Religion and education in the United States

Public schools and what they teach

While American public schools – at least the good ones, the ones that are not wishy-washy – stand for a way of understanding the goals of education and thus of a good and flourishing human life, they are not free to base that understanding on explicitly religious themes. This is by no means self-evident. For Horace Mann, often considered "the Father of American public education," it was beyond question that the school day should include reading from the Bible – passages carefully selected to reflect his optimistic and moralistic Unitarianism, and intended to be universally acceptable. He and his allies were promoting the common public school, he wrote in 1846, in order "to elevate mankind into the upper and purer regions of civilization, Christianity, and the worship of the true God" (Glenn 1988, 172-175). His religious critics, both Protestant and Catholic, charged that he was advocating an understanding of religion which had little to do with its real power or with what they believed.

In some other Western democracies, like the United Kingdom, Italy, and Germany, religious instruction is provided as part of the regular public school program, with students or their parents allowed some choice among Protestant, Catholic, and other alternatives. In English schools, each school day is supposed to include a daily act of worship "of a predominantly Christian character," even in schools where most of the children are Muslim or Hindu. That's not true in the United States, of course, and for what most of us think of as good reasons. Some of the reasons are constitutional. The First Amendment to the United States *Constitution* has been interpreted to forbid any level of government – including local public school systems – from engaging in or directly supporting religious practices. But even if that interpretation changed, it's not at all clear that people for whom religious beliefs are very important would want a government agency deciding how those beliefs would be interpreted and taught. Nor would we want children whose beliefs differ from those of the school forced to choose between violating their consciences and being singled out by asking to be excused. Nor would those for whom prayer is important want to see it trivialized as a way to quiet down a class, as has been suggested by some advocates of "school prayer."

In short, the American government is required, for very good reasons, to be neutral between various religious beliefs, and also to be neutral between belief and non-belief. Schools operated directly by government must act in ways consistent with that requirement, and so must each of their teachers. They must not seek to promote any particular religious belief, *nor may they in any way promote secularism* (a way of understanding the world that explicitly rejects any idea of divine purpose or meaning) in preference to religion. In fact, in *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court ruled that the provision of law permitting an exemption from the military draft for those with religious objections to war extended to those whose convictions were based upon a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those" who had routinely gotten the exemption, pointing out that some forms of Buddhism are formally 'atheistic' yet are recognized as religious. This has been interpreted as a legal recognition that 'Secular Humanism' is the functional equivalent of a theistic religion like Christianity or Islam.

It is worth noting, in passing, that John Dewey was as emphatic as was his predecessor Horace

Mann in stressing the 'religious' mission of public schools, though he was more open than Mann was able to be in distinguishing this from any traditional religious teachings. It was no accident that one of his earliest writings on education, since read as part of their professional preparation by millions of teachers in training, is called "My Pedagogic Creed" (1897), and consists of a series of assertions each preceded by "I believe" in best creedal fashion. In "A Common Faith" (1934), he stressed that the "Use of the words 'God' or 'divine' . . . selects those factors in existence that generate and support our idea of good as an end to be striven for. . . . the very idea that was central in religions has more and more oozed away, so to speak, from the guardianship and care of any particular social institution [such as churches]. . . . Such a faith [in the idea of good as an end to be striven for] has always been implicitly the common faith of mankind. It remains to make it explicit and militant" (Dewey, 35, 44, 58).

Unfortunately, educators may not be as sensitive to the ways in which the curriculum and how it is taught promotes a secularistic worldview as alone worthy of respect as they are to any appearance of promoting theistic religion, and this leads to continuing conflict between public schools and parents who object to the messages which their children receive in school.

The situation is naturally entirely different in a school which parents or students have chosen voluntarily in full knowledge of its religious character. Thousands of Protestant children attend Catholic schools, and accept participation in the religion class as "part of the deal." Of course, Protestants share most essential beliefs with Catholics, but the same principle applies to non-Christian students, and there is no violation of conscience so long as the student is not asked to pretend to believe something which she does not believe.

Schools operated by government, then, may not and should not promote religion. They should not behave like a church or other religious institution; they should not ask their students to engage in religious practices. A federal judge ruled that a New York State school district had violated the rights of Christian families by having their children cut out images of a Hindu god and build an altar and join in New Age prayers for an Earth Day ritual. "While reading the [Hindu god's] story can be part of a neutral secular curriculum," the judge pointed out, he could not find "any educational justification for telling young impressionable students to construct images of a known religious god." Building the altar, he found, was "truly bizarre" in a public school (*The New York Times* May 22nd 1999, A15).

This does not mean that public schools teachers should not mention religion, should not present in accurate ways the role of religious belief and religious institutions in American history and society, and should fail to mention religious motivations in discussions of how we should make decisions about sexuality, social justice, and other issues. To do so unintentionally conveys the message that religion simply has no place in contemporary life. Unfortunately, most public schools *have* been guilty of what can only be called a cowardly avoidance of this aspect of life. For example, one study found that most textbooks never mentioned that Martin Luther King, Jr. was a minister, or that religion played a fundamental role in the Freedom Movement of the 1960s. There was no mention, in discussions of current American society, of evangelist Billy Graham, who has consistently been one of the most popular Americans for the last 30 years, or of the fact that more Americans attend religious services each week than attend professional sports in a year!

It's entirely possible to teach about religion as a social reality, and about the scriptures of different religious groups, without seeking to convert anyone or to favor any particular faith. That has been done in public schools, and good curriculum and materials exist to support teachers who seek to do so in an objective way. But few do, nor is there room for that in the curriculum of most schools. Until curriculum standards and textbooks change – which is beginning to happen – we cannot expect much better.

This is why so many parents believe that the public schools are hostile to religion, though it would be more accurate to say that the schools are afraid to mention religion. The criticism from some Christian and Jewish and Muslim groups is not directed only against the failure of the public schools to teach fairly and accurately about the role of religion in history and society. There are also aspects of the goals and methods of many public schools which constitute a coherent system of belief conflicting with that of many parents. Sometimes this system of belief hides behind terms which no one could object to. For example, I imagine that all of us would applaud the emphasis of schools upon "critical thinking" as one of the main goals of education. Being able to think rationally and critically is a very good thing – it's one of the goals of this course, in fact – and is as important to Orthodox Jews and to evangelical Protestants and to Catholics and to Muslims and Buddhists as it is to those who are completely non-religious. In fact, much as might surprise the critics of religion, believers are often deeply involved in critical thinking as they seek to reconcile the demands of their traditions with the conditions of the modern world, more so than unbelievers who simply accept modernity without question.

But the phrase 'critical thinking' is often used to justify an approach to education with which many thoughtful critics (including some with no religious convictions themselves) disagree. E. D. Hirsch, Jr. points out that

> in the progressive tradition that currently dominates our schools, "critical thinking" has come to imply a counterpoise to the teaching of "mere facts," in which, according to the dominant caricature, sheep-like students passively absorb facts from textbooks or lecture-style classrooms. . . . This tool conception, however, is an incorrect model of real-world critical thinking. Independent-mindedness is always predicated on relevant knowledge; one cannot think critically unless one has a lot of relevant knowledge about the issue at hand. Critical thinking is not merely giving one's opinion (Hirsch, 247).

But there are deeper issues, as well. Sociologist Philip Selznick observes out that thinking needs to begin somewhere if it is to be productive, especially with respect to the moral choices that we make. "To be truly independent, self-confident, and resourceful, people need *foundations*." We can't just make up our standards as we go along; "the *pre*-judgments that form our minds are necessary starting points-and touchstones-for moral reflection. We begin with, and come back to, the 'intuitions' or 'settled convictions' in which we have confidence" (Selznick, 12, 394). Or, again, Canadian psychologist Elmer John Thiessen notes that "criticism always takes place from within a certain tradition" (Thiessen, 156-57, 162).

This means that schools do students no favor by expecting them – in the name of 'critical thinking' – to figure out for themselves what is fundamentally right and what wrong. Of course we know that no general rule can apply to all situations, and that any mature person needs to be able to reason about how to apply principles to practice. Aristotle called this ability ***phrōnēsis***

or “practical judgment.” Students will not know how to engage in this effort of application – indeed they may not know that they should – unless they observe adults whom they respect going through the process. It is appropriate for teachers to talk with students about difficult choices, but they should not leave them in doubt about their own conviction that such choices can be made on a principled basis, and not as a matter of whim or preference.

When religious parents and outside groups claim that the public schools are teaching immorality in sex education and other aspects of the curriculum, they are using the wrong word. Public schools, all too often, teach *amorality*, that decisions should be made on the basis of preferences and momentary feelings, rather than on the basis of a settled disposition to do the right thing.

So what’s the answer? Public schools and their teachers cannot and should not promote an explicitly religious viewpoint. But they can create a climate of moral seriousness, making it clear that decisions should be made on the basis of the sort of person we aspire to be, which in turn may reflect our religious convictions. Those decisions will inevitably shape our character as well as express it. And we do well to build our character and our decisions upon what others have learned from experience about what way of life leads to human flourishing. Every religious tradition is a repository of such experience, as is the best of – for example – the Chinese and Islamic and Western philosophical traditions. In his book about education, *The Abolition of Man*, C. S. Lewis called this repository of human moral experience ‘the Tao’, and showed how the same themes and the same conclusions recur again and again in many different cultures.

Public school teachers should not hesitate to affirm that there are important questions of meaning and of behavior which religious traditions and the experience of various cultures can help to answer: that right and wrong matter, that the experience of humanity provides us with reliable information about the “essential qualities that all civilizations over the ages have discerned,” and that seeking to make moral judgments is part of what makes us human. If they made that clear, consistently, there would be much less controversy and opposition from parents.

We should not be overly optimistic, though. Many parents will not be satisfied with less than an education which is based upon their own convictions. They will want schools whose goals and methods alike are shaped by a particular religious perspective. They have a right to choose such a school for their children. Thus there are about 2.5 million students attending Catholic schools in the United States, almost 200,000 students attending Jewish day schools, nearly 1.5 million attending Protestant schools, and more than 30,000 attending Islamic schools. Another 3/4 of a million attended private schools without a religious affiliation, but usually with some other special character, like Montessori schools and independent prep schools. A pressing policy question is whether or not public funds – as in most other Western democracies – should help parents with the costs of doing what they have an established right to do at their own expense. The Supreme Court has held that this is consistent with the *Constitution*, but it remains a controversial political issue.

We will review briefly the complex area of law and policy governing public funding of non-public, and especially religious, schools in the closing section of this paper, and the regulation of such schools has been discussed to some extent in the paper on Laws and Regulations.

Remaining a little longer with public schools, there is an interesting issue that is quite distinct from the question of what those schools may and may not teach their students, either intentionally or inadvertently: to what extent students (and teachers as individuals) are free to express their religious convictions and viewpoints in public schools. As we will see, American law takes a very different view on this than does that of France, as illustrated by the twenty years of controversy over the *hijab* or *foulard islamique* in French schools.

Public schools and the convictions of individuals

What about teachers and students who have strong religious convictions? Do they have a right to express these convictions in public schools? The right of teachers to talk about their own religious convictions is much more limited than is that of students, since teachers are assumed to speak for the school and thus – ultimately – for government.

Take the example of John Peloza, a biology teacher in a public high school in California, who contended that the school district's requirement that he teach evolution violated his constitutional rights because evolution is a religious theory, making him "an unwilling agent of the school district in the establishment of the religion of secular humanism, in violation of the First Amendment" (*Peloza v. Capistrano Unified School District*, 782 F.Supp. 1412, 1992). The Federal District Court held, however, that "there is a compelling state interest for secondary school teachers to adhere to the curriculum set forth by the appropriate school district," whatever their personal convictions.

Peloza also asserted that "even if he is not permitted to teach his theory of creationism in the classroom, he should be permitted to privately discuss religion and his theory of creationism in conversations with students during private, non-instructional time on the campus, during lunch, class breaks, and before and after school hours." The court found, however, that his "right to free speech must be balanced 'against his student's right to be free of religious influence or indoctrination in the classroom'."

In another case, Kenneth Roberts, a 5th grade teacher in Denver, "spent a significant amount of time teaching reading skills to his fifth graders. One method he used to teach the value of reading was to devote fifteen minutes each day to a "silent reading period." During this silent reading period, students were allowed to choose their own reading materials; these could have been brought from the students' homes, chosen from the school library, or selected from Mr. Roberts's classroom library. The classroom library was a collection of nearly 250 books of varying content that Mr. Roberts had compiled over his nineteen years of teaching. In order to set an example for the students, Mr. Roberts silently read his own materials during the silent reading time. Frequently, the book Mr. Roberts chose to read silently was the Bible, which he kept on his desk throughout the school day. Mr. Roberts never read from the Bible aloud nor overtly proselytized about his faith to his students" (*Roberts v. Madigan*, 921 F.2d 1047, 1992).

After a parent complained about two of the books (*The Bible in Pictures* and *The Story of Jesus*) in the classroom library, Principal Kathleen Madigan ordered him to remove those books and also to keep his Bible in his desk drawer during school hours. Roberts and several parents who supported him charged that these actions deprived the pupils of their right to free access to

information and also treated Christianity in a non-neutral, disparaging manner. They noted that the principal “ignored the presence of books dealing with Greek gods and goddesses and American Indian religions. . [and] . . allowed him to teach actively about Navajo Indian religion. Mr. Roberts was also allowed to read silently a book dealing with the life of Buddha and keep it on his desk for some period” (921 F.2d 1055).

Roberts lost his case when the court found that “the school district acted for the valid purpose of preventing him from promoting Christianity in a public school,” though in this decision – in contrast with Peloza – the evidence that this was in fact the teacher's intention was notably weak. The heart of the decision, indeed, seems to have been the traditional unwillingness of the courts to interfere with the administrative judgments of school officials, at least when they are acting in the name of neutrality.

These cases might leave the impression that public school teachers are under a sort of absolute gag rule about their religious convictions; that would be an exaggeration. In the *Roberts* case it seems likely that the court would also have supported the principal if she had allowed him to keep the books in his classroom library and to read the Bible silently. The issue became reduced to whether the principal had the right to decide what was appropriate in her school, and courts are very reluctant to intervene under those circumstances. Teachers who mention their religious activities outside of school when that is relevant to the matter at hand or allude briefly and appropriately to their own beliefs in a context when students are mentioning their own, and who consistently show respect for other religious and non-religious viewpoints, are unlikely to get into any difficulties as a result.

Students, by contrast with teachers, have much more extensive rights to express their religious (and other) convictions in public schools. Scott Slotterback was in the 10th grade and his friend Keith Ferry in the 9th when they began to distribute printed religious tracts in school. They handed these materials out on nearly fifty occasions, always in the halls or cafeteria. One of the teachers confiscated these materials on several occasions, and finally took one of the boys to the principal, who “ordered him to cease his hallway distributions or risk suspension.” After consulting with the school system’s lawyer, the principal told Scott he could distribute religious materials only twice during the remainder of the school year; in the area around the exit doors of the school, after school hours, with advance notice to the principal. The school system then adopted a formal policy governing distribution of materials on school property, providing for advance review and written approval by the principal, unless the material fell into one of seven prohibited categories. Among the seven categories of “unacceptable non-school written material(s)” were “Materials that proselytizes [sic] a particular religious or political belief” (*Slotterback v. Interboro School District* 766 F.Supp. 280, 1991).

The Federal District Court found that this prohibition was “unconstitutionally overbroad and invalid on its face. Although the school district has a compelling interest in preventing material that substantially interferes with the work of the schools and with the rights of other students, that interest is protected under other portions of the new policy, and the blanket ban on religious and political literature is unnecessary.” Scott and Keith could continue to distribute religious materials in school, so long as they did not disrupt classes or other school activities.

High school students may also form organizations to study the Bible together or take part in

other religious activities, provided that they do so at their own initiative and comply with the requirements for student groups in general. As a result of complaints that many schools were not allowing pupils to meet for religious purposes during time set aside for extracurricular activities, Congress passed the Equal Access Act of 1984 (P.L. 98-377), making it unlawful, if any student-initiated groups were allowed, to deny recognition on the basis of the religious, political, or philosophical content of discussions or activities.

The constitutionality of this law was upheld in 1990 by the Supreme Court, which found student religious groups legal "if the school uniformly provides that the meetings are voluntary and student-initiated; are not sponsored by the school, the government, or its agents or employees [such as teachers]; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by non-school persons" such as adult religious leaders (*Board of Education v. Mergens* 496 U.S. 226, 1990).

The most important case along these lines was decided quite recently, and involved college students. The University of Virginia refused to pay (from student activity fees) the printing costs of a new student publication called *Wide Awake* on the grounds that it presented "a Christian perspective" and that this would entangle the public university in support for religion. The students charged that this was a restriction on their freedom of speech. They were eventually upheld by the Supreme Court on the grounds that the university could lawfully decide not to support any student publications, or could allocate resources among them on the basis of an acceptable "neutral principle" (such as quality), but must not choose among them on the basis of perspective. "The University's decision to deny funding to religious publications," Justice O'Connor pointed out, gave the appearance of expressing disapproval of them in particular. Justice Kennedy, writing for the majority, pointed out the critical difference "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect" (*Rosenberger v. Rector and Visitors of the University of Virginia*, 115 S.Ct. 2510, 1995).

In brief, then, students have broad rights to express their religious beliefs in public schools and colleges, individually or in groups, provided that they do not disrupt the school and that they follow the procedures established for non-religious activities. Government – and its agents, the principals and teachers – should not discriminate between similar organizations or activities on the basis of religious content. To do so would not be neutrality but hostility toward religion. Recently, the federal government has required that states and school districts must certify thatthey have no policies preventing students from engaging in "constitutionally-protected" prayers as a condition for receiving federal funding under the Elementary and Secondary Education Act.

Teachers in public schools are much more limited in their religious expression, since they are considered to represent the government in whatever they do in an official capacity. Outside of school, of course, they are free to practice and proclaim their beliefs. This has the result that in some cases a public school teacher may, outside of school, lead a youth group or teach a Bible class which includes some youth who are also his students in school. There is no problem about that, provided that he is careful to keep what he does in school and outside of school distinct. . . and does not show any preference, in school, for the students whom he knows on

the outside.

At the end of this paper is an appendix consisting of guidelines on religious activities and expression in public schools, developed by a broad range of non-governmental organizations which, despite profoundly differing views on the appropriate role of religion in American society, were able to reach agreement on the current state of the law.

Private schools with a religious character

The right to establish non-public schools is guaranteed by the national *Constitution*, as applied by the Supreme Court in *Pierce v Society of Sisters,* 268 U.S. 510 (1925). It is the individual states, however, which establish the conditions under which nonpublic schools may operate, and

> each state has its own approach to control of nonpublic schools; and in some, such as Nebraska, the private schools are very strictly regulated. In others, such as Florida, there is very little or no regulation of private schools; while some, such as Kansas, give the private schools the option of being regulated by the state or operating independent of state control (Furst and Russo, 2).

In most states, the primary oversight over non-state schools is exercised by local public school authorities, which are responsible for ensuring that mandatory school attendance laws are complied with. This obligation can be met by attendance at a public school, a school generally equivalent to the local public schools, or by home schooling similarly equivalent to local public schools. This is a free-floating criterion, given the enormous range in quality and resources of public schools, and leads commonly to situations in which public school staff are sitting in judgment upon nonpublic schools which, at least in times of declining enrolments, are their competitors.

In most cases, it is important to add, approval of nonpublic schools occurs routinely and without difficulties on either side. The unproblematic character of much of this oversight has led some school choice advocates to propose it be adopted as the model of accountability for nonpublic schools that receive vouchers. States, they argue, should be prevented from "enlarging controls upon curriculum, facilities, and school employment policies beyond the modest regulations that have traditionally applied to private schools" (Coons and Sugarman 1992, 32).

With a few exceptions, federal, state and local governments do not fund the educational mission of nonpublic schools, whether or not these schools have a religious character. There is, in some states, funding support for support services such as transportation and textbooks, and for some supplemental educational services. These are provided on the basis of the "child benefit theory," that the services are provided to the children without benefitting the schools (and thus providing unconstitutional government support to religion).

Although the Supreme Court has struck down various state programs for funding of nonpublic schools on the basis of the religious character of most of them, this has not in practice led to public funding targeted to non-religious nonpublic schools for which religious ones are ineligible. Obviously, if there were such programs it would place great pressure on faith-based nonpublic

schools to abandon or compromise their religious character. While this was in fact the effect of some earlier programs for funding nonpublic higher education, it might be prevented by a recent decision by the Supreme Court which spoke of "the requirement of viewpoint neutrality in the Government's provision of financial benefits" (*Rosenberger v. University of Virginia*, 515 U.S. 819 (1995)). In fact, a number of state constitutions prohibit public funding of any school not under direct government control, whether religious or not.

The exceptions include programs in Maine and Vermont that allow communities with no secondary schools to tuition resident youth into either public schools of other communities or nonpublic schools. In the past, students could use these public funds to attend religious schools, but Maine limited the program to non-religious schools in 1981, and Vermont did so in 1995. The other example of treating religious and non-religious nonpublic schools differently is the initial stage of the voucher program in Wisconsin, adopted in 1990, when low-income pupils could receive state funds to attend non-religious schools. The state legislature amended this in 1993, and as of now the great majority of the participants are in religious schools.

Many state constitutions include explicit provisions (as the federal *Constitution* does not) forbidding such funding, and some, like that of Massachusetts, go further to forbid public funding of schools which are not "publicly owned and under the exclusive control" of public officials (Article CIII). Similarly, the Michigan *Constitution* prohibits public appropriations directly or indirectly to aid or maintain nonpublic pre-elementary, elementary or secondary schools. (Art. 8, Sec. 2). The Michigan Supreme Court has interpreted this provision to prohibit public payment of lay teachers in nonpublic schools

However, there are various 'loopholes' in these provisions. For example, many states provide bus transportation for pupils attending nonpublic schools, as a safety measure, and loan them textbooks. Publicly-funded services are often provided to pupils with special educational needs attending nonpublic schools. The constitutional provision in Michigan, for example, has been held not to be a bar to nonpublic school student participation in federally subsidized programs designed to aid educationally deprived elementary and secondary school children, shared time programs, or special education services. State law, in fact, requires local school districts that provide transportation to their own pupils to also provide free transportation to nonpublic school students. Similar provisions are found in the laws of many states.

The large Federal program of aid to low-achieving pupils in schools with large proportions of low-income pupils includes a provision that those attending nonpublic schools must also be served. Two U. S. Supreme Court decisions in 1985 – *Aguilar v. Felton* and *Grand Rapids School District v. Ball* – were a devastating setback for the view that the state had a legitimate interest (as, for example, in France) in providing strictly secular services within the context of faith-based schooling. *Grand Rapids* struck down a school district program that provided supplementary courses such as arts and crafts, home economics, Spanish, gymnastics, chess, and model building during and after the regular school day in classrooms leased from nonpublic schools to pupils in those schools; the classrooms were leased by the school system, had to be free of religious symbols, and displayed a sign "public school classroom"! The Court decided that the teachers might be influenced by the "pervasively sectarian" atmosphere of the schools in which they worked (40 out of 41 participating nonpublic schools were faith-based) to indoctrinate the children in particular religious beliefs, that the program created the appearance

of state endorsement of religion, and that the religious functions of the schools were subsidized indirectly through relieving them of other costs they might have borne.

Aguilar v. Felton struck down a federally-funded program under which employees of the New York City school system provided remedial instruction to poor children attending faith-based schools, on the basis that supervising those employees closely to ensure that they did not further the religious mission of the schools would necessarily create an "excessive entanglement" of public officials with religion (473 U.S. 373; 473 U.S. 402).

The Court appears to be returning to a more flexible stance in its decision in *Agostini v. Felton*, decided on June 23, 1997. Reversing in large part the earlier decisions, the *Agostini* majority declared "that the Court has abandoned [the] presumption that public employees placed on parochial school grounds will inevitably inculcate religion or that their presence constitutes a symbolic union between government and religion." The justices found that no impermissible state incentive to religious practice existed when "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." There may, therefore, be a certain softening in the Court's assumption that everything which a faith-oriented school does involves indoctrination.

In a dramatic development, two states (Wisconsin and Ohio) adopted publicly-funded 'voucher' programs to allow pupils from low-income families in the cities of Milwaukee and Cleveland to attend nonpublic schools, including faith-based schools, at state expense. In a significant indication of a change in position, the Supreme Court decided in November 1998, on an 8 to 1 vote, not to review the constitutionality of the state program in Wisconsin (*Jackson v. Benson*, 98-376). The Supreme Court thus left intact a ruling by the Wisconsin Supreme Court, in June 1998, that the state voucher program's inclusion of religious schools did not violate the prohibition against government establishment of religion.

In the 'public voucher' programs, the parent with a child accepted to a participating non-public school is issued a voucher for an amount equal to or less than the per pupil cost in local public schools. During the 2006-07 school year, there were twelve publicly funded voucher programs enrolling 56,285; of these, five were for students with disabilities and three were for children from low-income families in Milwaukee and Cleveland and the District of Columbia. In a controversial decision early in his Administration, President Obama decided to support the termination of the voucher program allowing children from low-income families in the District of Columbia to attend non-public schools, including the school which his own daughters attend. This was widely viewed as a return for the strong support which he had received in the election campaign from the teacher unions, which are adamantly opposed to vouchers.

In its historic decision of June 27th 2002, the United States Supreme Court reviewed the evidence and the legal arguments about the state-funded voucher program in Cleveland, Ohio and concluded that it was "entirely neutral with respect to religion" and as a result "does not offend the Establishment Clause" of the First Amendment to the federal *Constitution* (*Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), 21). The Court noted that "there is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system."

Although almost all of the families receiving vouchers were using them in religious schools, the Court noted that those families had a number of other options that were not religious, and that therefore the Cleveland voucher program fell within the category of “programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choice of private individuals.” The Court was insistent that it had not wavered from its previous rulings that direct government funding of religious schools (as in many other countries) would be a violation of the Establishment Clause, making very clear why the voucher strategy has been chosen by American supporters of parental choice and of religious schools.

There is another legal barrier: the fact that most state constitutions have provisions, adopted in the anti-Catholic mood of the late 19th century, barring the use of state funds for non-public education. The Appendix to the lecture on Laws, Regulations, and Decisions provides a state-by-state summary of these provisions. Several of them are currently under challenge as discriminatory.

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Religion In The Public Schools: A Joint Statement Of Current Law April 1995

The Constitution permits much private religious activity in and about the public schools. Unfortunately, this aspect of constitutional law is not as well known as it should be. Some say that the Supreme Court has declared the public schools "religion-free zones" or that the law is so murky that school officials cannot know what is legally permissible. The former claim is simply wrong. And as to the latter, while there are some difficult issues, much has been settled. It is also unfortunately true that public school officials, due to their busy schedules, may not be as fully aware of this body of law as they could be. As a result, in some school districts some of these rights are not being observed.

The organizations whose names appear below span the ideological, religious and political spectrum. They nevertheless share a commitment both to the freedom of religious practice and to the separation of church and state such freedom requires. In that spirit, we offer this statement of consensus on current law as an aid to parents, educators and students.

Many of the organizations listed below are actively involved in litigation about religion in the schools. On some of the issues discussed in this summary, some of the organizations have urged the courts to reach positions different than they did. Though there are signatories on both sides which have and will press for different constitutional treatments of some of the topics discussed below, they all agree that the following is an accurate statement of what the law currently is.

Student Prayers

1. Students have the right to pray individually or in groups or to discuss their religious views with their peers so long as they are not disruptive. Because the Establishment Clause does not apply to purely private speech, students enjoy the right to read their Bibles or other scriptures, say grace before meals, pray before tests, and discuss religion with other willing student listeners. In the classroom students have the right to pray quietly except when required to be actively engaged in school activities (e.g., students may not decide to pray just as a teacher calls on them). In informal settings, such as the cafeteria or in the halls, students may pray either audibly or silently, subject to the same rules of order as apply to other speech in these locations. However, the right to engage in voluntary prayer does not include, for example, the right to have a captive audience listen or to compel other students to participate.

Graduation Prayer and Baccalaureates

2. School officials may not mandate or organize prayer at graduation, nor may they organize a religious baccalaureate ceremony. If the school generally rents out its facilities to private groups, it must rent them out on the same terms, and on a first-come first-served basis, to organizers of privately sponsored religious baccalaureate services, provided that the school does not extend preferential treatment to the baccalaureate ceremony and the school disclaims official endorsement of the program.

3. The courts have reached conflicting conclusions under the federal Constitution on student-initiated prayer at graduation. Until the issue is authoritatively resolved, schools should ask their lawyers what rules apply in their area.

Official Participation or Encouragement of Religious Activity

4. Teachers and school administrators, when acting in those capacities, are representatives of the state, and, in those capacities, are themselves prohibited from encouraging or soliciting student religious or anti-religious activity. Similarly, when acting in their official capacities, teachers may not engage in religious activities with their students. However, teachers may engage in private religious activity in faculty lounges.

Teaching About Religion

5. Students may be taught about religion, but public schools may not teach religion. As the U.S. Supreme Court has repeatedly said, "[i]t might well be said that one's education is not complete without a study of comparative religion, or the history of religion and its relationship to the advancement of civilization." It would be difficult to teach art, music, literature and most social studies without considering religious influences.

   The history of religion, comparative religion, the Bible (or other scripture)-as-literature (either as a separate course or within some other existing course), are all permissible public school subjects. It is both permissible and desirable to teach objectively about the role of religion in the history of the United States and other countries. One can teach that the Pilgrims came to this country with a particular religious vision, that Catholics and others have been subject to persecution or that many of those participating in the abolitionist, women's suffrage and civil rights movements had religious motivations.

6. These same rules apply to the recurring controversy surrounding theories of evolution. Schools may teach about explanations of life on earth, including religious ones (such as “creationism"), in comparative religion or social studies classes. In science class, however, they may present only genuinely scientific critiques of, or evidence for, any explanation of life on earth, but not religious critiques (beliefs unverifiable by scientific methodology). Schools may not refuse to teach evolutionary theory in order to avoid giving offense to religion nor may they circumvent these rules by labeling as science an article of religious faith. Public schools must not teach as scientific fact or theory any religious doctrine, including "creationism," although any genuinely scientific evidence for or against any explanation of life may be taught. Just as they may neither advance nor inhibit any religious doctrine, teachers should not ridicule, for example, a student's religious explanation for life on earth.

Student Assignments and Religion

7. Students may express their religious beliefs in the form of reports, homework and artwork, and such expressions are constitutionally protected. Teachers may not reject or correct such submissions simply because they include a religious symbol or address religious themes. Likewise, teachers may not require students to modify, include or excise religious views in their assignments, if germane. These assignments should be judged by ordinary academic standards of substance, relevance, appearance and grammar.

8. Somewhat more problematic from a legal point of view are other public expressions of religious views in the classroom. Unfortunately for school officials, there are traps on either side of this issue, and it is possible that litigation will result no matter what course is taken. It is easier to describe the settled cases than to state clear rules of law. Schools must carefully steer between the claims of student speakers who assert a right to express themselves on religious subjects and the asserted rights of student listeners to be free of unwelcome religious persuasion in a public school classroom.

a. Religious or anti-religious remarks made in the ordinary course of classroom discussion or student presentations are permissible and constitute a protected right. If in a sex education class a student remarks that abortion should be illegal because God has prohibited it, a teacher should not silence the remark, ridicule it, rule it out of bounds or endorse it, any more than a teacher may silence a student's religiously-based comment in favor of choice.

b. If a class assignment calls for an oral presentation on a subject of the student's choosing, and, for example, the student responds by conducting a religious service, the school has the right -- as well as the duty -- to prevent itself from being used as a church. Other students are not voluntarily in attendance and cannot be forced to become an unwilling congregation.

c. Teachers may rule out-of-order religious remarks that are irrelevant to the subject at hand. In a discussion of Hamlet's sanity, for example, a student may not interject views on creationism.

Distribution of Religious Literature

9. Students have the right to distribute religious literature to their schoolmates, subject to those reasonable time, place, and manner or other constitutionally-acceptable restrictions imposed on the distribution of all non-school literature. Thus, a school may confine distribution of all literature to a particular table at particular times. It may not single out religious literature for burdensome regulation.

10. Outsiders may not be given access to the classroom to distribute religious or anti-religious literature. No court has yet considered whether, if all other community groups are permitted to distribute literature in common areas of public schools, religious groups must be allowed to do so on equal terms subject to reasonable time, place and manner restrictions.

"See You at the Pole"

11. Student participation in before- or after-school events, such as "see you at the pole," is permissible. School officials, acting in an official capacity, may neither discourage nor encourage participation in such an event.

Religious Persuasion Versus Religious Harassment

12. Students have the right to speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. But school officials should intercede to stop student religious speech if it turns into religious harassment aimed at a student or a small group of students. While it is constitutionally permissible for a student to approach another and issue an invitation to attend church, repeated invitations in the face of a request to stop constitute harassment. Where this line is to be drawn in particular cases will depend on the age of the students and other circumstances.

Equal Access Act

13. Student religious clubs in secondary schools must be permitted to meet and to have equal access to campus media to announce their meetings, if a school receives federal funds and permits any student non-curricular club to meet during non-instructional time. This is the command of the Equal Access Act. A non- curricular club is any club not related directly to

a subject taught or soon-to-be taught in the school. Although schools have the right to ban all non-curriculum clubs, they may not dodge the law's requirement by the expedient of declaring all clubs curriculum-related. On the other hand, teachers may not actively participate in club activities and "non-school persons" may not control or regularly attend club meeting.

The Act's constitutionality has been upheld by the Supreme Court, rejecting claims that the Act violates the Establishment Clause. The Act's requirements are described in more detail in The Equal Access Act and the Public Schools: Questions and Answers on the Equal Access Act, a pamphlet published by a broad spectrum of religious and civil liberties groups.

Religious Holidays

14. Generally, public schools may teach about religious holidays, and may celebrate the secular aspects of the holiday and objectively teach about their religious aspects. They may not observe the holidays as religious events. Schools should generally excuse students who do not wish to participate in holiday events. Those interested in further details should see Religious Holidays in the Public Schools: Questions and Answers*, a pamphlet published by a broad spectrum of religious and civil liberties groups.

Excusal From Religiously-Objectionable Lessons

15. Schools enjoy substantial discretion to excuse individual students from lessons which are objectionable to that student or to his or her parent on the basis of religion. Schools can exercise that authority in ways which would defuse many conflicts over curriculum content. If it is proved that particular lessons substantially burden a student's free exercise of religion and if the school cannot prove a compelling interest in requiring attendance the school would be legally required to excuse the student.

Teaching Values

16. Schools may teach civic virtues, including honesty, good citizenship, sportsmanship, courage, respect for the rights and freedoms of others, respect for persons and their property, civility, the dual virtues of moral conviction and tolerance and hard work. Subject to whatever rights of excusal exist (see 5 above) under the federal Constitution and state law, schools may teach sexual abstinence and contraception; whether and how schools teach these sensitive subjects is a matter of educational policy. However, these may not be taught as religious tenets. The mere fact that most, if not all, religions also teach these values does not make it unlawful to teach them.

Student Garb

17. Religious messages on T-shirts and the like may not be singled out for suppression. Students may wear religious attire, such as yarmulkes and head scarves, and they may not be forced to wear gym clothes that they regard, on religious grounds, as immodest.

Released Time

18. Schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on premises during the

school day.

Appendix

Organizational Contacts for "Religion in the Public Schools: A Joint Statement of Current Law"

American Civil Liberties Union
Beth Orsoff, William J. Brennan Fellow
202/544-1681 (x306)

American Ethical Union
Herbert Blinder
Director
Washington Ethical Action Office
301/229-3759

American Humanist Association
Frederick Edwords
Executive Director
800/743-6646

American Jewish Committee
Richard Foltin
Legislative Director/Counsel
202/785-4200

American Jewish Congress
Marc D. Stern
Co-Director
Commission on Law and Social Action
212/360-1545

American Muslim Council
Abdurahman M. Alamoudi
Executive Director
202/789-2262

Americans for Religious Liberty
Edd Doerr
Executive Director
301/598-2447

Americans United for Seperation of Church and State
Steve Green
Legal Director
202/466-3234

Anti-Defamation League
Michael Lieberman
Associate Director/Counsel
Washington Office

202/452-8320

Baptist Joint Committee
J. Brent Walker
General Counsel
202/544-4226

B'nai B'rith
Reva Price
Director
Political Action Network
202/857-6645

Christian Legal Society
Steven T. McFarland
Director
Center for Law and Religious Freedom
703/642-1070

Christian Science Church
Philip G. Davis, Federal Representative
202/857-0427

Church of the Brethren, Washington Office
Timothy A. McElwee, Director
202/546-3202

Church of Scientology International
Susan L. Taylor, Public Affairs Director, Washington Office
202/667-6404

Evangelical Lutheran Church in America,
Lutheran Office for Governmental Affairs
Kay S. Dowhower, Director
202/783-7507

Federation of Reconstructionist Congregations and Havurot
Rabbi Mordechai Liebling, Executive Director
215/887-1988

Friends Committee on National Legislation
Ruth Flower, Legislative Secretary/Legislative Education Secretary
202/547-6000

General Conference of Seventh-day Adventists
Gary M. Ross, Congressional Liaison
301/680-6688

Guru Gobind Singh Foundation
Rajwant Singh, Secretary
301/294-7886

Interfaith Alliance
Jill Hanauer, Executive Director
202/639-6370

Interfaith Impact for Justice and Peace
James M. Bell, Executive Director
202/543-2800

National Association of Evangelicals
Forest Montgomery, Counsel, Office of Public Affairs
202/789-1011

National Council of Churches
Oliver S. Thomas, Special Counsel for Religious and Civil Liberties
615/977-9046

National Council of Jewish Women
Deena Margolis, Legislative Assistant
202/296-2588

National Jewish Community Relations Advisory Council (NJCRAC)
Jerome Chanes, Director, Domestic Concerns
212/684-6950

National Ministries, American Baptist Churches, USA
Rene Ladue, Program Assistant, Office of Government Relations
202/544-3400

National Sikh Center
Chatter Saini, President
703/734-1760

North American Council for Muslim Women
Sharifa Alkhateeh, Vice-President
703/759-7339

People for the American Way
Elliot Mincberg, Legal Director
202/467-4999

Presbyterian Church (USA)
Eleonora Giddings Ivory, Director, Washington Office
202/543-1126

Reorganized Church of Jesus Christ of Latter Day Saints
W. Grant McMurray
First Presidency
816/521-3002

Union of American Hebrew Congregations
Rabbi David Saperstein, Director, Religious Action Center
202/387-2800

Unitarian Universalist Association of Congregations
Robert Alpern, Director, Washington Office
202/547-0254

United Church of Christ, Office for Church in Society
Patrick Conover, Acting Head of Office, Washington Office
202/543-1517

For Further information, please write to:

"Religion in the Public Schools"
15 East 84th Street, Suite 501
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