necessarily factually incorrect, information about Islam that was presented as if it was uncontroversial. See Josh Kowalkowski, *Junior, High School Textbooks Lack Accuracy on Islam, Report Says*, EXAMINER.COM, June 17, 2008, [http://www.examiner.com/a-1444884-Junior\\_high\\_school\\_textbooks\\_lack\\_accuracy\\_on\\_islam\\_report\\_says.html](http://www.examiner.com/a-1444884-Junior_high_school_textbooks_lack_accuracy_on_islam_report_says.html) (reporting that the study found that "[o]utright textbook errors about Islam are not the main problem" but that "[t]he more serious failure is the presence of disputed definitions and claims that are presented as established facts").

<sup>212</sup> NORD, *supra* note 2, at 249–51.

<sup>213</sup> See NORD & HAYNES, *supra* note 2, at 50.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 52.

<sup>216</sup> *Id.* at 83–84.

<sup>217</sup> *Id.* at 85–86.

priate that they also discuss the place of Islam globally, different beliefs and practices within Islam, and Islam's political and sociological commitments—i.e., from the “outside.”<sup>218</sup>

Nord's fifth option would have the text or teachers “consider religious ways of understanding the world as live contenders for the truth, to be argued about and critically assessed,” but without the teacher or text drawing any conclusions.<sup>219</sup> Greenawalt is skeptical about option five:

I believe teachers . . . should be cautious about in-class critical discussions of the merits of controverted religious claims. . . . Children with minority or “bizarre” beliefs might feel ganged up on by their peers; whose approval they crave, and they might believe that the way the teacher puts crucial questions implies negative or positive views. . . . Critical discussion can work fairly well with a skilled teacher, and mature students who have diverse religious views and are respectful of each other's perspectives; but in other circumstances the risks are too great.<sup>220</sup>

Greenawalt is correct that discussion of sensitive topics among students runs the risk of alienating outsiders or minority believers and nonbelievers.<sup>221</sup> When discussion and reflection on religious topics occurs in class, Greenawalt is right to insist that it be managed with the requisite delicacy on the part of both students and teacher.<sup>222</sup> But in recommending against in-class discussion, he implies that if these sorts of exchanges occur at all, it is better that they take place on students' own time.<sup>223</sup> Yet to the extent that such discussions do occur outside class, they are more likely to end in misunderstandings, hurt feelings, and uncivil exchanges than would be the case if they were undertaken within the formal and more carefully controlled conversational apparatus that characterizes the external mode of religious learning.<sup>224</sup> More importantly, religious learning as a component of civic and moral

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<sup>218</sup> NORD & HAYNES, *supra* note 2, at 86.

<sup>219</sup> NORD, *supra* note 2, at 250. Option five seems necessarily to incorporate option four—the “inside/outside” approach—since an informed conversation about the truth of the religious tradition or historical era being studied could not occur without the background instruction provided by option four.

<sup>220</sup> GREENAWALT, *supra* note 21, at 131–32.

<sup>221</sup> *See id.* at 132.

<sup>222</sup> *See id.*

<sup>223</sup> *See id.* at 133. He takes no position on whether such outside-class discussions should occur, and if so how frequent they should be, but it does seem likely that they *will* occur.

<sup>224</sup> *See supra* notes 120–129 and accompanying text.

learning demands that religious beliefs be carefully, respectfully, non-oppressively discussed and reflected upon within the conversational structures of school. In the context of a history course, reflection of this kind is necessary precisely because it brings to light, through the two modes of religious learning, how and why religious beliefs and ideas have had an influence on major historical events.

But option five is highly problematic for a different reason. It describes and approaches different religious traditions as "contenders for the truth."<sup>225</sup> This orients the exchange in a misguidedly argumentative direction before it has even begun, and it runs roughshod over the crucial idea that education is essentially individual and open-ended and that it aims at an initiation of students into the world of civic and moral understandings. It also unconstitutionally implies that the religious traditions studied and discussed are the only ones that legitimately claim truth value.<sup>226</sup>

Neither of these options, therefore, provides a satisfying explanation of the conversational value of religious learning for instruction in history. Religious learning in history and social studies is worthwhile for its contribution to the external and internal modes of civic and moral learning. In its external mode, religious learning opens possibilities for mutual understanding and tolerance, broadening students' intellectual horizons within the communal configuration offered by school. The classroom offers the best forum for discussion and reflection of this kind because its procedural and substantive structures are more conducive than most to the respectful exchange of ideas and their fullest consideration. In its internal mode, religious learning enables students to begin to participate in an ongoing reflection upon the relationship of religious beliefs and practices to their other moral commitments.

### *B. Religious Learning and English, Music, and Art*

Most of the arguments for religious learning in history courses also apply to literature and arts classes. Apart from the question of teaching holy texts in a literature class<sup>227</sup> or of offering elective courses on the

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<sup>225</sup> NORD, *supra* note 2, at 250.

<sup>226</sup> See *Lee v. Weisman*, 505 U.S. 577, 607 (1992) (Blackmun, J., concurring) ("When the government appropriates religious truth, it 'transforms rational debate into theological decree.'"); *Schempp*, 374 U.S. at 276 (Brennan, J., concurring) ("The truths of the Bible are the truths of religion, which do not come within the province of the public school." (quoting *Ring v. Bd. of Educ.*, 92 N.E. 251, 256 (Ill. 1910))).

<sup>227</sup> See, e.g., *Aguillard*, 482 U.S. at 608 (Powell, J., concurring); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Schempp*, 374 U.S. at 225.

historical influence of a single religious text,<sup>228</sup> it is worth noting that many canonical works of literature and art cannot be understood or appreciated adequately without some grounding in religion. Inasmuch as teachers must "explain the basic religious understanding that underlies a religious text,"<sup>229</sup> they must also delve into the religious understandings that inform "secular" texts not explicitly tied to a religious faith. By learning about this background, reflecting upon it, and discussing it with teachers and classmates, students' own views about a variety of moral propositions will inevitably be affected. Students learn to participate in the conversation of civic and moral learning when they address themselves seriously to the religious themes and ideas in works of art. Nord and Haynes discuss these qualities of literary and artistic experience, all of which are relevant to the operation of the internal mode:

Virtually all "great" literature and art address and deepen our understanding of those existential questions about the meaning of life that are inescapable for any reflective person: Who am I? What is the nature of my humanity? How do I make sense of suffering and death? What is justice? What is my duty in life? For what can I hope? What is love? What is the human condition? Often these are called "religious" questions, in part because religions have traditionally provided widely accepted answers to them, in part because they are *ultimately important*.<sup>230</sup>

As they critically assess works of literature and art with connections to religious experience and belief, students confront their own views about the "ultimate" questions,<sup>231</sup> reflecting upon and discussing whether that which authors and artists have said exerts any "moral pull"<sup>232</sup> for them.

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<sup>228</sup> See, e.g., Bradford Wiles, *School Board Approves Bible Course for High School*, OURVALLEY.ORG, <http://ourvalley.org/news.php?viewStory=2660> (last visited Aug. 3, 2008) (describing the elective course now offered by one Virginia school district in "The Bible in History and Literature").

<sup>229</sup> GREENAWALT, *supra* note 21, at 136.

<sup>230</sup> NORD & HAYNES, *supra* note 2, at 124-25.

<sup>231</sup> See PAUL TILlich, *DYNAMICS OF FAITH* 1-2 (1957).

<sup>232</sup> See Smith, *supra* note 130, at 506.

C. *Religious Learning and the Natural Sciences: A Limited Application*

The natural sciences require a different analysis. In large measure, this is because the two modes of religious learning have a limited application to the teaching of science. The core incongruity lies in the fact that science, unlike literature and history, purports to tell students what is (or what is generally thought to be) true about the physical and natural world, whereas the modes of religious learning do not aim at providing "true" answers.<sup>233</sup> Instead, the modes expose students to the insights, or voices, of religious traditions with an eye toward civic and moral development.<sup>234</sup> Moreover, the basic purpose of religious learning is to enable students to explore the relevance of religious belief to other parts of their education. But understanding science (like understanding mathematics) does not depend upon religious insight to the same degree as history, literature, music, and art.<sup>235</sup>

It is true that some people resist the widely accepted position that science accurately represents what we now believe to be true about the physical and natural world. To this very limited extent, the external mode is relevant: considering and discussing why significant numbers of people believe this,<sup>236</sup> even if one thinks that they are wrong to believe it, promotes some of the purposes underlying the external mode: the ability to understand people whose views are radically different than one's own and to see how their religious beliefs enable them to make sense of the world. But the science course itself is not the place for these considerations.

Perhaps the most contentious Establishment Clause issue with respect to religious learning in public schools involves the teaching of evolution.<sup>237</sup> Efforts to introduce "creation science" or "Intelligent De-

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<sup>233</sup> See *supra* notes 87-94 and accompanying text.

<sup>234</sup> Obviously particular religious traditions, just like most science curricula, make truth claims about the physical and natural world. But the purpose of religious learning, and conversational learning generally, is not and cannot be to inculcate the truth of any of these views.

<sup>235</sup> In large part, this is because the development of civic and moral understandings is much less central to the scientific enterprise than to the religious and humanistic. Science is, in this respect, a more limited field. See GREENAWALT, *supra* note 21, at 145 ("In contrast to natural science, no science of morality establishes what are correct and incorrect moral conclusions.").

<sup>236</sup> See NORD & HAYNES, *supra* note 2, at 139 ("Roughly a third of Americans believe that the Bible is inerrant and would presumably adopt the view (if asked) that religion trumps science.").

<sup>237</sup> GREENAWALT, *supra* note 21, at 88; see also *supra* note 6.

sign"<sup>238</sup> into the science curriculum are ill conceived for at least two reasons. First, science, including the many important insights of neo-Darwinian synthesis<sup>239</sup> (e.g., recent advances in genetics, comparative anatomy, species distribution, embryology, astronomical physics, and the use of radioactive isotopes for determining age) have proven extremely valuable as tools for explaining and understanding innumerable phenomena in the world.<sup>240</sup> Like arithmetic, scientific methodological naturalism and the theories that it has produced (including evolution) constitute an essential fund of knowledge that every student must study in order merely to attain the most rudimentary procedural skills of the educational conversation—e.g., the capacity to understand why an argument that proceeds from certain commonly shared premises is highly likely to be sound. The very notion that "science" should be a distinct and required subject of study presupposes that topics such as evolution must take center stage, just as no one would doubt that addition and subtraction must be taught in mathematics classes. That is, even if one were inclined to take seriously the comparatively modest argument<sup>241</sup> of some Intelligent Design theorists that scientific evidence cannot *completely* explain the origins of the human species or the universe—that there are "gaps" in the account—one must notice how much this claim already concedes. It implies that evolutionary theory (for example) provides highly persuasive, empirically testable explanations for a significant number of crucial conclusions about the origins of life.<sup>242</sup>

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<sup>238</sup> See generally *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (holding that teaching Intelligent Design in high school biology class violated the Establishment Clause).

<sup>239</sup> See PHILIP KITCHER, *ABUSING SCIENCE: THE CASE AGAINST CREATIONISM* 17 (1982).

<sup>240</sup> See Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 804–05 (2003) ("[A]lthough the scientific community might disagree on some of the details, it overwhelmingly agrees that the basic theory of evolution is correct and indeed that it is the central and unifying concept in all of biology." (footnotes omitted)); Editorial, *The Crafty Attacks on Evolution*, N.Y. TIMES, Jan. 23, 2005, at 16 (quoting the statement of the National Academy of Sciences that evolution is "one of the strongest and most useful scientific theories we have," and that it is supported overwhelmingly within the scientific community).

<sup>241</sup> I put to the side arguments for teaching Intelligent Design (or creationism) as the alternative to evolution, as these are patently unconstitutional. See GREENAWALT, *supra* note 21, at 124.

<sup>242</sup> See *id.* at 108 ("If an intelligent-design theorist is careful not to deny that the dominant account with all its features explains a great deal about life's development, he can render his own approach consistent with the empirical evidence, which itself cannot rule out a possible role, however minor, for creative intelligence that transcends ordinary scientific principles at various stages of the process."). In a similar vein, see Peter Slevin, *Battle*

Second, the claims of Intelligent Design are not generally believed to be scientific;<sup>243</sup> they are arguments about the limits of science.<sup>244</sup> The negative claim that evolutionary theory cannot explain completely the way that particular species or organisms have developed (and is unlikely to provide complete explanations in the future) may in theory be advanced with empirical evidence, but even then one may wonder whether it is within science's domain to be *certain* that science either can or cannot explain every natural phenomenon.<sup>245</sup> Intelligent Design theories that do not rely on such empirical evidence, however, are immune from observation and falsification, which in turn severely impairs the legitimacy of their claims to a place in the "science" class.<sup>246</sup>

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on *Teaching Evolution Sharpens*, WASH. POST, Mar. 14, 2005, at A01 (reporting the comment of Professor William Harris of the University of Missouri at Kansas Medical School that "[o]ur goal is not to remove evolution. Good lord, it's incredible how much this is misunderstood. . . . Kids need to understand it, but they need to know the strengths and weaknesses of the data, how much of it is a guess, how much of it is extrapolation."). It should be noted that Professor Harris does not advocate teaching Intelligent Design. *See id.*

<sup>243</sup> See Wexler, *supra* note 240, at 805–07 ("The same [scientific] community holds a near-complete consensus that intelligent design is not good science and therefore an unimportant theory in the field. Perhaps the most salient fact regarding this last consensus is that articles advocating intelligent design theory in peer-reviewed scientific journals appear to be nonexistent." (footnotes omitted)).

<sup>244</sup> See GREENAWALT, *supra* note 21, at 110; GREENAWALT, *supra* note 2, at 147–48. Greenawalt helpfully distinguishes between "intrinsic" limits of science—"basic limits that are set by the domains of scientific endeavors"—and "contingent" limits—"limits on what science is able to explain, within the domains that scientific inquiry covers." *Id.* at 148. He argues that it may be appropriate for science teachers to acquaint students with contingent limits of methodological naturalism, but that the appropriateness of doing so will depend on the plausibility (as gauged by a kind of scholarly consensus) of the specific contingent limit. *Id.* at 149.

Though this Article argues in principle for a cleaner separation in which most "contingent" (as well as "intrinsic") limits would be discussed outside the science class but in another curricular context, it is not clear that this distinction will amount to much of a practical difference, as Greenawalt's "plausibility" screen might well rule out the appropriateness of introducing many "contingent" limits in the science curriculum.

<sup>245</sup> See GREENAWALT, *supra* note 21, at 110. *But cf.* Thomas Nagel, *Public Education and Intelligent Design*, 36 PHIL. & PUB. AFF. 187, 192 (2008) (characterizing as a "scientific claim" Michael Behe's argument that "random mutation is not sufficient to explain the range of variation on which natural selection must have acted to yield the history of life: some of the variation was not due to chance").

<sup>246</sup> I agree with Greenawalt that, in principle, "[a] particular theory that science 'runs out' in some respect in explaining events *can be* subject to observation and falsification"—for example, a methodologically scientific investigation of a claimed miracle that concludes that the miracle cannot be explained naturally. *See* GREENAWALT, *supra* note 21, at 110. Yet even the most sophisticated Intelligent Design objections to science curricula are not falsifiable in the way that methodological scientific theories are (a point with which Greenawalt, I believe, agrees). *See id.*; Chris Mooney & Matthew C. Nisbet, *Undoing Darwin*, COLUM. JOURNALISM REV., Sept./Oct. 2005, at 30, 33 (reporting the belief of biologist Mi-

Nevertheless, the fact that the questions with which Intelligent Design, like many other philosophically and religiously grounded beliefs, is concerned (e.g., what is the nature and origin of the universe and humanity?) should not be pursued in the natural science curriculum does not mean that they should be ignored by public schools.<sup>247</sup> To the contrary, the overtly religious cast of Intelligent Design and creationist claims ought to be acknowledged, reflected upon, and discussed, along with other belief systems, within the conversation of civic and moral education in an appropriate classroom context. Such an approach may enhance students' perspectives, both with respect to the limits of science's subject matter and the spiritual questions for which science may not provide answers. These kinds of discussions could occur, for example, in a history course, a high school ethics course, or a comparative religion course.<sup>248</sup>

The advantages of pursuing these topics outside the science class are manifest. The idea of creation or a creator is not a universal feature of all faiths.<sup>249</sup> "Some Hindu texts tell of vast cycles of creation," while others, such as Buddhism, are agnostic about it.<sup>250</sup> Moreover, the external and internal modes are not properly accounted for unless religious beliefs about life's origins are presented within an adequate historical and cultural context: "Teaching intelligent design, without talking about history, culture, politics, and especially religion, will not help students understand what the controversy over evolution is really about

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chael Behe that "certain biochemical structures are 'irreducibly complex'" and that such complexity alone constitutes a challenge to evolutionary theory); Slevin, *supra* note 242 (reporting the statement of Stephen C. Meyer of the Discovery Institute that "[w]hat we would like to foment is a civil discussion about science. That falls right down the middle of the fairway of American pluralism").

<sup>247</sup> Mark Lilla has questioned why I seem to draw a Maginot Line around natural science and points out that the history of modern science might be fruitfully explored in the light of theology, ancient cosmology, and the like. E-mail from Mark Lilla, Professor of the Humanities, Columbia University, to Marc O. DeGirolami [author] (Nov. 4, 2007) (on file with author). Lilla is certainly correct to note the value of religious learning for the history of science. But these questions are better pursued in other subject areas—a history course, for example, as Professor Lilla's comment itself suggests—in order to give them a more thorough, and a fairer and more representative, treatment.

<sup>248</sup> See GREENAWALT, *supra* note 21, at 119; NORD & HAYNES, *supra* note 2, at 186 ("We also believe, however, that the curriculum should include room for a moral capstone course that high school seniors might take, in which they learn about the most important moral frameworks of thought—secular and religious, historical and contemporary—and how such frameworks might shape their thinking about the most urgent moral controversies they face.").

<sup>249</sup> See NORD & HAYNES, *supra* note 2, at 146.

<sup>250</sup> See *id.*



or help them discuss issues that range over the spectrum of human concerns."<sup>251</sup>

From this, it should be clear that the science class is not the forum for discussing the limitations of science in considering the kinds of questions that inform civic and moral learning. In fact, religious learning is far better promoted if such discussions do not intrude on the precious few hours to communicate the basics of evolutionary theory. Both the external and internal modes contemplate cultural and historical instruction about the claims of religion within the conversation of civic and moral education, but in a context where such learning does not compete for time and preeminence with the natural science curriculum.<sup>252</sup>

#### IV. DIFFICULTIES POSED BY THE MODAL THEORY OF RELIGIOUS LEARNING

This Part explores three objections to religious learning, as informed by the two modes.<sup>253</sup> As with the prior application of the theory to a selection of curricular matters, the treatment of difficulties is not exhaustive.<sup>254</sup> Nevertheless, the objections discussed are some of the most challenging, both from a constitutional and a more general perspective, for the educational model offered here.<sup>255</sup>

##### A. *Teacher Competence, Curricular Incorporation, and Demandingness*

Perhaps the most obvious objection to the religious learning model is that teachers are simply not qualified to teach about religious traditions and beliefs, let alone to conduct a class incorporating religious themes, with the requisite delicacy demanded by the two modes.<sup>256</sup> Likewise, teachers come to the classroom with their own beliefs and opinions about religion, and it is therefore unlikely that they can offer religious instruction in an appropriately balanced way.<sup>257</sup> A somewhat related objection is that there is no room in the curriculum (or inadequate resources or time) for incorporating religious learn-

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<sup>251</sup> Wexler, *supra* note 240, at 808.

<sup>252</sup> See *supra* notes 233–251 and accompanying text.

<sup>253</sup> See *infra* notes 256–314 and accompanying text.

<sup>254</sup> See *supra* notes 200–252 and accompanying text.

<sup>255</sup> See *infra* notes 256–314 and accompanying text.

<sup>256</sup> See GREENAWALT, *supra* note 21, at 27.

<sup>257</sup> See NORD & HAYNES, *supra* note 2, at 55.

ing.<sup>258</sup> Even if teachers were well trained and otherwise inclined, the demands of the No Child Left Behind Act of 2001<sup>259</sup> are too onerous to focus on anything other than teaching basic skills like reading and mathematics.<sup>260</sup>

The problem of adequate time and resources is considerable.<sup>261</sup> Public schools are under enormous strain to meet demanding national standards and must often devote substantial, if not exclusive, attention to reading and mathematics in order to survive within the current framework.<sup>262</sup> One might argue, however, that if No Child Left Behind's reading and mathematics standards are so high that they effectively preclude the teaching of any other subject, then a readjustment of educational priorities is in order. The ability to read and add indisputably are crucial components of every educational program, but proficiency in reading requires more than an ability to understand the literal meaning of an assortment of sequential sentences.<sup>263</sup> It is a central claim of this Article that reading comprehension, essay writing, oral expression, and the like presuppose the development of certain educational habits of thought that are necessarily wedded to the substance of past traditions of understanding and meaning.<sup>264</sup> Introducing religious learning is therefore not *necessarily* a matter of "adding" to the reading curriculum.<sup>265</sup> Instead, it may involve consciously using texts that implicate religious concerns and teaching about those concerns within the context of learning how to read deeply—that is, the "natural inclusion" of religion within the existing curriculum.<sup>266</sup>

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<sup>258</sup> See Sam Dillon, *Schools Cut Back Subjects to Push Reading and Math*, N.Y. TIMES, Mar. 26, 2006, at A1.

<sup>259</sup> Pub. L. No. 107-10, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

<sup>260</sup> See Dillon, *supra* note 258 ("Thousands of schools across the nation are responding to the reading and math testing requirements laid out in No Child Left Behind, President Bush's signature education law, by reducing class time spent on other subjects and, for some low-proficiency students, eliminating it.").

<sup>261</sup> See *id.*

<sup>262</sup> See *id.* The evidence that even then, they frequently cannot meet the standards is overwhelming, as one recent news article demonstrates. See Diana Jean Schemo, *Failing Schools Strain to Meet U.S. Standard*, N.Y. TIMES, Oct. 16, 2007, at A1.

<sup>263</sup> See Eisgruber, *supra* note 84, at 72.

<sup>264</sup> See *supra* notes 200–252 and accompanying text.

<sup>265</sup> See NORD & HAYNES, *supra* note 2, at 89.

<sup>266</sup> See *id.* at 46, 89. Professor Nord admits that "there is a very important ambiguity in the term 'natural inclusion.' Natural to whom?" See NORD, *supra* note 2, at 209. This raises two important points. First, not all of literature, history, and art implicates religious concerns, and some works do so only obliquely. In these cases, religion is less "naturally" included than it may be in other cases, so that some deliberate effort must be made to study

The concerns about teacher competence and religious preference are also significant.<sup>267</sup> On the issue of training, one might claim that teachers of a religious history, comparative religion, or upper-level ethics class should be certified by the state, just as teachers are for history, science, mathematics, and all other major disciplines.<sup>268</sup> Certification in subjects such as history, the arts, and English or reading could be re-fashioned to include religious learning as it might apply to particular disciplines.<sup>269</sup> The state-mandated character of certification would certainly have the effect of standardizing the content of what could be constitutionally taught about religion both in a freestanding religious studies or ethics class and within other disciplines.<sup>270</sup> Standardization would also offer guidance to teachers who will doubtless bring a variety of perspectives about religion to the classroom.

A danger in standardization is that it could be used improperly to compel teachers to incorporate religious learning into their disciplines uniformly.<sup>271</sup> Teachers—"[t]he only indispensable equipment of 'School'"—must be given considerable latitude to develop a curriculum that incorporates religious learning after an individual fashion that will allow them best to fulfill their key role in initiating their students into the world of civic and moral understanding.<sup>272</sup> Perhaps districts could supplement a rudimentary certification requirement with a suite

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topics with religious connections. Second, this Article has attempted to demonstrate how pervasive the reach of religion can be for enlarging one's civic and moral sensibilities; to this extent, religion may often be "naturally" includable.

<sup>267</sup> See GREENAWALT, *supra* note 21, at 27; NORD & HAYNES, *supra* note 2, at 55.

<sup>268</sup> See NORD & HAYNES, *supra* note 2, at 45, 56.

<sup>269</sup> See Wexler, *supra* note 3, at 1235–36 ("[E]ven though schools should add religious themes and ideas to existing social studies classes so that students can learn about the role that religion has played in human history, the goals outlined above probably can not be attained through simply adding religious content to classes that already exist. Instead, separate classes in religious topics will have to be added to the curriculum so that students can gain an in-depth understanding of religion.").

<sup>270</sup> NORD & HAYNES, *supra* note 2, at 56 ("All teachers who deal with religiously contested matters should know something about the relationship of religion to their particular subjects and disciplines. Ideally, they should be required, as part of their certification, to take at least one course relating religion to their subject . . . . Whether required or not, departments of religious studies should make such courses available as electives.").

<sup>271</sup> On the difficulties of assessing the legality, let alone the propriety, of state teacher certification standards, see generally *Gulino v. N.Y. State Educ. Dep't*, 460 F.3d 361 (2d Cir. 2006).

<sup>272</sup> See OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 69–70. I mean "fashion" in the same sense that Oakeshott uses the word "style" to express something of the judgment that teachers bring to the task of imparting information. See OAKESHOTT, *Learning and Teaching*, *supra* note 89, at 61. For greater elaboration of this important aspect of Oakeshott's work, see SULLIVAN, *supra* note 87, at 75.

of additional courses in religion that may be of particular relevance to the student population or community, thus giving teachers greater choice in developing their specific religious learning curricula. Still, in order to satisfy the aims of religious learning as a conversation, minority and majority religious perspectives should be taught in all schools.<sup>273</sup>

Some teachers may still object, conceivably even on free exercise grounds, to incorporating religious learning into their classrooms in any form because they are simply uncomfortable with the educational model presented here.<sup>274</sup> These reservations are understandable but, in the main, they are indistinguishable from any number of curricular objections teachers may have.<sup>275</sup> Though teachers require the freedom to shape their curricula, that freedom must be balanced against the possibility that some teachers who find religion an awkward topic would exclude religious learning altogether from disciplines to which it has made contributions.<sup>276</sup>

I am also sensitive to the criticism that the model of education advocated in this Article is too demanding given the dire condition of contemporary American public schooling.<sup>277</sup> To expect so much of an institution that is struggling merely to keep children in school and out of the criminal justice system and to provide them with the barest literacy and numeracy is, some might object, unrealistic.<sup>278</sup> Like the preceding criticisms, this one has obvious bite. This Article suggests ways in which religious learning can be incorporated without adding dramati-

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<sup>273</sup> See NORD & HAYNES, *supra* note 2, at 48.

<sup>274</sup> There is an interesting analogy, implicating both Establishment and Free Exercise Clause concerns, to cases where a religious school has complained that state certification requirements interfere with its religious liberty and that of its students. See, e.g., *New Life Baptist Church v. Town of E. Longmeadow*, 885 F.2d 940, 952, 954 (1st Cir. 1989) (rejecting both types of challenges); *Fellowship Baptist Church v. Benton*, 815 F.2d 485, 494-95, 498 (8th Cir. 1987) (rejecting both types of challenges and holding that "nothing in the certification statute or regulations requires agreement or acceptance of the beliefs and values of others").

<sup>275</sup> For some teachers, a conversational approach toward religious learning may prove repugnant and essentially incompatible with their own religious or anti-religious beliefs. For example, some teachers may feel that all religion is an unalloyed evil, or that the only true religion is their own and all others are impostors, and they may insist on expressing these views to their students in class. If one is committed to the value of religious learning for civic and moral education, teachers with these types of views about religion should not teach disciplines in which religious ideas and perspectives are relevant (and they should not teach a comparative religion course).

<sup>276</sup> See *supra* notes 274-275 and accompanying text.

<sup>277</sup> See Dillon, *supra* note 258.

<sup>278</sup> See *id.*

cally to the burden already imposed on public schools.<sup>279</sup> But there should be no illusions about the ambitiousness of the model of liberal learning presented in this Article. Oakeshott usefully compared the difficulty of developing fluency in the conversation of education to the challenge of learning a foreign language.<sup>280</sup> It will require time, resources, good will, a "discipline of inclination" and perseverance,<sup>281</sup> and more than a few trials and errors to achieve. Any theory that engages with the problem of religious learning within liberal public education and takes its challenges seriously will face practical obstacles such as these. And yet the practical difficulties, substantial as they may be, do not diminish the power of the theory as an educational aspiration.

### B. Age-Appropriate Instruction

A different objection that implicates Establishment Clause concerns is the age at which religious learning becomes appropriate.<sup>282</sup> In the elementary grades, students are especially impressionable and sensitive to the authority of teachers and their parents. To introduce religious learning is inadvisable for very young children because they have not yet developed sufficiently the cognitive skills to engage in conversational learning.<sup>283</sup> Parents' beliefs are extremely important in these years. Similarly, the objection continues, older students are subject to powerful pressures to conform, so that introducing religious learning along the lines suggested by the two modes may create special problems for their relationships with parents and friends. This objection is directly reflected in the Supreme Court's observations in its Establishment Clause jurisprudence about the impressionability of children and its consequent concern to provide them special constitutional protection.<sup>284</sup>

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<sup>279</sup> See *supra* notes 262–266 and accompanying text (arguing that religious learning should be accomplished by "natural inclusion" of the topic).

<sup>280</sup> See OAKESHOTT, *Understanding Human Conduct*, *supra* note 108, at 65; Andrew Davis & Kevin Williams, *Epistemology and Curriculum*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF EDUCATION*, *supra* note 121, at 253, 266–67.

<sup>281</sup> OAKESHOTT, *Engagement and Frustration*, *supra* note 88, at 68–69.

<sup>282</sup> See NORD & HAYNES, *supra* note 2, at 177.

<sup>283</sup> See *id.*

<sup>284</sup> See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311–12 (2000) (commenting on the "immense social pressure" experienced by adolescents); *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (commenting on high school students' impressionability in the context of graduation prayer); *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (noting that "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools"); *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981) (observing that university students are "less impressionable" than younger

For young students in the elementary grades, this objection is persuasive. Kindergarteners are not intellectually ready for religious learning, let alone for internal conversational reflection about the relevance of religious beliefs to their own lives.<sup>285</sup> For these students, the most common contact with religion in school may occur when a Christmas tree or menorah appears in class sometime in December. Religious symbols celebrating the holidays present an especially thorny problem. The appearance together in a public school classroom or hallway of symbols as different as a crèche, a Christmas tree, a menorah, and a large plastic Santa Claus, with no explanation and unconnected to any educational aim, is extremely likely to render religion opaque and mystifying, as inquisitive youngsters are deliberately given no information to make sense of the symbols. These effects are exacerbated when particular symbols are added or removed on the basis of threats of legal action or other community displeasure. Most importantly, the *de facto* exclusion of non-Christian or non-Jewish holiday symbols creates not only the potential for resentment among children who adhere to other traditions but also the unwarranted sense in Christian and Jewish students that their traditions are the most important.<sup>286</sup>

Because the aim of religious learning as guided by the two modes is solely educational, and not to celebrate certain religious traditions (even those whose symbols—e.g., the Christmas tree, Santa Claus, Easter eggs, etc.—are imbued with culturally ambiguous dimensions), if schools introduce these symbols, they should do so only in the context of an educational activity and with a concerted effort to present a healthy variety of them.<sup>287</sup> Such limited exposure might be consistent

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students); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (holding that university students are "less impressionable and less susceptible to religious indoctrination" than younger students).

<sup>285</sup> See NORD & HAYNES, *supra* note 2, at 177.

<sup>286</sup> Justice O'Connor's "endorsement" Establishment Clause test has become the Supreme Court's favored standard for assessing the constitutionality of religious displays on government property. See *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989) (citing *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring)). Under that test, the government acts impermissibly in its religious displays when it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). Note that the endorsement approach does not account for the special educational concerns that attend religious displays in public schools. See *id.*

<sup>287</sup> Professor Noah Feldman has advocated a constitutional approach that would give greater latitude to symbolic religious displays by the government than the present Supreme Court practice allows. See, e.g., *County of Allegheny*, 492 U.S. at 589-94. It is unclear, however, how he feels about religious displays in public schools. See NOAH FELDMAN, *Di-*

with the external mode of religious learning if undertaken to initiate youngsters into an educational conversation with one another. Still, because very young students have limited capacities for understanding complex concepts and historical explanations, even this approach is perhaps better suited to students in later primary grades.<sup>288</sup>

Religious learning in both modes becomes more appropriate as students grow older. Although more in-depth study in a comparative religion or ethics course should be reserved for upper-level students, religious topics and themes may be gradually introduced and their civic and moral relevance explored.<sup>289</sup> Older students will as a general matter be better prepared for the conversational model of civic and moral education and the contributions of religious learning to it.<sup>290</sup> As students' powers of critical reasoning and reflection develop and become more independent, teaching about religion's civic and moral insights and failings becomes more appropriate.<sup>291</sup> Peer pressure to conform can of course be powerful in these years,<sup>292</sup> but the external and internal modes of religious learning can help to relieve at least a part of that pressure by opening civic and moral understandings within the educational structures of school. Religious learning may serve as an additional source of civic and moral guidance, or students may find it irrelevant or unhelpful to their concerns.<sup>293</sup>

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VIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 15–16 (2005) (arguing that religious displays are permissible “so long as they accommodate and honor religious diversity”). In the particular case of religious displays in public schools, Professor Feldman’s approach is not sufficiently sensitive to what should be the educational impetus behind such displays. *See id.*

<sup>288</sup> *See* NORD & HAYNES, *supra* note 2, at 177.

<sup>289</sup> *See* *Aguillard*, 482 U.S. at 608 n.7 (Powell, J., concurring) (“[M]any general teaching guides suggest that education as to the nature of various religious beliefs could be integrated into a secondary school curriculum in a manner consistent with the Constitution.”).

<sup>290</sup> *See* NORD & HAYNES, *supra* note 2, at 177.

<sup>291</sup> *See id.*

<sup>292</sup> *See supra* note 284 and accompanying text.

<sup>293</sup> Upper-level students should be offered an elective in comparative religion or ethics to pursue these questions more deeply. Nord and Haynes consider the possibility that a school would require such a class, remarking that in such a case requests for excusal should be liberally granted. NORD & HAYNES, *supra* note 2, at 178. I agree, however, with Greenawalt and Wexler that the better policy is to give students (and their parents) the option whether to take a more rigorous course in religious studies and ethics. *See* GREENAWALT, *supra* note 21, at 150, 242 n.53; Wexler, *supra* note 3, at 1261.

### C. Parental and Student Objections and Exemptions

Objections to religious learning within the conversational model could come from either religious or nonreligious parents and students.<sup>294</sup> The principal religious objection proceeds along these lines: "Some deeply religious people object to the idea of teaching religion objectively in the public schools because such an approach to religion encourages a dangerous attitude of relativism and devalues religion by making it seem like choosing a religion is like choosing a product, a 'styl[e] of dress . . .'"<sup>295</sup> A slightly different but related objection is that the approach advocated in this Article results in a watery and anemic version of religion, in which the rich coloring of religious traditions—especially the *chiaroscuro*—loses its vibrancy and becomes a kind of "mush."<sup>296</sup> Indeed, it is a classic anti-establishment argument that strict separation of church and state is necessary to "preserve" religion in all of its uniqueness and that government interaction with religion inevitably "corrupts" it.<sup>297</sup>

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<sup>294</sup> See *infra* notes 295–314 and accompanying text.

<sup>295</sup> Wexler, *supra* note 3, at 1258–59 (alteration and omission in original) (footnotes omitted); see also Nomi Maya Stolzenberg, "He Drew a Circle That Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education, 106 HARV. L. REV. 581, 614 (1993) ("[T]o its opponents, the objective study of religion, and objective approaches to knowledge in general, are quintessentially secular humanist activities.").

<sup>296</sup> See Michael W. McConnell, *Education Disestablishment: Why Democratic Values are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION, *supra* note 84, at 87, 98.

An even more probable scenario is that public schools, under conditions of pluralism, will attempt to avoid conflict by watering down the curriculum and avoiding any teaching that might be offensive to any significant group. . . . This is the educational equivalent of the least-common-denominator religion that seems to be the result of official establishment. But this result is neither neutral (mush, too, reflects an ideological perspective that sharp differences and clear opinions are either dangerous or pointless) nor calculated to provide a firm basis for democratic citizenship.

*Id.*

<sup>297</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 711–12 (2002) (Souter, J., dissenting). Justice Souter's argument is illustrative:

[T]o save religion from its own corruption, Madison wrote of the "experience . . . that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution"; in the 21st century, the risk is one of "corrosive secularism" to religious schools and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape



This latter point may be the most serious challenge of all for religious learning within the conversational model of education.<sup>298</sup> It is at bottom a claim that religious learning cannot convey religious experience, an essential component of the religious life without which only the most superficial aspects of religion remain.<sup>299</sup> There is really no way around this objection other than to concede its force and observe that it is fundamentally compatible with this Article's claims. It is of course true that religious learning is not the same as religious experience.<sup>300</sup> Religious learning will not give students the personal experience of conversion, the sublime, the ascetic life, enlightened awareness of existence through the prism of the Four Noble Truths, or the discipline that is required to practice the five "Ks" of Sikhism. No student will come away having experienced religious faith, ecstasy, or mysticism because of religious learning (at least not intentionally). But that is precisely the point. Religious learning is an educational, not a religious, model. Its aims are to introduce students to the world of religious understandings and to illuminate the relationship of religion to their civic and moral ideals. It does not impart the potent experience of actually *being or believing like* a Catholic or a Sikh. It could never do this because it takes no position on the truth or the reality of Catholic or Sikh beliefs,<sup>301</sup> and because the ineffable and noetic qualities of Catholic or Sikh belief cannot be imparted or taught, but must be directly felt or experienced.<sup>302</sup>

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the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation.

*Id.* (alterations and omissions in original) (citations omitted).

<sup>298</sup> See *id.*

<sup>299</sup> See *id.*

<sup>300</sup> "Religious experience" is itself an enormously complex and variegated phenomenon, but in the context of this objection to religious learning I take it to mean roughly what William James described as "the feelings, acts, and experiences of individual men . . . so far as they apprehend themselves to stand in relation to whatever they may consider the divine." JAMES, *supra* note 161, at 31. The key point is that religious experience reflects a subjective assessment—an apprehension—of what is true or real about the subject, here "the divine." See WAYNE PROUDFOOT, RELIGIOUS EXPERIENCE 183–84 (1985) ("A religious experience is an experience that is identified by its subject as religious, and this identification must be based, not on the subject matter or content of the experience, but on its noetic quality or its significance for the truth of religious beliefs.").

<sup>301</sup> This is so for constitutional as well as educational reasons. See *supra* notes 46–52 and accompanying text.

<sup>302</sup> JAMES, *supra* note 161, at 380–81. James was the first to describe the noetic quality of religious experience:

Although so similar to states of feeling, mystical states seem to those who experience them to be also states of knowledge. They are states of insight into

One might still object that religious learning without religious experience is insipid or "mushy"—that it cannot convey what is deeply meaningful about religion—and that it is therefore best avoided altogether. Similarly, one might claim that to emphasize "conversation" privileges a verbal, textual, propositional understanding of religion at the expense of non-verbal manifestations of religious life, and that whatever approach is chosen must do justice to a broader range of religious experience.<sup>303</sup> Yet this seems too quick and harsh a judgment. It is one thing to point out that there is more to a religious life than understanding and reflecting upon religious learning's contributions to the conversation of civic and moral education. It is something else again to condemn the educational model proposed here because it cannot offer students the entirety of a religious experience. There are many experiences the intensity and fullness of which cannot be rendered by learning about them. Romantic and familial love, the bond of friendship, the exhilaration of an athletic success or a musical performance, the flush stupor of drunkenness, and the terror of war are only a very few that come immediately to mind. But no one would seriously suggest that reading *King Lear* is pointless because it cannot deliver the first-hand experience of filial devotion or the conceits of power and old age, or that studying a piano concerto is worthless because it is not the same as composing or performing it oneself. Just as with a foreign language, conversational engagement in school is only an initial preparation for what to listen for or expect in order to gain greater mastery. Developing the linguistic metaphor, what this Article urges is the comparatively limited project of "translation" of religious beliefs—which are, admittedly, only a part of religious experience—to add richness to the conversation of liberal civic and moral ideals.<sup>304</sup> And though religious

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depths of truth unplumbed by the discursive intellect. They are illuminations, revelations, full of significance and importance, all inarticulate though they remain; and as a rule they carry with them a curious sense of authority for after-time.

*See id.*

<sup>303</sup> Professor Winnifred Sullivan suggested this criticism to me in correspondence. *See* E-mail from Winnifred Sullivan, Associate Professor, University at Buffalo Law School, to Marc O. DeGirolami [author] (Dec. 10, 2007) (on file with author) ("Becoming a Jew is partly about eating your grandmother's cooking. Being a member of any religious community is about experiencing the variety of styles and attitudes present in any religious community[.]").

<sup>304</sup> The project is "comparatively limited" because it in no way suggests that this exercise in translation comprehends the whole of religious experience. On the extraordinarily thorny question of "defining religion," see generally JONATHAN Z. SMITH, *IMAGINING RELIGION: FROM BABYLON TO JONESTOWN* (1982).

learning might conceivably degenerate into "mush," there is no reason to suppose that this need be so. This Article suggests, on the contrary, that students' more thorough educational exploration of religious learning is likely to deepen and enrich their civic and moral development.

More general skepticism about the possibility of "objective" religious learning<sup>305</sup> or about its inevitably "secular humanist" assumptions resurrects the multicultural specter hovering about this entire exercise.<sup>306</sup> What more can be said, other than to concede that a viewpoint is being espoused about the nature of liberal education and the role of religious learning in it? Another perhaps more practical response is that even though some extraordinarily devout parents might object to exposing their child to any religion other than their own, it seems at least possible that many religiously inclined parents would prefer an inclusivist program to the current, "the-less-said-the-better" approach.<sup>307</sup>

Whatever the force of these responses, there will surely be religious and anti-religious or religiously skeptical objections to religious learning within the conversational model. Whether and when exemptions should be granted is a complex question that implicates the Free Exercise Clause.<sup>308</sup> If a course in comparative religion or ethics is offered as an elective, the exemption question is avoided on at least this front.<sup>309</sup>

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<sup>305</sup> See NORD & HAYNES, *supra* note 2, at 55.

<sup>306</sup> See *supra* notes 101–104 and accompanying text. It may be worthwhile to recall that the U.S. Supreme Court rejected the idea that "objective" teaching about religion, assuming that is possible, establishes a "religion of secularism." See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

<sup>307</sup> See ROSEMARY C. SALOMONE, *VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION* 238 (2000) ("Parent dissenters do not necessarily want the curriculum to privilege their views over others but merely to include their perspectives along with others. In some cases, they merely want the curriculum to reflect an appropriate range of moral perspectives on nonconsensual issues without falling into the trap of moral relativism." (footnote omitted)); Wexler, *supra* note 3, at 1259–60 ("[T]he religious objection to teaching about religion is adequately countered by the fact that the current curriculum, through its silence on religious matters, is widely viewed by many—including conservative Christians—as hostile to religion. Teaching about religion, in other words, despite its inherently secular qualities, is viewed by many as a remedy for the current marginalization of religion in public life and is, on balance, highly supportive of religious ways of life." (footnote omitted)). But see GREENAWALT, *supra* note 21, at 174 ("Religious objections to curriculums will almost certainly increase if schools deal more fully with religion; some parents will not want their children educated about other religions.").

<sup>308</sup> See GREENAWALT, *supra* note 21, at 174–87; NORD, *supra* note 2, at 247–49; NORD & HAYNES, *supra* note 2, at 178.

<sup>309</sup> In an interesting variation on the exemption question in this context, Quebec's Education Department has instituted a requirement that all schools within the province, public and private, have a required course in "Ethics and Religious Culture" that would

As for the remainder of the curriculum, the approach taken by the U.S. Court of Appeals for the Sixth Circuit in 1987 in *Mozert v. Hawkins County Board of Education* seems fundamentally sound: exemptions are in principle unwarranted merely for exposure to ideas with which one disagrees.<sup>310</sup> Concurring in *Mozert*, Judge Danny Boggs concluded that school boards' authority to set curricula is bounded only by the Establishment Clause, and under this rule exemptions from courses that incorporated religious learning would never be required by the Free Exercise Clause.<sup>311</sup>

Nevertheless, there are other reasons that counsel against forcing religious learning on unwilling parents and students. Threats of compulsion are often met with threatened or actual lawsuits and general community consternation, which will surely dampen efforts to achieve the model of liberal education discussed here.<sup>312</sup> But because part of the value of the external and internal modes of religious learning consists in explaining religion's relevance within particular disciplines, it would be extremely impractical to excuse students from, say, certain history classes because they objected to particular conversations or kinds of instruction that are an integral part of learning about a given historical era or event.<sup>313</sup> Perhaps a compromise could be reached in cases of adamant resistance by reserving the end of a class for teaching about the relevance of religion for a particular subject and excusing the objecting students at that point.<sup>314</sup>

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begin in first grade. See Graeme Hamilton, *Losing Faith in Quebec: Even Private Schools in La Belle Province Must Adopt One-Size-Fits-All Religious Classes*, NAT'L POST, Nov. 3, 2007, at A1. The course will cover Christianity, Judaism, aboriginal spirituality, Islam, Hinduism, and Buddhism. *Id.* It was reported somewhat tendentiously that the course is a reform that "has been sold as an effort to bring the education system more in line with an increasingly secular Quebec." *Id.* Recently, two private religious schools have sought an exemption from the requirement, claiming that their students are already "strongly formed" in the values taught in the new course. See Brenda Branswell, *Parochial Schools Reject New Mandatory Ethics Course*, MONTREAL GAZETTE, May 9, 2008, at A7. Both of these stories were collected by the invaluable Religion Clause Blog run by Professor Howard M. Friedman. See Postings of Howard Friedman to Religion Clause Blog, <http://religionclause.blogspot.com/> (May 9, 2008, 6:30 AM & Nov. 4, 2007, 12:01 PM).

<sup>310</sup> See 827 F.2d 1058, 1063 (6th Cir. 1987); see also *Parker v. Hurley*, 514 F.3d 87, 105–06 (1st Cir. 2008) (holding that "the mere fact that a child is exposed on occasion in public school to a concept offensive to the parent's [or the child's] religious beliefs" does not violate either's religious liberty); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533 (1st Cir. 1995) (holding that parents do not have the constitutional right "to dictate the curriculum at the public school to which they have chosen to send their children").

<sup>311</sup> *Mozert*, 827 F.2d at 1078–81 (Boggs, J., concurring).

<sup>312</sup> See Wexler, *supra* note 3, at 1261–62.

<sup>313</sup> See NORD & HAYNES, *supra* note 2, at 23.

<sup>314</sup> See *supra* notes 312–313 and accompanying text.

## CONCLUSION

It is perplexing that at a time when public schools seem most vulnerable, more is being asked of them than perhaps ever before. Ideological, socioeconomic, pedagogical, and political stresses—or, in Judge Michael McConnell's apt summary, "the *fact* of cultural and religious pluralism, the *principle* of liberalism, and the *ineffectiveness* of public education"—constantly threaten their viability.<sup>315</sup> Public education is such bitterly contested terrain and fraught with so many immense challenges that the temptation simply to give up the ghost cannot easily be denied. And yet, in the face of these obstacles, ever more elaborate demands are made of it.<sup>316</sup> The No Child Left Behind Act, which has been called "the most ambitious federal education statute in decades,"<sup>317</sup> requires states to set challenging intellectual standards of merit against which students are regularly tested.<sup>318</sup> Respected scholars continue to press the case for full-bodied civic and moral cultivation, a case made all the more urgent by "the fact of religious and cultural pluralism" itself.<sup>319</sup> And, perhaps most telling of all, "comprehensive" approaches to public education—in which a broad range of out-of-school educational services are combined with curricular programs and activities—are vigorously advocated as especially necessary to combat the adverse educational effects of poverty and to reduce socioeconomic achievement gaps.<sup>320</sup> All of these policies and proposals presuppose an extraordinary degree of involvement in students' civic and moral upbringing and development that is all too often insufficiently acknowledged.<sup>321</sup>

The Supreme Court has perennially reaffirmed, as recently as 2007, that the core obligation of public schools is "to teach that our strength comes from people of different races, creeds, and cultures

<sup>315</sup> See McConnell, *supra* note 296, at 96.

<sup>316</sup> See James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932–33 (2004).

<sup>317</sup> Chester E. Finn, Jr. & Frederick M. Hess, *On Leaving No Child Behind*, PUB. INT., Fall 2004, at 35.

<sup>318</sup> See Ryan, *supra* note 316, at 933.

<sup>319</sup> See McConnell, *supra* note 296, at 96; see also MACEDO, *supra* note 22, at 279 (arguing that schools should actively "pursue our deepest civic purposes *openly*" by cultivating a robust civic and moral education); Amy Gutmann, *Civic Minimalism, Cosmopolitanism, and Patriotism: Where Does Democratic Education Stand in Relation to Each?*, in MORAL AND POLITICAL EDUCATION, *supra* note 84, at 23, 26.

<sup>320</sup> Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1476 (2007).

<sup>321</sup> See *id.* at 1515–19 (listing examples of "promising school/community collaborations" in providing "comprehensive" educational services).

uniting in commitment to the freedom of all.<sup>322</sup> That theme has been a cornerstone of the Supreme Court's jurisprudence of public education, and it has intimated that teaching about religion can promote that theme constitutionally.<sup>323</sup> Yet in order to reconcile its sweeping and lofty statements about the virtues of civic and moral education with its Establishment Clause jurisprudence, the Supreme Court must confront the problem of religious learning—the problem that religious learning must be, but cannot be, separated from public education—more rigorously and sensitively than is possible within its current dichotomous methodology. That binary approach—promotion or non-promotion<sup>324</sup>; the “secular” or the “sectarian”<sup>325</sup>—is conceptually inadequate to account for the broad and often subtle effect that religious learning has on the cultivation of civic and moral ideals. The most controversial Establishment Clause policy battles involving public schools today, such as those over evolution and Intelligent Design, demand a more complex constitutional framework of assessment in light of the deeply problematic questions that they raise.

Even as it is assailed, the idea of a public school still retains the power to inspire and excite as a cultural aspiration—a vision of what we wish and hope to be. But to meet its challenges and to realize its possibilities, public education needs grounding in a theory of liberal learning that can support its civic and moral commitments. It has been this Article's aim to identify and elaborate just such a model of liberal learning, within which civic, moral, and religious learning have an integrated place in the development of an individual sensibility or layered personality. Liberal learning, on this model, aspires to be “free” from the narrow partialities of community and the appetites of the world *sub specie voluntatis*.<sup>326</sup> It makes available to students what does not “lie upon the surface of [their] present world,” but it is also liberal in the sense that one is always at liberty to accept or reject its offerings.<sup>327</sup> Civic and

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<sup>322</sup> See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738, 2788 (2007) (Kennedy, J., concurring). Justice Kennedy did not write the plurality opinion for the Court (it was written by Chief Justice Roberts), but his concurrence in part and in the judgment was crucial for the outcome. See *id.*

<sup>323</sup> See *supra* notes 74–82 and accompanying text.

<sup>324</sup> See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 225 (1963).

<sup>325</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1972); *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

<sup>326</sup> See WILLIAMS, *EDUCATION*, *supra* note 87, at 31–32.

<sup>327</sup> OAKESHOTT, *Learning and Teaching*, *supra* note 89, at 48; René V. Arcilla, *Modernising Media or Modernist Medium? The Struggle for Liberal Learning in our Information Age*, 36 J. PHIL. EDUC. 457, 463 (2002).

moral learning, within that liberal structure, is not the ingestion of a premasticated code that makes it easier to solve problems or pick the best national policies. "[I]t is agents continuously and colloquially related to one another in the idiom of a familiar language of moral converse."<sup>328</sup> Education in that ongoing conversation is carried on in external and internal modes, in much the way that a foreign language is learned and only gradually mastered through public and personal discursive practices. And religious learning is a sphere of understandings and meanings whose particular expressions offer insights of widely divergent value for an enriched conversational engagement. To access these insights is to participate in the external and internal discursive modes of learning about and contemplating the religious voices that have come before. Liberal learning, in public schools no less than anywhere else, occurs in the perpetual achievement of tentative, temporary, and perhaps agnostic beliefs.

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<sup>328</sup> OAKESHOTT, *Understanding Human Conduct*, *supra* note 108, at 64; see also SULLIVAN, *supra* note 87, at 105 ("Knowing how to act, how to be an agent, and finally the understanding of agency itself, are all components of a culture which can be imparted only through education.").