SHAMING KINDERGARTENERS?
CHANNELING DRED SCOTT? FREEDOM OF EXPRESSION RIGHTS IN PUBLIC SCHOOLS

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Catholic University Law Review, Forthcoming

GEORGE MASON UNIVERSITY LAW AND ECONOMICS RESEARCH PAPER SERIES

This paper can be downloaded without charge from the Social Science Research Network at http://ssrn.com/abstract_id=977327
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I. INTRODUCTION

We live in a “contemporary moment [that is] marked by profound cultural division.” Cultural separation may be sparked by an attempt to restore religion and religious expression to their once prominent place in American discourse, or by countervailing root and branch efforts aimed at removing all discomforting religious references from the public square. In Kentucky, the state school board recently tackled a dispute over historical date references initiated by a proposal to substitute “C.E. (Common Era) for A.D. and B.C.E. (Before Common Era) for B.C.” This proposal was aimed at eliminating religious dates from classrooms. Given the semiotics of this issue for disputants, the school board is expected to broker an inclusive solution that embraces both systems. In another case, a federal district court denied a preliminary injunction sought by a student organization that asserted a violation of its First Amendment rights to freedom of expressive association and free speech because the student organization insisted on enforcing a provision requiring voting members to subscribe to its statement of faith, which the university deemed exclusionary. In still another case, the United States Court of Appeals for the Third Circuit allowed a lawyer to strike jurors from the jury pool on the basis of their religious beliefs. The disputed practices included teaching Sunday school, singing in the church choir, and reading the Bible and related literature. This exclusionary maneuver amounts to “another victory for the liberalism of personal autonomy” as part of America’s emerging constitutional jurisprudence.

Consistent with this move, Daniel Dennett maintains that the evolution of religion reflects the stubborn persistence of a bad meme from which inoculation and isolation are required. Accordingly, “parental teaching of religion [should] be closely monitored and treated as a potential form of child abuse.” As thus understood, children under the influence of parents who are infected with a religious meme are unlikely to live consistently with John Dewey’s worldview, wherein the concept of culture is transformed “from a tool of analysis [in]to a resource for [unconstrained] individual
liberation" and singularity. This liberal worldview appears to be of a piece with a line of thought wherein “religion is doubly discredited, first by the casual assumption that it is outside the domain of reason, and then by hostility to its unwelcome critiques of and constraints upon ‘deep’ desires” and cauterized preferences. Consistent with this intuition, religious expression should be seen as a mark of degradation. It follows that individuals and groups that are afflicted with the religious meme should be excluded from discourse with a nation that is characterized by Justice Taney’s conception of civilization that is driven by the exigencies of compromise and the necessity of holding things together.

Since Justice Taney and the Supreme Court took on the slavery question in the Dred Scott case, courts have assumed an expanded role in enforcing such values as peace and harmony while compelling national unity. Judges, perhaps driven by their own conception of self-evident truth and the superiority of their own judgment, have accepted society’s plea, sua sponte, to become statesmen. In this emerging world, intention (particularly good intention) can often be utilized to trump the plain meaning of words. In a broadly catalytic move, judges enter willingly into compromises that exclude certain individuals and groups when necessary to resolve impending controversies. This is particularly true when disagreements threaten America’s putative consensus or alternatively, risk fracturing the nation. Consistent with this paradigm, religious expression has been seen to pose just such a threat.

Why has the public square become so secular and so suspicious of religious expression? Explaining this move implicates the usual suspects. Among the plausible explanations, two options resonate. First, that the “secularization of public discourse necessarily results from increased pluralism in American society” and second, “that it was the deliberate product of a determined faction on the Supreme Court.” In reality, any explanation that simply blames “judges leaves unanswered the question of why they interpreted the Constitution in so secularist a manner . . . [and] underestimates the extent to which the decisions of the Warren Court reflected the common wisdom of their time.”

The explanatory force of the common wisdom may be consistent with the costs of “muddling through,” which can be analogized to Larry Alexander’s understanding of the right of freedom of expression. As thus understood, secularization signifies “practices that have a rule-consequentialist structure of justification specific to particular kinds of questions and to particular cultures, eras, and technologies.” In harmony with that perception, one fruitful hypothesis suggests that the secularized public square mirrors “the prior secularization of the university” grounded in the deduction that

12. See Wilfred McClay, Foreword to SHANNON, supra note 11, at viii.
14. See Rubin, supra note 9, at 74.
15. See Scott v. Sandford (Dred Scott), 60 U.S. (19 How.) 393, 410 (1856) (describing the exclusion of members of the Negro race from the civilized world). Justice Taney took the view that even free blacks could not be citizens within the meaning of the United States Constitution. Id. at 418-19.
18. Id.; see also THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 889 (Kermit L. Hall et al. eds., 2d ed. 2005) [hereinafter OXFORD COMPANION].
20. See, e.g., Dred Scott, 60 U.S. at 454-455 (Wayne, J., concurring).
22. Id.
23. Id. But see Harry V. Jaffa, Original Intent and the American Soul, CLAREMONT REV. BOOKS, Winter 2005-2006, at 36, 36 (“The struggle for control of the Supreme Court is a profound political struggle, going to the heart of the meaning of our existence as a free people. For more than a half century, liberal judicial activism has been riding roughshod over the Constitution bequeathed to us by the founders.”).
25. Id. at 180-81.
pedagogy has stripped theology from the branch of knowledge and mandates that it and religion be understood as “merely an elaboration of [subjective] belief.”

Another proposition, consistent with the first, intimates that the public square reverberates with a pedagogy that denies there are objective moral truths that reason can disclose without appeals to faith and revelation.

Although Larry Alexander argues that attempts to distinguish between faith and reason are tenuous on an epistemological level, these two moves not only anticipate Richard Rorty’s various claims about truth and progress, but also may have legal consequence, that place adherents to religiously grounded views at a disadvantage. Whatever its source, the religious-secular divide reflects a clash of orthodoxies in which the terms of the debate may render religious conviction without the defensive cover supplied by rationality that is achieved through contestation—if, of course, rationality and truth can be relied on in a progressively more postmodern world.

Given the clash of orthodoxies, the disputed territory encircled by First Amendment jurisprudence tends to discharge more heat than light. Against this backdrop, the United States Supreme Court’s 2006 decision denying a writ of certiorari to the United States Court of Appeals for the Second Circuit, once again, proclaimed a preeminent role for courts in public school governance and freedom of expression disputes. The Supreme Court refused to reconsider a Second Circuit opinion, Peck v. Baldwinsville Central School District, which concluded it may be possible for plaintiffs to prevail in a lawsuit to vindicate freedom of expression rights of children. At issue was a school district’s censorship of an art poster drawn by Antonio Peck, a kindergartner. The poster, drawn as part of a class assignment, contained a picture of Jesus.

In reversing the lower court’s opinion in favor of the school district, the Second Circuit concentrated on the plaintiff’s freedom of speech claims, despite the fact that the poster was drawn in what has been called a nonpublic forum. The Second Circuit suggested that Antonio Peck’s right to display the poster could withstand the school district’s motion for summary judgment. Although the court denied Antonio’s establishment clause claim, “[t]he Second Circuit joined the Ninth and the Eleventh Circuits in holding that public schools may not censor a student’s viewpoint on a permissible subject matter when it is responsive to a school

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27. See Response of Hadley Arkes, Correspondence, CLAREMONT REV. BOOKS, Winter 2005-2006, at 4, 4 (suggesting that “human beings have reasoned about these matters of moral consequence . . . without appeals to faith and revelation” as a form of natural law and perhaps natural rights). It is also possible that today “bad natural rights teachings have all but forced out good natural rights teachings.” Ralph A. Rossum, A More Dependable Approach, CLAREMONT REV. BOOKS, Winter 2005-2006, at 37, 37.
28. ALEXANDER, supra note 24, at 152 (noting that it may be impossible to make a convincing epistemological distinction between faith and reason).
29. For example, postmodernists contend that there is no such thing as truth “out there.” See, e.g., richard rorty, Contingency, Irony, and Solidarity 5 (1989); richard rorty, Truth and Progress: Philosophical Papers, Volume 3, at 20 (1998) [hereinafter RORTY, TRUTH AND PROGRESS] (raising the postmodern pragmatist possibility that “the difference between true beliefs considered as useful nonrepresentational mental states, and as accurate (and therefore useful) representations of reality, seemed a difference that could make no difference to practice”). But see J. BUDZISZEWSKI, WHAT WE CAN’T NOT KNOW 167 (2003) (noting that antifoundationalism may denote the contemporary manifestation of Sophism that appears to deny reality while resisting metanarratives that attempt to make sense out of life).
30. See Rorty, Truth and Progress, supra note 29, at 185 (suggesting that moral progress largely consists of sad and sentimental stories, which have as their objective, answering this question: “Why should I care about a stranger, a person who is no kin to me?” Evidently, the appropriate answer drives us toward inclusion as a value).
35. Id. at 621-22.
36. Id. at 625-33.
37. Id. at 626-27.
38. Id. at 624-25 (noting “that further discovery might uncover a) evidence of animus or hostility by [Baldwinsville Central School District] toward Christianity; or toward religion generally, and b) indications as to the accuracy of [the school district’s] claim that Antonio’s poster was not responsive to the assignment”).
39. Id. at 620.
assignment or program.40 By contrast, “[t]he First and Tenth [C]ircuits hold that viewpoint discrimination in the curricular context may be permissible.”41

The question becomes: how did America reach the position where student posters so effectively threaten societal cohesion that bureaucratic or judicial intervention is required? The Baldwinsville case may offer an answer. One reading of the facts of the case suggests that school officials are committed to the opinion that society must indoctrinate children so they are capable of autonomy.42 Apparently, instead of answering one basic question—“[w]hat is best for man”—students must answer, and see as important, another—“what is best for me”—as part of the liberal and republican focus “that exalts the individual self as a bundle of desires,” the fulfillment of which are protected rights.43 Uniform with this verdict, public school officials as enablers of the “liberal tradition” have been rightly concerned about the necessity to screen out nonhomogenizing viewpoints that might upset members of the public, or otherwise call into question the presumably desirable secular consensus on the meaning of life, the global environment, or the cosmos.44

By contrast, for parents of deep religious devotion, liberal principles and educational pedagogy may supply important values but not necessarily sufficient conditions for a life lived in the kind of community that they envision. In agreement with philosopher Alasdair MacIntyre’s critique of contemporary intellectual and popular culture,45 captivated by the impossibility of imagining civilization without “a sense of sacred,”46 such parents may see their children as something more than a random bundle of preferences cabined solely by subjectivism.47 If society’s consensus holds that everyone should seek fulfillment in atomistic autonomy, it is possible that all sorts of parents (religious and nonreligious) will disagree with that consensus for all sorts of reasons. This development leads inexorably to tension between a liberal state that acts as a creator of meaning, and communities and individuals that are animated by an alternative viewpoint.48 Tension is not a surprising development. “No state is truly interested in preserving independent communities of meanings. States, historically, have been interested in preserving themselves.”49

While it could be argued that a “liberal state should be different, because of its supposed neutrality among competing conceptions of the good,” in actuality the liberal state may be “just as insistent as any other that everybody should believe the same basic things . . . as long as they are liberal things.”50 Although pluralists contend that judicial protection of diverse opinions can rightly be defended on a countermajoritarian basis,51 it is likely that countermajoritarianism remains ineffective when courts

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40. News Release, Liberty Counsel, supra note 33; see also Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (en banc) (applying viewpoint neutrality standard to a nonpublic school forum); Searcey v. Harris, 888 F.2d 1314, 1324 (11th Cir. 1989) (disallowing viewpoint-based discrimination in a nonpublic forum).

41. News Release, Liberty Counsel, supra note 33; see also Fleming v. Jefferson County Sch. Dist. R-I, 298 F.3d 918, 926-29 (10th Cir. 2002) (allowing “educators to make viewpoint-based decisions about school-sponsored speech”); Ward v. Hickey, 996 F.2d 448, 450 (1st Cir. 1993) (affirming the district court’s judgment sustaining a public school committee’s decision to not reappoint a biology teacher who discussed abortion from her perspective in class).


44. This viewpoint may operate consistently with the conclusion that public schools should construct children for the benefit of the state. See id. at 50.

45. Simply put by Richard John Neuhaus, MacIntyre argues “that not only intellectuals but our popular culture has largely abandoned an understanding of moral truth and virtue, with the result that we are all dog-paddling in the murky sea of ‘modern emotivism.’” RICHARD JOHN NEUHAUS, CATHOLIC MATTERS: CONFUSION, CONTROVERSY, AND THE SPLENDOR OF TRUTH 145-46 (2006).

46. See George Weigel, Foreword to JOSEPH RATZINGER & MARCELLO PERA, WITHOUT ROOTS: THE WEST, RELATIVISM, CHRISTIANITY, ISLAM, at vii, vii (Michael F. Moore trans., 2006) (asking the question: “[I]s it possible to imagine anything properly called ‘civilization’ that lacks a sense of the sacred?”).

47. See NEUHAUS, supra note 45, at 145-46.

48. Carter, supra note 43, at 31 (“If the state tries to domesticate religion, its most powerful competitor in the creation of meaning, then religion tries simultaneously to subvert the state.”).

49. Id. at 34.

50. Id. (omission in original).

themselves are captured and captivated by the prevailing dogma, which requires the minority to lose even when the majority is wrong.\footnote{Id. at 719.} As an empirical matter, few, if any, adherents to non-Christian faiths have won religious freedom cases before the Supreme Court.\footnote{Carter, supra note 43, at 35-36.} Equally true, “[d]issenting Christians have not fared well either, [particularly] in recent years.”\footnote{Id. at 36; see also Gregory C. Sisk, How Traditional and Minority Religions Fare in the Courts: Empirical Evidence from Religious Liberty Cases, 76 U. Colo. L. Rev. 1021, 1023-24 (2005) (noting that “adherents to traditionalist Christian faiths . . . enter the courthouse doors at a distinct disadvantage”).} Indeed, if courts are driven by a calculus that is premised on their extra-constitutional role as our national conciliator, then it is ever more likely that adjudication leads inevitably to minority acquiescence when members of resisting faith communities’ practices and motives are seen as illiberal by the defenders of the secular consensus. My thesis is that members of what might be called “minority faiths” that hold sincere but “divisive views” are increasingly likely to be placed at risk by language that reifies society’s “progressive” interest in suppression through conciliation. This process is likely to expand when school hierarchs transmute judicial language and goals into operational dogma while raising the putatively omnipresent specter of division when they confront adherents to deeply held religious faiths and diverse practices.

In Part II, I consider the Baldwinsville case as well as the split among the United States courts of appeal. Although I provide some analysis of the facts, the district court case and the Second Circuit’s holding, the primary purpose of this examination is not to provide extensive legal analysis, but to discover and set forth the terms of the debate. This investigation includes an excursion into the notion of evaluative neutrality, metaphysics, epistemology, and the nature of liberal society. Regardless of the actual outcome of Baldwinsville or any similar case, I conclude it is highly doubtful that the prevailing terms of the debate can be seen to favor religious expression that reflects deeply held, as opposed to, shallow beliefs.

In Part III, I build on the claims of Steven Smith, Robert Nagel, and Larry Alexander, coupled with the observation that “[i]t is simply self-congratulatory to suppose that the members of our own persuasion have reached their convictions in a deeply reflective way, whereas those espousing opinions we hate are superficial,”\footnote{Ackerman, supra note 51, at 719.} in order to contest the justification offered for shame production in public schools. I conclude that because lower courts and public officials are constrained by Supreme Court precedents and the common wisdom, whether they rule in favor of or against viewpoint discrimination in a given case, the paramount objective of judges and school hierarchs is to achieve conciliation and inclusion, even at the price of vilification. As such, public officials and courts, whatever language they deploy, are merely doing politics.

[Note: Catholic University Law Review is in the process of publishing this article and it will be edited accordingly. Only the introduction is available at the moment. The full-text will be available upon publication.]