

# ESSAY

## Let's Bring Religion into the Public Schools and Respect the Religion Clauses

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### I. INTRODUCTION

The purpose of this Essay is to propose to public school teachers, school administrators, and state legislators several ways in which religious subjects and practices may be recognized by public education without contradicting the Religion Clauses of the United States Constitution. The dual goals of this proposal are to help invigorate public education by facilitating the teaching of issues that can be of substantial interest and importance to many students, and to respect the diverse religious values, practices, and beliefs of public school students, parents, and teachers. This Essay begins by sketching the context of this thesis and by outlining the basic principles of the Religion Clauses. It then proposes ways of incorporating religious subjects into public school activities. This proposal would recognize the ideas of creationism or "creation science" in particular ways and also help allow voluntary collective prayers by students, including prayers by student athletes before athletic events. This policy also respects the principles of the Establishment and Free Exercise Clauses of the Constitution by keeping any teaching of creationism essentially separate from the teaching of evolution, encouraging the toleration of religious questioning by students in science classes, and recommending that the Kansas legislature clarify and expand the statutory right of students to be excused from teaching that may burden their religious beliefs.

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## II. BACKGROUND

Several years ago, I attended a lecture at which Nel Noddings, a philosopher at Stanford University's School of Education, recommended that religious subjects be brought into public school curricula in order to address important questions that concern many students and to help motivate students in studying a variety of subjects.<sup>1</sup> She suggested, for example, that Descartes' proof of God could be used to stimulate the study of logic in math courses. American and world history might be invigorated by the careful study of religious wars, the religious motivations to abolish or retain slavery, and other religious conflicts that have informed our history. Reading and discussing religious and anti-clerical fiction might similarly stimulate the study of literature, or at least the writing of papers by individual students. Professor Noddings argued that introducing such religious subjects into the public school curriculum not only would make public education more interesting and relevant for many students, but would enrich their thinking about the existential questions of creation, God, human purposes, and ethics, thus improving the education of democratic citizens in our multicultural society.<sup>2</sup>

As a parent of children then attending public schools, I thought, "what a capital idea!" But as a professor of constitutional law, I was immediately concerned about possible violations of the Establishment Clause that require a certain kind of separation between church and state. I also worried about the practical problem of how Professor Noddings' ideas might be implemented by public school teachers who themselves hold diverse views about religion. Would many teachers be inclined to favor religion, and thus promote it in teaching these ideas? Conversely, might others tend to dismiss religious ideas in the schoolroom out of hand, thereby disparaging or excluding the beliefs of individual students, and perhaps trampling on their rights to the free exercise of religion and to free speech? In other words, can religious matters be effectively incorporated into public school activities in appropriate and pedagogically neutral ways?

The recent debates in Kansas about the teaching of evolution and "creation science" in public schools suggest the importance of exploring the wisdom and constitutionality of proposals like Professor

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1. Nel Noddings, Lecture at the University of Missouri-Kansas City School of Education. Professor Noddings has also published a book on this subject. NEL NODDINGS, EDUCATING FOR INTELLIGENT BELIEF OR UNBELIEF (1993) [hereinafter NODDINGS, INTELLIGENT BELIEF].

2. See NODDINGS, INTELLIGENT BELIEF, *supra* note 1, at 1-61 (discussing how to treat religious questions in courses like math, science, and social studies in public schools).

Noddings's.<sup>3</sup> We should ascertain whether there is room for any healthy compromise between the contemporary political interest in expanding the attention paid to religion in public education and the traditional notion of a relatively strict separation between public education and religion.<sup>4</sup> Important values are at stake, including the effective teaching of high school science (in particular biology, the course that usually introduces students to scientific method), toleration and respect for persons with diverse religious views, and even the existence of public schools as a basic democratic institution. If some kind of healthy compromise cannot be reached, the teaching of science may suffer, even though the Kansas Board of Education has reversed its 1999 ruling that disfavored the teaching of evolution and cosmology in public schools.<sup>5</sup> The religious

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3. In 1999, the Kansas Board of Education deleted critical aspects of evolution, geology, and cosmology from the state's standards and tests for public schools. *See, e.g.*, Letter from Kansas State Board of Education to Kansas Educators (Apr. 13, 2000) [hereinafter KSBE letter] (on file with author) ("[T]he [new] standards do not include the evolutionary theory that one species can evolve into another species, references to geologic time or the Big Bang theory of the origin of the Earth."). On August 1, 2000, creationists lost in three primary elections that left a minority of three board members supporting these standards. Jim McLean, *Conservatives Lose Control of Education Board*, TOPEKA CAP.-J., Aug. 2, 2000, at 1-A. On February 14, 2001, the Board of Education restored evolutionary theory, geology, and cosmology to the state's standards for science education. Roger Myers, *Board Revives Evolution*, TOPEKA CAP.-J., Feb. 15, 2001, at 1-A. This change, however, will not end the debate between creationists and scientists, nor will it determine larger issues about the role of proper religious discussions in public schools. *See generally, e.g.*, JAMES W. FRASER, *BETWEEN CHURCH AND STATE: RELIGION AND PUBLIC EDUCATION IN A MULTICULTURAL AMERICA* (1999) (stating that the central question of the book is "[h]ow should a diverse and democratic society deal with issues of religion in public schools?"); Derek H. Davis, *Kansas Versus Darwin: Examining the History and Future of the Creationism-Evolution Controversy in American Public Schools*, 9 KAN. J. L. & PUB. POL'Y 205 (1999) (discussing approaches to the creationism-evolution controversy); Lisa D. Kirkpatrick, *Forgetting the Lessons of History: The Evolution of Creationism and Current Trends to Restrict the Teaching of Evolution in the Public Schools*, 49 DRAKE L. REV. 125, 135-40 (2000) (discussing the Kansas Board of Education's 1999 ruling and similar actions in other states including Alabama, Kentucky, and Illinois); John W. Fountain, *Kansas Puts Evolution Back into Public Schools: New Standards Reverse Debated 1999 Rule*, N.Y. TIMES, Feb. 15, 2001, at A12 (quoting Kansas Commissioner of Education Andy Tompkins to the effect that the creationism-evolution issue will remain in Kansas).

The term "creation science" is placed in quotation marks throughout this Essay because this body of thought appears to include unquestionable faith in a creator, a faith which, unlike scientific theories, does not need to be supported by persuasive empirical evidence. *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578, 592 (1987) (noting that "creation science," as defined by a state statute, "embodies the religious belief that a supernatural creator was responsible for the creation of humankind").

4. As a son of public school teachers, I confess to having held to a notion of strict separation between religion and public education for most of my life.

5. *See supra* note 3. Although the subjects of species evolution, geologic time, and the Big Bang theory of the origin of the universe have been returned to Kansas standards and state tests for public schools, thus restoring incentives to teach these subjects, we can expect creationists to continue questioning the teaching of these subjects with local school boards, school administrators, and teachers. Moreover, as teachers tend "to teach to the test," many local school board members,

views of individual public school students may be treated harshly, without due civility and respect,<sup>6</sup> and demands for dismantling public education in favor of voucher systems that would support selective and separatist private schools will surely continue to escalate. More fundamentally, how should a liberal democracy like ours engage religious and other cultural diversity in ways that might best teach tolerance and respect for the different views of others? Providing a comprehensive "civic education" that encompasses religious matters more freely and substantially could be a good way to address these complicated issues.<sup>7</sup>

This Essay thus proposes that Kansas public schools, the Kansas Board of Education, and the Kansas legislature take several steps to introduce an optimum study of religious subjects in public schools that is consistent with the Religion Clauses in the United States Constitution. This proposal focuses on incorporating religious subjects into the public school curriculum, recommends improving the current statutory exemption from public school requirements for persons with faith-based objections, and considers the types of religious student clubs and collective prayer activities that may be undertaken on a voluntary basis by public school students.

I should recognize at the outset that individual teachers and school districts already engage in some of the actions recommended by this Essay. The main point of the Essay is to encourage expansion of these practices by articulating the justifications and constitutional considerations that support them. I should note too that most of this proposal is not regulatory in nature. In essence, it recommends actions

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school administrators, and public school teachers may tend to respond to parents who voice these objections, and thereby limit science teaching. Cf. Fountain, *supra* note 3 (quoting the Kansas Commissioner of Education to the effect that the creationism-evolution debate will remain in Kansas schools).

6. See NODDINGS, *INTELLIGENT BELIEF*, *supra* note 1, at 143-44 (arguing that ignoring the beliefs of some students is demeaning to them). See generally WARREN A. NORD, *RELIGION & AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA* (1995) (arguing that the pervasive secularism of public schools implicitly teaches a secular worldview, and that equality obligates public schools to present religious worldviews as well).

7. On the values and complexities of educating democratic citizens in public schools, see generally AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987) (proposing to institute a common standard of education compatible with diversity); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000) (suggesting "that diversity and difference are not always to be celebrated: political work needs to be done to shape a world in which forms of diversity can be considered valuable rather than sources of fear and violence"); Nel Noddings, *Renewing Democracy in Schools*, 80 *PHI DELTA KAPPAN* 579 (1999) [hereinafter Noddings, *Renewing Democracy*] (arguing "that the movement for uniform standards may actually handicap efforts to renew democracy in the schools").

that teachers and school districts might choose to implement in order to incorporate religious matters into public school activities—but only after appropriate deliberations and preparations to ensure that these actions would be desirable and effective.

This proposal, of course, will face several formidable obstacles or criticisms. First, as an apparent recommendation for the “systematic reform” of public education, there appears to be no natural political constituency to support the proposal, and there are several constituencies, including particular religious groups, teachers, and school administrators, that may oppose it in its entirety. This situation not only might defeat the systematic reforms, but also could produce a piecemeal approach, with the adoption of some measures but not others, which would defeat the proposal’s overall value of promoting healthy compromise. Second, implementation of the proposal’s key aspects may face understandable bureaucratic resistance from several sources—most notably teachers, who would be asked to add new responsibilities to their already complex jobs, and school administrators, who would be presented with new potential “administrative nightmares” in implementing policies for teaching religious subjects, tolerating the religious questioning of secular subjects, and providing exemptions to students with faith-based objections to the study of particular subjects. Third, a potential value of this proposal is to make public schools more attractive to fundamentalist religious groups, who often support competing proposals to bring prayer into public schools, or oppose the teaching of subjects that question their beliefs, such as evolution, cosmology, and geology. These groups may not be interested in a compromise policy, like this one, that supports only limited kinds of voluntary student prayers in public schools and provides for the teaching of scientific subjects as science, while recognizing exemptions for those who have religious objections. Finally, it might be argued that the timing of this proposal is unfortunate—that it should not be advanced at this time when the Kansas polity is roiled by controversies over the role of religion in public education.

At this point, several general responses to these criticisms can be made. One is that the proposal and the justifications for each of its components have been tailored to meet or deflect these objections. How well this tailoring works, of course, remains to be seen. A second response is that each of the proposal’s components may be worth implementing on its own terms. A piecemeal approach would defeat the overall compromise value of making public schools more attractive to groups who oppose current practices, but each component has justifications that are independent of the proposal’s overall value. A third response is that major aspects of this proposal can only occur over

time, as individual school districts and teachers make choices to implement the incorporation of religious issues within their teaching. Moreover, during this period, the schools of education in Kansas will have time to organize appropriate courses to help train teachers to present religious subjects or respond to religious questioning in pedagogically neutral and appropriate ways. Finally, while the proposal's complexity and its opposing constituencies may ensure that significant parts of it would not succeed, it also speaks to individual teachers, administrators, and school districts that may choose to implement it in its entirety or in significant part. In this event, the proposal would advance democratic education in small ways at least. In addition, at the most general level, this proposal is intended to stimulate discussion in public forums about religion, science, and public education. As such, it is designed to promote "democratic deliberations" about our seemingly foundational disagreements over the nature of public education. Our society needs more of these deliberations, not less.<sup>8</sup> Perhaps over time, such deliberations might even help create "unnatural" constituencies of teachers, students, parents, administrators, and policymakers who support the systematic aspects and overall values of this proposal.

### III. CONSTITUTIONAL PRINCIPLES

Broadly speaking, the Establishment and Free Exercise doctrines of the First Amendment rest upon three foundational principles.<sup>9</sup> The state *may not promote or endorse* religion, for example, by requiring Bible readings<sup>10</sup> or official prayers at the beginning of each day in public schools,<sup>11</sup> establishing official prayers at public school graduations,<sup>12</sup> or even organizing student-led prayers at high school football games.<sup>13</sup> The

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8. See generally AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (calling for more discussion in public forums about moral disagreements); Robert E. Goodin, *Democratic Deliberation Within*, 29 PHIL. & PUB. AFF. 81 (2000) (arguing that an important aspect of "democratic deliberation" is individual self-deliberation that engages the democratic virtues of toleration, an understanding of others, empathy for others, and appreciation for the possibilities of compromise between conflicting perspectives).

9. See, e.g., Nadine Strossen, *How Much God in the Schools?: A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 617-26 (1995) (discussing each of the foundational principles in light of recent cases and public school trends).

10. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963).

11. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

12. *Lee v. Weisman*, 505 U.S. 577, 599 (1992); see also Strossen, *supra* note 9, at 626-31; *infra* text accompanying notes 92-95 (discussing "student-led" prayers at public school graduations and predicting, notwithstanding the split in lower court opinions, that *Lee v. Weisman* also dictates constitutional invalidation of school-organized student prayers at commencement ceremonies).

13. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2280-81 (2000).

state *may respect* religion, for example, by inscribing "In God We Trust" on U.S. coins,<sup>14</sup> hiring chaplains to consult with legislators or deliver prayers at the beginning of legislative sessions,<sup>15</sup> or teaching religious subjects in a secular or historical manner within public schools.<sup>16</sup> The state *may not disadvantage or suppress* the religious beliefs or practices of individuals or institutions by prohibiting private religious schools or otherwise imposing burdensome regulations on religious practices.<sup>17</sup>

There will be "hard cases," of course, where the application of these principles or the characterization of a factual situation is contested and constitutional opinions divide. For example, the United States Supreme Court recently split five to four over the question whether the university funding of student organizations may extend to student religious publications so as not to *disadvantage* a religious group, or whether this funding would *promote* religion and violate the Establishment Clause.<sup>18</sup> Any proposal to optimize the study of religious subjects in public schools consistent with the Religion Clauses certainly will not be free of such difficult cases. All that one can do in these cases, I believe, is to stake out what appears to be the most reasonable position, recognize the opposing arguments, and provide reasons for choosing one's position.

#### IV. THE PROPOSAL

This proposal has three major components. First, religious subjects should deliberately be introduced into high school literature and history

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14. *Schempp*, 374 U.S. at 303 (Brennan, J., concurring); see also *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996) (holding use of the motto "In God We Trust" does not violate the Establishment Clause); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979) (same); *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970) (same).

15. *Marsh v. Chambers*, 463 U.S. 783, 792-93 (1983).

16. *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Schempp*, 374 U.S. at 225.

17. See *Wisconsin v. Yoder*, 406 U.S. 205, 207 & n.2, 219 (1972) (recognizing the free exercise right of the Amish to withdraw their children from public schools after eighth grade notwithstanding a state law compelling school attendance until age sixteen); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (invalidating a state law requiring public school attendance for children between the ages of eight and sixteen because "liberty . . . excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."). The principle against disadvantage or suppression of religion underlies Establishment Clause doctrine. For example, the Supreme Court in *Lemon v. Kurtzman* prohibited "excessive entanglement" between state and religious institutions under the Establishment Clause, 403 U.S. 602, 612-13 (1971), *modified*, 521 U.S. 203 (1997), and, in *Wisconsin v. Yoder*, declined to apply the state's mandatory school attendance law on Free Exercise grounds. 406 U.S. at 219.

18. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822, 837-46 (1995) (holding that funding to certain student religious publications would not violate the Establishment Clause).

courses, including the development of elective courses on such subjects as comparative religion and theories of the origins of the universe, Earth, and humankind. An elective course on "theories of our origins," for example, could provide a comparative study of creationism, evolution theory, geology, and other ideas or stories about the origins of the world and human communities. Second, high school science courses, especially those in biology, geology, and physics, should be "framed" at the outset by the recognition that there are competing ideas, such as creationism, that conflict with the consensus in scientific communities about the kinds of theoretical knowledge in which scientists have a high degree of confidence due to empirical observations. High school science teachers should also be encouraged, or instructed if necessary, to respect the religious questioning of scientific subjects by their students. However, religious beliefs should not be formally incorporated into the science curriculum, for this would have the likely effect of endorsing the religious beliefs of some students and diminishing the effectiveness of science education. Third, the Kansas legislature should enact a statute that requires public school districts to provide feasible alternative instruction for students with religious or other conscientious objections because the study of particular subjects burdens their religious or ethical beliefs. There is a statutory right in Kansas to an exemption for any "public school . . . activity which is contrary to the religious teachings of the child,"<sup>19</sup> but this exemption is weakly articulated and fails to mandate alternative study for students who obtain the exemption. Moreover, this exemption could be unconstitutional because it *promotes or endorses religion* and fails to provide *equal protection of the law* for persons who might object to public school teaching on the grounds of nonreligious matters of conscience.<sup>20</sup>

In addition, two other steps might be taken to enhance the religious contexts of public schooling in a manner consistent with the Religion Clauses. Under the Equal Access Act,<sup>21</sup> public schools that permit extracurricular clubs may not exclude religious clubs or activities from sponsorship or from the school's facilities.<sup>22</sup> Public school districts in Kansas thus may choose to promote broad varieties of extracurricular activities, including religious activities and studies. Furthermore, these voluntary extracurricular activities need not be concerned with

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19. KAN. STAT. ANN. § 72-1111(e) (Supp. 2000).

20. See *infra* note 75 and accompanying text (discussing the constitutionality of these exemptions under the Establishment Clause).

21. 20 U.S.C. §§ 4071-4074 (1994).

22. *Id.* § 4071(a).

maintaining a “pedagogically neutral” view of religious subjects, so long as the school’s criteria for supporting student clubs are neutral. As a second step, the Kansas Board of Education or the state’s Attorney General could issue a regulation or opinion clarifying the legality of voluntary prayers by public school students in accordance with case law and the U.S. Department of Education’s standards on Religious Expression in Public Schools.<sup>23</sup> This regulation or opinion could recognize the legality of particular kinds of student prayers, including those by student athletes, as long as they are neither required nor led by coaches or other public employees, and do not disrupt school functions.<sup>24</sup> These two steps would supplement the proposal’s major components.

#### A. *Literature, History, and Theology*

Professor Noddings’s basic idea is that many high school students are intrigued by the consideration of existential questions, and that these questions may usefully be studied in a pedagogically neutral manner within public schools. She argues that high school students should be exposed in a balanced and respectful way to works of art; historical, political, and social subjects; and scientific theories that raise fundamental questions about the creation of our world, the existence and nature of our God or gods, the different roles that religions can play in politics and society, and the connections between religion, morality, and ethical life.<sup>25</sup> She recognizes that this idea raises several practical and political problems. Many public school teachers may experience difficulty teaching religious subjects or responding to religious questions with adequate knowledge and “pedagogical neutrality.” Existential questions also tend to cross disciplinary lines, and may often be difficult to implement in public high school curricula that have been carefully compartmentalized. Moreover, many parents may object to the presentation of balanced (or, in their eyes, “critical”) views of religion and religious values.<sup>26</sup> In response to these problems, Professor Noddings argues that public school students deserve this kind of education and that our society already trusts public school teachers to

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23. OFFICE OF EDUC. RESEARCH & IMPROVEMENT, U.S. DEP’T. OF EDUC., RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS: A STATEMENT OF PRINCIPLES 6-7 (1998), available at <http://www.ed.gov/Speeches/08-1995/religion.html> [hereinafter U.S. DEP’T OF EDUC.].

24. See *infra* text accompanying notes 111-12.

25. See generally NODDINGS, INTELLIGENT BELIEF, *supra* note 1.

26. See *id.* at 132-44 (discussing the constitutionality and implementation of such teaching, including the preparation that would be required by teachers and how they could meet the objections of fundamentalists).

train their students in equally complex and contentious issues, say, for example, mathematics or race relations.<sup>27</sup> We thus should attempt to train and trust our public school teachers to deal with religious subjects in a similar manner.<sup>28</sup> Indeed, Professor Noddings's book, *Educating for Intelligent Belief or Unbelief*, may be viewed as a text for use in schools of education to help prepare teachers to raise religious subjects in an appropriate and pedagogically neutral manner.<sup>29</sup>

Significantly, Professor Noddings recommends that religious materials bearing most directly on major existential questions "not be made a part of the formal curriculum," but rather be included informally as situations warrant.<sup>30</sup> In general, this seems like sage advice. Different students will be interested in different subjects, and are likely to raise different kinds of questions at different times. Moreover, the comfort zones of teachers in dealing with different religious subjects are likely to be quite varied. Existential questions are often essentially "interdisciplinary" and likely to pop up in any of several parts of a high school curriculum, and it is difficult to imagine objective testing about existential questions as such. On the other hand, in order to promote a *policy* of bringing religious subjects into the public schools, some degree of formalization seems necessary. This proposal thus departs from Professor Noddings's proposal by specifying several curriculum changes. Although I am mindful of her advice, I shall try to keep these specifications quite open-ended. Of course, the specification of new courses or parts of courses to cover religious subjects will entail some delicate work by teachers in order to construct "pedagogically neutral" evaluations of students' comprehension of such subjects.

First, literature that raises basic existential questions about the presence and nature of God, the presence and nature of evil, human purposes, and ethics should be included in high school literature courses. Teachers of these courses should lead the discussion of such works in a pedagogically neutral manner that recognizes different religious views and nonreligious, or even anticlerical, perspectives on these questions. This constraint, however, would not apply to individual students, who should be free to express their own opinions as a matter of free speech and free exercise of religion, to say nothing of good education.

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27. *Id.* at 134-39.

28. *Id.* at 138-41.

29. *Id.* at xv.

30. *See id.* at 134 ("My preference would be to include the material as sets of suggestions for enriching and supplementing standard topics.").

Classic texts for the exploration of good and evil, and the presence or nature of God, include Nathaniel Hawthorne's *The Scarlet Letter*<sup>31</sup> and Herman Melville's *Billy Budd*.<sup>32</sup> As additional examples, one can imagine fruitful examinations by teachers and their students of the confrontations between the "whiskey priest" and "Marxist policeman" in Graham Greene's *The Power and the Glory*,<sup>33</sup> of the very different (comparative) approaches to the search for religious meaning by a Muslim, Christian, and Hindu in E.M. Forster's *A Passage to India*,<sup>34</sup> and of Margaret Atwood's exploration of the complex space and relationships between science and religion in *Cat's Eye*.<sup>35</sup> Moreover, if individual teachers find it too difficult to maintain an appropriate pedagogical neutrality in their classes, or if existential literature proves too complex and frustrating for an entire class, literary works such as these can at least be included on optional reading lists or as possible subjects for individual writing assignments.<sup>36</sup>

An objection may be raised at this point that many high school students will be hesitant to discuss religious subjects in front of their peers, and class conversations will thus proceed unequally and to the disadvantage of some students. The likelihood of student hesitancy seems well-founded, but this objection ignores the fact that most public school classroom discussions on other subjects, say politics or nonreligious literature, are probably similarly unbalanced. Moreover, many of us learn much more by listening than talking. In this

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31. NATHANIEL HAWTHORNE, *THE SCARLET LETTER: A ROMANCE* (Charles E. Merrill Publishing Co. 1969) (1850).

32. HERMAN MELVILLE, *BILLY BUDD, SAILOR: AND OTHER STORIES* (Penguin Books 1967) (1948).

33. GRAHAM GREENE, *THE POWER AND THE GLORY* (Viking Penguin 1990) (1940).

34. E.M. FORSTER, *A PASSAGE TO INDIA* (Harvest 1952) (1924).

35. MARGARET ATWOOD, *CAT'S EYE* (1988).

36. Other candidates for such lists include E.L. DOCTOROW, *CITY OF GOD* (2000) and KURT VONNEGUT, *CAT'S CRADLE* (1963). Doctorow's diffuse but intriguing new novel is reviewed by Madison Smartt Bell, *Asking the Big Questions*, WASH. POST, Mar. 5, 2000, at X04, reprinted in *GUARDIAN WKLY.*, Mar. 16-22, 2000, at 30:

The problem of evil and the God who permits it has been with us at least since the time of Job. In his new novel, E.L. Doctorow engages with most of its important 20th-century manifestations. He sets his sights on the ordering principles of the universe and the nature of the God who created it . . . if there is one.

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. . . In its deliberate incompleteness, it is the sort of philosophical novel that our times demand. If Doctorow cannot answer the questions he asks, who could? And he has asked them as cogently and as stubbornly as Job.

*Id.*

Second, in high school history and social studies courses, there are many opportunities, one might even say demands, for the inclusion of religious subjects to help teach these courses in interesting, accurate, and insightful ways. In world history, for example, the polytheism of ancient Greece and Rome may be contrasted with the monotheism of Judaism and Christianity. The tendency of religions to be intellectually and emotionally, if not socially, exclusive of other religions may be contrasted with the idea of religious tolerance developed by the Roman Empire as a means of social order among diverse religious communities.<sup>37</sup> The Protestant Reformation, and the ensuing religious wars in sixteenth- and seventeenth-century Europe, are also surely central aspects of our world history. In courses on American history, politics, and society, there are also ample opportunities, in some cases perhaps even requirements, for effective teaching of the good and the less attractive features of religion in public life. Thus, for example, one may teach how religious beliefs influenced both the abolitionist movement and the arguments for slavery before the Civil War.<sup>38</sup> The significance of Native American religions and African-American churches to their respective communities could be presented in a balanced, pedagogically neutral way, as well as the role that religion has played in supporting ideas of "civilizing" or assimilating Native Americans and in segregating American churches by race.<sup>39</sup>

More generally, the role of religion in American politics throughout the nineteenth and twentieth centuries is an intriguing and important aspect of American history. Exemplary subjects include the issue of prayer in public schools, which has ranged from the establishment of private Catholic schools in the nineteenth century to avoid Protestant prayers in public schools, to the contemporary reactions of many Christian conservatives to the Supreme Court's decisions that have

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37. See, e.g., Jack Moser, *The Secularization of Equity: Ancient Religious Origins, Feudal Christian Influences, and Medieval Authoritarian Impacts on the Evolution of Legal Equitable Remedies*, 26 *CAP. U. L. REV.* 483, 492-93 (1997) (discussing Constantine's Edict of Milan, which established a policy of religious toleration in an attempt to restore and maintain political unity throughout the Roman Empire).

38. See NODDINGS, *INTELLIGENT BELIEF*, *supra* note 1, at 45 (noting the well-recognized role of Christians in the abolitionist movement and James Haught's less well-recognized finding that "almost half of the published defenses of slavery were written by ministers."); see also JAMES OAKES, *THE RULING RACE: A HISTORY OF AMERICAN SLAVEHOLDERS* 96-150 (1982) (describing the complex and nuanced religious beliefs about slavery that were held by southern slave owners).

39. See generally FRASER, *supra* note 3, at 83-103 (discussing the teaching of religion in Native American schools by Christian missionaries from 1819 to 1926); NODDINGS, *INTELLIGENT BELIEF*, *supra* note 1, at 46-53 (discussing Christianity and African-American churches in the context of advocating the teaching of the effect of religion on U.S. history).

declared official prayers in public schools unconstitutional.<sup>40</sup> Opposition to the teaching of evolution in public schools, which has ranged from attempts to ban the practice in the 1920s, to the contemporary movement to seek "equal time" for teaching "creation science" and evolution, is another exemplary subject.<sup>41</sup> In addition, any effective course on contemporary American history or politics can hardly avoid covering the school prayer and abortion issues in constitutional law or the influence of religious views on these and other public issues.<sup>42</sup>

In a more innovative vein, elective courses could be oriented toward the study of how humans in history have coped with existential questions of human purposes and ethical choices. One model for such an elective course is provided by Theodore Zeldin's brilliant *An Intimate History of Humanity*.<sup>43</sup> In this book, Zeldin provides compelling stories of how individuals have dealt with existential questions together with a masterful historical analysis of how humans at different times in history have thought about these questions, their world, and their relationships to God, nature, and others.

Third, in the area of humanities and social sciences, school districts may also experiment with offering elective interdisciplinary courses that treat religious subjects more systematically. Thus, a course on comparative religion could be, one would think, a fascinating and

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40. See *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (holding that prayer at a public school graduation ceremony is unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38, 40, 61 (1984) (holding that an Alabama statute that authorized a period of silence for "meditation or voluntary prayer" in all public schools violated the First Amendment); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963) (holding that a Pennsylvania law requiring Bible verses to be read at the opening of each public school day was unconstitutional under the Establishment Clause); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (holding that requiring the daily recitation of a state-composed prayer in public schools is wholly inconsistent with the Establishment Clause); FRASER, *supra* note 3, at 49-65, 127-53 (discussing the relationship between religion and the schools from 1801 to 1892 and 1925 to 1968).

41. See, e.g., FRASER, *supra* note 3, at 116-26, 155-215 (discussing the Scopes trial, in which a teacher was prosecuted for teaching evolution in a public school, as well as religion in the schools from 1968 to 1990); EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION* (1997) (recounting the Scopes trial).

42. A significant problem for including any religious subject in history and social science courses may be the general absence of religious references in high school textbooks. See, e.g., NORD, *supra* note 6, at 140-46 (discussing history and economics textbooks); Paul C. Vitz, *Religion and Traditional Values in Public School Textbooks: An Empirical Study* 42-55 (discussing history textbooks), in NAT'L INST. OF EDUC., U.S. DEP'T OF EDUC., *EQUITY IN VALUES EDUCATION: DO THE VALUES EDUCATION ASPECTS OF PUBLIC SCHOOL CURRICULA DEAL FAIRLY WITH DIVERSE BELIEF SYSTEMS? FINAL REPORT* (1985). This absence means that teachers will need to supplement textbooks on their own in order to teach such religious subjects, unless the schools of education in Kansas develop appropriate supplemental materials to deal with religious questions in the classroom.

43. THEODORE ZELDIN, *AN INTIMATE HISTORY OF HUMANITY* (1994).

insightful way for many high school students to study world history in view of the importance of particular religions to our world's major civilizations (for example, Christianity, Judaism, Islam, Hinduism, and Buddhism). Similarly, American history might be studied through the lens of "the American civil religion," or the idea that this country has thrived from a widespread sharing of common religious and moral values among the adherents to America's many different religious creeds.<sup>44</sup>

Importantly, in view of the conflicts today over the teaching of "creation science" in the public schools,<sup>45</sup> school districts should also consider experimenting with interdisciplinary courses on such subjects as "theories of our origins," "the universe," or "creation." What is needed in such a course is a relatively full and balanced treatment of scientific and nonscientific perspectives on our origins. Contemporary scientific theories could be presented together with religious and artistic theories of our origins in ways that demonstrate possible differences and coherence among these views.<sup>46</sup> This course would not provide the kind of "equal time" demanded today for teaching creationism together with evolution, for evolution should continue to be taught as a separate subject in high school science courses. But this course would provide what might be called "equivalent time" for two different kinds of speech; that is, teaching about religiously grounded ideas and teaching about the scientific theory and evidence of evolution, geology, and cosmology. While providing this equivalent time for the ideas of creationism probably would not satisfy all opponents of secularism in public schools, it would help clarify the important proposition that by choosing to teach

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44. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE*, 219-49 (1985) (discussing the importance of religion in Americans' private and public lives). See generally ROBERT N. BELLAH, *THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL* (2d ed. 1992) ("I wish to examine the history of America's religious self-understanding, the myths that have developed to help us interpret who and what we are . . .").

45. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987) (invalidating Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act as violative of the Establishment Clause); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1005-06 (7th Cir. 1990) (upholding a school district's decision to prohibit a junior high school social studies teacher from teaching "creation science"); *Peloza v. Capistrano Unified Sch. Dist.*, 782 F. Supp. 1412, 1419-20 (C.D. Cal. 1992) (holding that a school district can prohibit a biology teacher from commenting on his own religious beliefs in the classroom), *rev'd on other grounds*, 37 F.3d 517 (9th Cir. 1994); NORD, *supra* note 6; COMM. ON SCI. & CREATIONISM, NAT'L ACADEMY OF SCIENCES, *SCIENCE AND CREATIONISM: A VIEW FROM THE NATIONAL ACADEMY OF SCIENCES* (1984); Davis, *supra* note 3.

46. See, e.g., generally Victor Weisskopf, *The Origin of the Universe*, N.Y. REV., Feb. 16, 1989 (summarizing the state of Big Bang theory and suggesting its consistency with certain biblical phrases about the creation of the world and with Haydn's oratorio, *The Creation*).

evolution, geology, and cosmology, public schools are not *endorsing* evolution or science as a belief system about life's ultimate causes, purposes, and values.

We should also consider the appropriate decision-making level for initiating the kinds of courses I have just proposed. While some of these changes could probably be implemented by individual teachers or faculties without much objection, many of the proposed changes, such as a course on contemporary American politics, or courses on comparative religions and "theories of origins," should certainly be open to widespread public comment and discussion. It thus may be appropriate in many, if not most, communities for local school boards to decide to include (or reject) such courses after creating effective opportunities for parents, teachers, and other members of the community to discuss them with the board. This approach, of course, would be consistent with our traditions of local democracy in operating public schools. Furthermore, this approach would ensure that novel courses are not offered in communities where there may be very substantial opposition to a balanced, pedagogically neutral study of religious subjects. These are, after all, optional ways to teach the public school curriculum, and there would seem to be no reason for a public school system to impose good (but not necessary) educational ideas on an unwilling and potentially disruptive majority, or even a very large and determined minority in the community.<sup>47</sup>

### 1. Separationist Objections

In addition to political opposition, we need to consider the constitutional and practical objections that may be raised against these changes. For those who believe in a "strict separation" between religion and public schools, there will be the basic objection that using public resources to study religious subjects in any way constitutes either an unwise or unconstitutional *promotion or endorsement* of religion, especially if the teachers of these subjects are likely to favor religious views. This objection can be usefully analyzed in two stages.

This objection fails as a constitutional claim that the *policy itself* would violate the Establishment Clause. The Supreme Court has said emphatically that the secular study of religious subjects in public schools

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47. Of course, if the state legislature approved of this proposal and wanted to encourage the introduction of religious subjects into the public school curriculum, it could establish a program to subsidize the effective teaching of religious subjects and evolution, geology, and cosmology in the public schools.

is constitutional.<sup>48</sup> Objections to the policy itself are persuasive only if it can be shown that it would be unwise for Kansas schools. In some communities it may be unwise, either because many persons in the community object to the balanced study of religious subjects, or because many teachers in the local school system are likely to favor or disfavor religious subjects in the classroom. In the first situation, political and administrative disruptions to public schooling from those who object may simply outweigh the pedagogical and political values of the proposed policy. In the second situation, the possibility of lawsuits and administrative costs in policing the classroom may outweigh the policy's values. But otherwise, the policy of teaching religious subjects neutrally in literature and history would promise great benefits by helping individual students think through their life purposes, providing better and more complete literature and history courses, and helping to educate our young citizens for their future lives in the diverse, multicultural society that America has become. Local school districts should thus consider carefully just how much weight should be given to the particular costs of this policy that would be incurred by implementing it in their own communities.

Separationist objections may also be advanced against the *implementation* of the teaching religious subjects in three somewhat related ways. First, individual teachers may in fact violate the Establishment Clause's proscriptions against promoting or disadvantaging religion. Second, it might be argued that it is inherently impossible to teach religious subjects in a pedagogically neutral way, for majoritarian religious views are likely to at least tacitly subordinate or disadvantage the religious views of minority groups in the classroom. Third, the costs of asking teachers to take on this new demand in their teaching work may be too great. These costs could include training teachers to discuss religious subjects in a pedagogically neutral way, imposing new, complex demands on public school teachers who are already burdened with many demands, and the administrative and litigation costs that could be necessary to prevent violations of the Establishment Clause in public school classrooms.

The best answers to these separationist objections, I think, are that we already depend on public school teachers to handle complex and sensitive demands throughout their work, that by and large they do a pretty good job of dealing with such demands, and that an open discussion of existential questions may be the best way to create an

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48. See cases cited *supra* note 16.

environment of tolerance and respect for minority religious views, as well as other kinds of minority perspectives. We expect public school teachers to instruct beginners in complex ideas and subjects, and we expect them to deal with politically and personally sensitive subjects, such as race relations or the prevention of sexual harassment among students. Moreover, by their example and discussion of particular subjects and ideas, public school teachers inevitably provide a kind of moral education of their students whether we (or they) like it or not. In addition, the open discussion of religious views among students will tend to question stereotypical thinking about "other religions," and could therefore promote increased measures of respect and tolerance.<sup>49</sup> In this context, then, including religious subjects in the literature and history curricula of public high schools does not seem as daunting as it is often made out to be, and this policy conceivably would enrich and improve the inherent moral education provided by our public schools.

Moreover, the objection that many teachers may violate the Establishment Clause in presenting religious subjects may be something of a red herring. Although there may be an understandable fear among teachers that individual students and parents will react adversely to statements about religion in the classroom, if the teacher presents a subject with the clear intention of pedagogical neutrality, she should not be held responsible in any way for clashing interpretations placed on the statements by others. Furthermore, both this objection and the idea that teachers do not have either the necessary knowledge or time to prepare to teach religious subjects in a pedagogically neutral manner would be substantially mitigated if Kansas schools of education developed appropriate training for teachers.

## 2. Free Exercise Objections

In addition to these separationist objections, individual parents and students may complain that the study of religious subjects in public schools constitutes a significant burden on students' religious beliefs by imposing wrong ideas on them, thus violating their right to the free

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49. See, e.g., Sanford Levinson, *Some Reflections on Multiculturalism, "Equal Concern and Respect," and the Establishment Clause of the First Amendment*, 27 U. RICH. L. REV. 989, 996-97 (1993) (discussing the hope that the public education system will bring about religious and political tolerance).

exercise of religion.<sup>50</sup> The courts have not recognized a constitutional right to be free from religiously neutral public school requirements of this kind,<sup>51</sup> but this religious concern deserves to be taken seriously, if not as a matter of constitutional right, then certainly as a matter of good politics. The third component of this proposal thus urges the Kansas legislature to clarify and expand the statutory right for parents and students to obtain exemptions from any subject in a "required course" that imposes a burden on their religious beliefs.<sup>52</sup> This exemption, to be sure, may involve some difficulties of administration and some costs in providing alternative study for objecting students, but if only a few students object, the benefits of the policy to study religious subjects in public schools would seem to outweigh these costs. Of course, if a particular school district were to experience widespread objections and costs in providing alternative study, it may choose not to offer a balanced treatment of religious subjects in its major courses.

Finally, the free exercise objection that the study of particular religious subjects imposes significant burdens on the religious beliefs of individual students can be expanded into a more general objection that religious subjects, like "values" and the moral education of children, should not be discussed in public schools, and should be left to families, churches, and other private institutions. This objection, of course, may also be made from an establishment or separationist perspective, that one of the important values in maintaining "purely secular" public schools is the protection of private moral education from public taint. But this policy objection ignores the fact that a very considerable moral education of children is already taking place in public schools, be it secular or otherwise, and this proposal for the balanced study of religious subjects should be viewed as an effort to improve our children's moral education, not impede it.

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50. See *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1063-70 (6th Cir. 1987) (rejecting a free exercise of religion claim that particular required reading texts would impose wrong ideas on students, and thus violate individual students' constitutional rights).

51. See *id.*; *cf.* *Employment Div. v. Smith*, 494 U.S. 872, 874, 881-82 (1990) (upholding the state's denial of unemployment benefits to employees who violated religiously neutral state law by ingesting peyote for religious purposes). *But cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 207 & n.2, 219 (1972) (recognizing the free exercise right of Amish parents to withdraw their children from Wisconsin schools after the eighth grade notwithstanding a state compulsory attendance law that required children to attend school until the age of sixteen, which usually required students to finish the tenth grade).

52. See *infra* Part IV.C.

### B. *Cosmology, Geology, and Evolution*

The second component of this proposal involves the consideration of religious objections to the teaching of evolution, geology, and scientific theories of the universe in science courses. Scientific theories and evidence about the great age and uniformly expanding nature of our universe, the great age of the Earth, and the common ancestry of our animal species conflict with certain religious doctrines about the creation of the universe, Earth, and humans. From some religious perspectives, therefore, it can be claimed that the teaching of this science in public schools is particularly destructive of children's religious beliefs.<sup>53</sup>

During the twentieth century, this claim has caused some state legislatures to ban the teaching of evolution,<sup>54</sup> and others to require, or consider requiring, that public schools provide "equal time" to teaching both "creation science" and evolution.<sup>55</sup> In 1999, this objection caused the Kansas Board of Education to deemphasize public school teaching of three scientific subjects: the Big Bang theory of the universe, the age of our Earth, and evolution, by eliminating them from statewide student tests and informing school districts that they were not required to teach them.<sup>56</sup> The general objection to teaching these scientific theories and evidence, and the policies proposed to implement this objection, clearly require careful consideration in view of Christian fundamentalists' political power, the large number of Americans who say they do not believe in these scientific theories or evidence,<sup>57</sup> and the law and values of the Religion Clauses in the United States Constitution.

In this complicated context, a reasonable policy would be to pursue four concepts in teaching evolution, geological science, and cosmology or the study of the expanding universe. First, at the beginning of classes, high school science teachers should frame each subject by briefly indicating the existence and nature of the religious controversy. They

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53. See, e.g., FRASER, *supra* note 3, at 158-68 (discussing the debate about the teaching of evolution and creationism).

54. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 98, 109 (1968) (holding Arkansas's "anti-evolution" statute unconstitutional).

55. See *Edwards v. Aguillard*, 482 U.S. 578, 580, 594 (1987) (invalidating Louisiana's "balanced treatment" act); see also Davis, *supra* note 3, at 217-21 (proposing that religiously grounded creationist theories be presented formally as part of high school science courses).

56. See *supra* note 3.

57. See Davis, *supra* note 3, at 217, 219 (discussing the groups at both ends of the creationism-evolution spectrum); David W. Moore, *Americans Support Teaching Creationism as Well as Evolution in Public Schools*, GALLUP NEWS SERVICE, Aug. 30, 1999, available at <http://www.gallup.com/poll/releases/pr990830.asp> (providing polling data indicating that forty-seven percent of respondents did not believe in evolution).

might approach this task by, for example, specifying the essentially different questions that are asked and addressed by science and religion and the possibilities for conflict between these two different realms of thought. Thus, science pursues knowledge of the physical universe by following well-recognized methods that attempt to link scientific hypotheses, models, and theories with empirical observations that can confirm or falsify them. In this realm, a "hypothesis" can become a well-recognized "theory" only after rigorous testing by empirical evidence, the accumulation of "substantial observational or experimental support," and the elimination of plausible competing hypotheses.<sup>58</sup> It may also be emphasized that science invites questions about its theories and evidence, and that questions advancing scientific knowledge focus upon the confirmation of hypotheses, models, and theories by persuasive empirical observations.

At the same time, this framing might indicate that science does not provide any definitive answers to the ultimate questions addressed by religious thought: (1) why there is a physical universe rather than nothing at all; (2) whether or not our physical universe results from an intelligent designer, planner, or creator; and (3) what our morals, ethics, and purposes should be.<sup>59</sup> Conversely, religious doctrines speak directly to these questions, sometimes with the assistance of science (particularly in the case of moral or ethical questions), but often with no obvious relationship to scientific thought. Of course, not everyone accepts this essential division of thought, especially those who read the Bible literally. Thus, in addition to specifying the essentially different questions pursued by science and religion, science teachers should mention the possibility of conflicts between the two realms of thought, as well as the possibility of their coherence. This framing should also indicate the teacher's willingness to entertain religiously motivated questions about the subject under study, a willingness that should help implement the second concept of toleration and respect for diverse persons.

Second, sound educational principles, as well as the Religion Clauses of the United States Constitution, would seem to require that teachers of

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58. COMM. ON SCI. & CREATIONISM, *supra* note 45, at 9-10.

59. This was how Professor Ursula Goodenough of Washington University suggested that we might think about the different realms of scientific and religious thought. Ursula Goodenough, Lecture at the University of Kansas Colloquium on Science, Teaching, and the Search for Origins (Apr. 14-15, 2000). *But see* Steven Weinberg, *A Designer Universe?*, N.Y. REV., Oct. 21, 1999, at 46 (arguing that empirical evidence cuts against any idea of the universe having been designed, and suggesting that some day, science will be able to determine how it all began).

evolution, geology, and cosmology in public schools tolerate and respect students who ask questions or state discontents with the subject from religious perspectives. This concept, of course, is much easier to state than to implement, or even illustrate with examples or homilies. As a law teacher, I must confess that I have not always known how to respond with adequate tolerance and respect to some students' expressions of deeply held personal beliefs that oppose certain aspects of constitutional law, for example, issues of race, abortion, or gender discrimination. But perhaps one or two techniques from the law school classroom may be of assistance to science teachers who face intense religious questioning. One idea is to ensure that both sides of a disputed question are fully aired. The second is to maintain some kind of distinction between the subject under examination, and moral or ethical questions about the issue that have not received any scientific endorsement.

To be sure, the effective framing of high school science courses and the construction of appropriate responses to religious questions about science may be difficult tasks. As I have suggested, concepts like these are easier to state than implement. But consider the costs of not attempting to implement these concepts. If many high school students have religious questions about science that go unaddressed in their science courses, what kind of learning occurs in this situation? Some kind of "democratic deliberation" about these issues seems advisable.

Third, as recommended later in this Essay,<sup>60</sup> the Kansas legislature should enact a statute that requires public school districts to offer "alternative study" for students who have sincerely held religious objections to the study of any subject in a course that is "required" either by the school district or generally for college admission. This exemption would be designed primarily to help alleviate the tensions that currently exist between the teaching of evolution, geology, and cosmology in the public schools and particular religious faiths. This exemption should make it easier for public school districts to teach scientific subjects as science, and also could make it easier for science teachers to implement the concepts of framing, tolerance, and respect.

Fourth, school districts and teachers should not try to incorporate "creation science" or other religious perspectives into their teaching of scientific subjects. There are good policy reasons, as well as constitutional reasons, for following this concept. As a matter of policy, scientific theories, methods, and evidence are particularly complex and difficult subjects, and surely the exclusive focus upon a scientific

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60. See *infra* Part IV.C.

subject—upon one realm of thought—will provide for a better comprehension of the subject than if it were continually juxtaposed with religious ideas grounded in the search for answers to ultimate questions.<sup>61</sup> In addition, such juxtapositions could make the objective evaluation of students' learning of scientific subjects more difficult, running afoul of Nel Noddings's advice about the dangers of formal incorporation of religious ideas into the public school curriculum.<sup>62</sup>

As a matter of constitutional law, there is a good argument that any formal incorporation of "creation science" or other religious perspectives into high school science courses by decisions of school districts or individual teachers would violate the Establishment Clause. In *Edwards v. Aguillard*,<sup>63</sup> the Supreme Court invalidated a Louisiana law that required such dualistic teaching on the grounds that the clear purpose of the state legislature was to promote religious beliefs in public schools.<sup>64</sup> In decisions by local school districts or individual teachers to provide such dualistic teaching of science courses, the available evidence of "purpose" or "intent" might be quite different. Thus, one can imagine these decisions being based upon sincere beliefs that the dualistic teaching of science is designed to provide "equal time" to religious and nonreligious speech, or to incorporate "legitimate criticisms" of scientific theories, and not to bring God back into the public schools, as the sponsors of the Louisiana law said they wanted to do.<sup>65</sup> Nonetheless, state actions that have the *effect* of promoting religion, notwithstanding the absence of clear purpose, can also violate the Establishment Clause.<sup>66</sup>

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61. *But see* Noddings, *Renewing Democracy*, *supra* note 7, at 582; Richard Rothstein, *Separating Fact and Theory*, N.Y. TIMES, June 7, 2000, at B11. Both authors recommend that creationism be brought into the science classroom in order to achieve particular educational advantages.

62. *See supra* text accompanying note 30.

63. 482 U.S. 578 (1987).

64. *Id.* at 581, 594.

65. *Id.* at 585-88 & n.7.

66. *See* *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (stating that for validity under the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (quoting *Waltz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)) (citation omitted), *modified by* *Agostini v. Felton*, 521 U.S. 203 (1997)); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (stating that a teacher's decision to teach a nonevolutionary theory of creation in a social studies class raised serious Establishment Clause concerns). Although *Lemon* has become controversial, and is not often cited by today's Supreme Court, which is badly splintered over Establishment Clause issues, the judicial search for the religious effects of state actions that may violate the Establishment Clause remains. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2278 (2000) ("The actual or *perceived endorsement* of the message, moreover, is established by factors beyond just the text of the policy.") (emphasis added).

It seems likely then that the formal incorporation of "creation science" into public high school science courses, no matter how pedagogically neutral the delivery may be, is likely to have *the effect* of *promoting* the religious ideas and beliefs of some students, thus violating the Establishment Clause.<sup>67</sup>

Moreover, as I have noted, the argument for "equal time" for religious and nonreligious speech, as applied to the teaching of science, fails because in this context, we are not considering commensurable kinds of speech about how to do science, but rather two very different realms of thought.<sup>68</sup> Science teaching, in other words, is not a "public forum" to which all kinds of speech, no matter what their nature, deserve equal access.<sup>69</sup> Furthermore, one needs to draw a distinction between criticisms of science that are based upon the scientific method, even though they may be religiously motivated, and criticisms grounded upon religious faith in a Supreme Being or Creator, as creationism is grounded. *Scientific criticisms* of science are criticisms from within science that depend upon the scientific method of proving or disproving theories, models, and hypotheses by empirical observations, and they may have background motivations that are religious or not. These criticisms, we might say, involve turning the scientific method on itself even if religion motivates the questions. On the other hand, criticizing science because it does not address the ultimate questions that religions address, or because it is inconsistent with a religious belief, is *religious criticism* that does not depend on scientific method. Such religious criticism will have the same general purposes and effects of promoting religion as the positive presentations of religious beliefs or doctrines about the origins of our universe and humans.

Still, I am willing to concede that whether any dualistic teaching of "creation science" and science in public high school courses could survive Establishment Clause analysis is uncertain—a "hard case" that might go either way. Even so, the *policy arguments* for separating these

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67. Cf. *Webster*, 917 F.2d at 1007-08 (holding that a school board "had the authority and the responsibility to ensure that [a junior high school teacher] did not stray from the established curriculum by injecting religious advocacy into the classroom," and that it was justified in instructing the teacher not to teach creation science because of the board's "legitimate concern with possible [E]stablishment [C]lause violations"); *Pelozo v. Capistrano Unified Sch. Dist.*, 782 F. Supp. 1412, 1419-20 (C.D. Cal. 1992) (holding that a school district could require a teacher to refrain from commenting on his own religious beliefs in the classroom).

68. See *supra* text accompanying notes 59-60.

69. On the public forum theory of free speech law that has supported the access of religious speech to public forums, see *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 828-37 (1995) and *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-70 (1995).

two realms of thought in order to promote effective science education are powerful arguments for keeping the two subjects essentially separate in science courses. The basic ideas of the scientific method, evolution, geology, and cosmology have major pragmatic values that can help Kansas high school students in many walks of life, ranging from the diverse health professions to technical and mechanical work, to subsequent academic success and to better consumer understanding of scientific studies and evidence about food safety and medicines.<sup>70</sup> In our high technology twenty-first century, Kansas high school students deserve the best science education they can get, and this seems most likely to be achieved if teachers and students are allowed to concentrate on one subject, science, in their science courses.

### C. *The Statutory Exemption*

The third essential component of this proposal is that the Kansas legislature should amend its statute that currently exempts a student, upon parental request, from “any activity” in a public school “which is contrary to the religious teachings of the child.”<sup>71</sup> The current statute has three major problems. While it grants a religious exemption from public school activities in broad terms, it fails to require the local school district to provide reasonable alternative study to help ensure that students continue to learn at a general pace equal to that of their peers. The statute also fails to specify reasonable procedures that would help teachers and school districts plan for and provide alternative forms of study and alternative tests for those students with exemptions. The statute as currently written is also subject to constitutional challenge because it arguably *promotes* or *endorses* religion, and fails to provide equal treatment for persons who hold equivalent nonreligious convictions that cause them to object to public school activities.

The amendment of the statute to correct these problems will admittedly involve several sensitive choices about the scope of the new statutory right, the conditions for its exercise, the nature of alternative

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70. See, e.g., Gina Kolata, *Health Advice: A Matter of Cause, Effect and Confusion*, N.Y. TIMES, Apr. 25, 2000, at F1 (describing the confusion among the public, which at times may be promoted by scientists, between “hypothesis-generating” evidence of what might be an effective therapy, and theory-confirming evidence that gives scientists confidence about the effectiveness of particular therapies).

71. KAN. STAT. ANN. § 72-1111(e) (Supp. 2000). This provision grants its exemption, without providing for alternative study, “if a written statement signed by one of the parents or a person acting as parent of the child is filed with . . . the school attended requesting that the child not be required to participate in such activities and stating the reason for the request.” *Id.*

studies to be provided by public schools, and who may claim the right—a student or the student's parents. These choices are most appropriately subjects for debate and compromise by the public and our state legislature. In this Essay, I shall merely indicate the major choices that these issues raise and suggest some initial starting points for subsequent debate and legislative deliberation.

First, should the statutory provision apply only to high school science teaching, to all high school teaching, or to all public school teaching? While the main religious objections today appear to be aimed at teaching evolution, cosmology, and geology in high schools, some of this science teaching may occur preliminarily in primary or junior high schools. There also may be parents or students like the plaintiffs in *Mozert v. Hawkins County Board of Education*<sup>72</sup> who have religious objections to the teaching of other subjects.<sup>73</sup> Moreover, this proposal calls for introducing religious subjects throughout the high school curriculum, especially in literature and history courses, and there may be religious objections to this teaching. Thus, as a starting point, I propose that the statutory exemption and mandate of alternative study should apply to all public school students, K-12. At the same time, the broad scope of the new requirement for reasonable alternative study in required courses could produce many administrative difficulties for public schools, especially in the lower grades where every course is required. Limiting this exemption and the mandate of alternative study to grades 9-12, or even limiting them to high school science courses, would certainly be reasonable options as well.

Second, should the statutory provision apply only to students who have religious objections to particular subjects, or should it also apply to students who have equivalent ethical objections on grounds of personal conscience? While it may be difficult to imagine these latter objections, suppose that an atheist objected to the teaching of a religious novel or poem because it contradicted her deeply held nonreligious beliefs. The same policy reasons for granting an exemption and alternative study to religious students, the protection of their spiritual beliefs and growth, would seem to apply to such a student. Including good faith objections of conscience as well as religious objections would also help defend the statutory exemption from constitutional challenges that it violates the Establishment Clause by *promoting* religion.<sup>74</sup> Thus, I propose the

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72. 827 F.2d 1058 (6th Cir. 1987).

73. *Id.* at 1060.

74. There is currently a substantial debate among commentators about whether state laws designed to exempt only religious beliefs and practices from state regulation constitute "the

broader alternative, at least as a starting point, that the statutory exemption should apply to any student who has a sincere and deeply held objection to the teaching of a particular subject because it would impose a significant burden upon her deep convictions, whether religious or nonreligious in nature.

Third, another important question concerns the "required courses" to which the exemption should apply. While the costs of providing alternative study could be limited by extending the exemption only to courses that are required by public schools, there will undoubtedly be strongly held religious objections to the teaching of some subjects in "elective courses," especially high school science courses, that are either required or desirable for obtaining admission to colleges. In these cases, it may be preferable to allow students to claim the exemption and take less-than-comprehensive science training in order to seek admission to colleges, rather than to "force" them to choose between taking the science course or not. Thus, the exemption should extend to all courses required by school districts or commonly used to support applications to colleges. This will, admittedly, raise not only administrative costs, but also the ticklish question of how an exemption and alternative study should be treated on high school transcripts. This latter question should probably be left to local school districts to decide in accordance with their general transcript policies. In general, though, if transcripts do not specify the coverage of particular courses in, say, physics, chemistry, or biology, I see no good reason why the exemption and alternative study of the same general subject need be listed on the student's transcript.

Fourth, the conditions for exercising this right and the nature of the alternative study to be provided by school districts may be among the most sensitive or difficult issues. One would like to provide this right

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promotion of religion," and thus violate the Establishment Clause. Compare Timothy L. Hall, *Omnibus Protections of Religious Liberty and the Establishment Clause*, 21 *CARDOZO L. REV.* 539 (1999) (asserting that general exemptions from state actions for religious believers should not violate the Establishment Clause), with Marci A. Hamilton, *The Constitutional Rhetoric of Religion*, 20 *U. ARK. LITTLE ROCK L. REV.* 619, 627-30 (1998) (explaining that state laws that provide a general exemption for religious believers are unconstitutional, but narrower, problem-specific exemptions may not be), and William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 *MONT. L. REV.* 227, 237-42 (1995) (stating that any law that provides special treatment for religion is probably unconstitutional). My own view is that state laws that encourage the exercise of any constitutional value, such as free exercise of religion, should be characterized as secular in purpose and effect because they promote the exercise of constitutional rights. But, in any event, this problem can be avoided by protecting any individual from state action that unreasonably burdens her conscience for religious or nonreligious reasons. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 *U. CHI. L. REV.* 1245 (1994) (arguing for the "protection view" over the "privilege view" of religious exemptions).

with a minimum of contention, disruption, and litigation at the local level and with a minimum of extra costs for providing alternative study. Yet the basic right to object for religious or equivalent moral reasons needs to be defined liberally in order to respect the diversity of beliefs in multicultural America, and to avoid religious entanglements between public officials and individual believers. One hopes too that these decisions about specific objections and appropriate alternative study can be resolved amicably and quickly by parents, students, local schools, and school districts.

In this context, I propose that the legislature enact specific but relatively liberal definitions of the right to an exemption and the nature of alternative study, thus giving substantial discretion to students who claim an exemption, on the one hand, and to school districts that must provide appropriate alternative study, on the other. In addition, the legislature should provide a limited and relatively expeditious kind of judicial review for those who seek review of specific decisions. To illustrate these concepts of substantial discretion and expeditious judicial review, the legislature could define the right to exemption as "the right of any student in public school to be exempt from the study of any subject in a particular course that is required by the school district or required for admission to college when the student claims in good faith that studying the subject would impose a substantial burden on his or her religious beliefs or moral conscience." Importantly, the right to claim this exemption should be conditioned upon the student making the claim within the first two weeks of the course in order to limit the costs to teachers and administrators in arranging alternative study, assignments, and tests. The alternative study to be provided by schools could be defined as "upon granting an exemption, the school district shall make reasonable arrangements for the student to engage in alternative study of the general subject, which may include independent reading, research, and writing assignments; other appropriate study; and appropriate alternative tests." Lastly, judicial review of these decisions by school districts could be limited to initial review in a state district court, with an immediate right of appeal to the Kansas Supreme Court. Moreover, this review should be conducted under the traditional standard of judicial deference to reasonable administrative decisions; in other words, a school district's decision to deny an exemption or provide a particular

kind of alternative study should be affirmed unless it is found to be "arbitrary, capricious, [or] an abuse of discretion."<sup>75</sup>

Given our judicial and administrative traditions of deferring to individuals about what religion requires or demands of them,<sup>76</sup> and our judicial tradition of deferring to "reasonable" administrative agency decisions,<sup>77</sup> this scheme promises liberality both in the granting of exemptions and in reviewing school decisions about the nature of alternative study. This scheme also promises a relative ease or efficiency, to the extent possible, in the exercise of judicial review for those (relatively few?) instances where a dissatisfied student or her parents seek judicial review.

Finally, there is the sensitive issue of who may claim this exemption—parents or students. In general, it seems reasonable to assume that there will be only a few irreconcilable disagreements between parents and their children over the need to claim the exemption. However, one can imagine cases where a student wants to continue studying with her peers despite parental objections to a subject, and cases where a student claims the exemption and a parent is opposed to the claim. Perhaps parents should have the say in these instances, especially in view of the practice in some Kansas high schools of requesting parental consent for a student's choice of high school courses.<sup>78</sup> There will be exceptional cases, however, where a student can show that she has become "an emancipated minor" by independent living or independent support, or where parents with joint custody might disagree between themselves over the exemption, and these knotty questions could lead to considerable legal uncertainty, potential litigation costs, and divisiveness within families. Moreover, there is a strong moral argument that adolescent children should have rights to determine their own way in our modern economy and society.<sup>79</sup> Thus, as a starting

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75. This standard is taken from section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1994).

76. See, e.g., 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 21.5(b) (2d ed. 1992) (explaining that only coercive measures tend to be found invalid by the Supreme Court).

77. See, e.g., RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO, & PAUL R. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 122 (3d ed. 1999) (describing the scope of review applicable to agency actions).

78. Michael Imber, American Educational Reform Movements: Past and Present, course taught at the Department of Teaching and Leadership, University of Kansas School of Education (July 13, 2000).

79. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part) (expressing concern over the potential disagreement between Amish parents and their high school

point, I propose a bright line rule: that high school students in the ninth, tenth, eleventh, and twelfth grades must claim the exemption for themselves, while parents of younger students must claim the exemption for these students. Parents may be involved in claims made by their older students, of course, and a parent who objects to her child's claim may be able to provide relevant evidence that the religious or moral objection of the student is not well-founded. On the other hand, if the Kansas legislature were to determine that the parents of high school students should have the ultimate say on this exemption, this would be quite understandable in light of our strong tradition of parents governing their children's educational choices.<sup>80</sup>

The main objection to this statutory exemption and provision of alternative study may be stated plainly and quickly: "This will create an administrative nightmare and impose unwarranted costs upon many Kansas public schools." There are good reasons to think, however, that this statutory provision may be (quite appropriately) more symbolic than material, and that it will not induce large numbers of students or their parents to actually seek exemptions. Certainly at the high school level, there will be substantial incentives for students not to exempt themselves from the teaching of the evolution of species in biology, the teaching of cosmology in physics, or the teaching of geologic time in a geology course. Not only do these subjects appear on Kansas statewide tests,<sup>81</sup> but college-bound high school students could want to take these courses in full for the possible benefits they may provide of scoring well on national college admissions tests, passing advanced placement tests, or simply performing well in advanced college science courses. Furthermore, at all levels, but perhaps especially at the high school level, students may not wish the bother or possible stigma from their peers of leaving the classroom for special projects.

A second objection would be that subjects such as biology and physics cannot be taught adequately without exposing the student to evolution or cosmology, respectively. Thus, high schools and the state would essentially be perpetrating fraud upon students who choose the exemption and on other institutions that rely on a certain kind of high

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aged children about whether the children should withdraw from public schools after the eighth grade, and concluding that the Court should abide by the child's desires in such a conflict).

80. *See, e.g., id.* at 234 (holding that Amish parents may withdraw their children from public schools after the eighth grade).

81. *See supra* notes 3 (discussing the Kansas Board of Education's exclusion of aspects of evolution, geology, and cosmology from the state's standards and tests for public schools and recent reinstatement of these subjects).

school education. But as a public high school student of the 1950s who was not taught evolution, cosmology, or geology,<sup>82</sup> my suspicion is that most of us even today can survive quite well with less than ideal science education in high school. More importantly, although the ideal education certainly includes comprehension of these subjects as well as the scientific method, the best pragmatic goals to hope for may be that students in high school science courses will be exposed to the scientific method, which certainly can be provided by study and experiments with different aspects of biology and physics,<sup>83</sup> and that they will acquire a beginner's vocabulary of basic scientific terms.<sup>84</sup> In this light, we might conclude that the value of high school science courses would not be vitiated for most students by their right to claim a statutory exemption from particular parts of these courses.

It might also be objected that a statutory exemption that allows persons to opt out of the study of important subjects contradicts other components of this proposal that call for increased "democratic deliberation" among different cultural perspectives. The exemption does this, but of course this proposed statute is only a modification or clarification of the statutory exemption that is already part of Kansas law. Moreover, faith-based objections to government actions, though they do not always support a "constitutional right" to exemptions, still have a "constitutional dimension" that is grounded in the important values of free speech and free exercise of religion. It does not seem unreasonable as a matter of good policy to draw a balance between promoting democratic deliberations in public education through the first two components of this proposal and allowing individuals with faith-based objections to opt out of particular deliberations.

Two more general points about the values of this statutory exemption may be observed. First of all, this proposal's three major components, to teach more religious subjects in humanities courses,<sup>85</sup> to tolerate religious

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82. Evolution was not in my biology textbook, since my course in 1956-1957 occurred just before the Russian launch of Sputnik encouraged improvements in American high school science teaching. Cosmology was not in my physics textbook either, probably because empirical confirmations of the theory of the expanding universe were a relatively recent phenomenon. Geology was not offered at my relatively large public high school.

83. See, e.g., Richard Rothstein, *A School District Rebels Against State Standards*, N.Y. TIMES, June 21, 2000, at B11 (describing the California Institute of Technology's design of a science curriculum for the Pasadena public schools that involves many hands-on experiments by students with the scientific method).

84. I owe this observation to Professor Douglas McKay of the University of Kansas Department of Physics and Astronomy.

85. See *supra* Part IV.A.

questioning in science courses,<sup>86</sup> and to provide a statutory exemption,<sup>87</sup> taken together, constitute a far superior response to the claim that public schools should respect "equal religious rights" than the Kansas Board of Education's recent attempt to delete subjects of evolution, geology, and cosmology from state tests.<sup>88</sup> This proposal respects not only the religious rights and experiences of those who object to these subjects, but also those whose religious beliefs permit them to study scientific subjects to the fullest extent possible. The Board of Education's ruling, in contrast, responded only to the religious position of one sector in the religious community, those who object to evolution, geology, and cosmology. Furthermore, by encouraging school districts to delete these subjects from high school courses, the ruling essentially imposed the views of one religious group upon those who have different religious beliefs.

Second, it should be recognized that if the state legislature is unwilling to enact this new statutory exemption, local school districts and even individual schools could decide to establish a similar policy for themselves. There is plenty of anecdotal evidence that public schools, in Kansas and elsewhere, have offered informal exemptions with alternative study to the children of parents who have religious objections to particular subjects.<sup>89</sup> Should the state choose not to act, formalizing this policy at the local level might increase the number of exemptions taken, but would have the considerable virtue of ensuring more equal application of the exemption policy. Thus, a local school district itself could choose to implement all three major components of this proposal.

#### D. *Extracurricular Clubs*

Kansas public schools may also choose to accommodate and support the religious ideas and interests of public school students by making two quite different uses of extracurricular clubs. First, as part of a larger system of "curriculum-related" student clubs, public high schools could, in various ways, support the voluntary study of religious subjects and

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86. See *supra* Part IV.B.

87. See *supra* Part IV.C.

88. See *supra* note 3.

89. See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987) (recounting a middle school principal's attempts to find an alternative study program for parents that objected to the teaching of mental telepathy); George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RES. L. REV. 707, 710 (1993) (stating that religious objectors to physical education and to sex and AIDS education may receive exemptions from these classes from local school officials when a state law exemption is unavailable).

ideas by students outside the formal curriculum. In this approach, the same legal and policy constraints that apply to a school's formal curriculum would apply to the way in which teachers as sponsors of curriculum-related clubs present religious ideas. But this approach would offer some special advantages over employing the formal curriculum to study religious subjects. Students presumably could be given more time to express and exchange their own ideas. This study of religious subjects would be clearly voluntary, and thus avoid some of the need for careful policing of student disruptions in the classroom. Furthermore, the study of religious subjects outside the formal curriculum could provide the political benefits of understatement as well. In fact, it might seem that the use of curriculum-related clubs could accomplish just as much as the incorporation of religious subjects into the formal curriculum, and at less cost, but for the obvious feature that school clubs require students to commit additional time, thus lessening the impact of this policy as an alternative policy. If religious subjects are to invigorate public education, this club policy should be viewed as a supplement, not an alternative.

Second, public school districts could establish a clear policy, at least for high schools, that recognizes the right of *student-organized* groups or clubs to use schools for extracurricular meetings. These groups may not be otherwise sponsored or supported by school resources, nor of course may they be limited to religious groups. But if a public high school adopts a policy that allows "noncurriculum related student groups to meet on school premises during noninstructional time,"<sup>90</sup> its students certainly may be informed of their rights to organize groups for religious as well as nonreligious purposes. In addition, this policy could provide information about typical religious and nonreligious student groups that might take advantage of it, such as Bible study clubs, prayer clubs, and groups organized to study subjects such as, say, creation science or the origins of the universe. Students would need to take the leadership in organizing and conducting the work of these groups, and thus the policy of promoting noncurriculum-related student groups would tend to provide even greater opportunities for student expression of religious ideas than the policy of promoting curriculum-related clubs.

This second policy, of promoting noncurriculum-related clubs, would still have to observe certain constraints. The Equal Access Act applies to public secondary schools that receive federal financial assistance and establishes a "limited open forum" by granting an

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90. Equal Access Act, 20 U.S.C. § 4071(b) (1994).

opportunity to one or more noncurriculum-related student groups "to meet on school premises during noninstructional time."<sup>91</sup> Any school that meets these conditions must ensure that these meetings are "voluntary and student-initiated,"<sup>92</sup> that there is "no sponsorship of the meeting[s] by the school,"<sup>93</sup> that school employees "are present at religious meetings only in a non-participatory capacity,"<sup>94</sup> and that "nonschool persons may not direct, conduct, control, or regularly attend activities of student groups."<sup>95</sup> Furthermore, public schools are subject to the Equal Access Act, which establishes limited open forums, and may not deny "equal access or a fair opportunity to, or discriminate against" students who wish to conduct student meetings "on the basis of the religious, political, philosophical, or other content of the speech at such meetings."<sup>96</sup> Thus, any school district that pursues a policy of promoting noncurriculum-related student clubs will be committing itself to supporting a possibly wide variety of different kinds of student associations and student speech, including anticlerical and other kinds of speech deemed offensive by the majority in a particular community. But the toleration of such multicultural diversity would seem a relatively small cost to pay for using extracurricular clubs to promote a richer engagement of public school students with religious ideas and practices.<sup>97</sup>

#### E. *Voluntary Collective Prayers*

In *Santa Fe Independent School District v. Doe*,<sup>98</sup> the Supreme Court recently held that school-organized "student-led" prayers at high school football games violate the Establishment Clause.<sup>99</sup> The reasoning in this case, that a school's organization of prayer activities involved the imposition of majority religious views upon minority views by means that are subtly coercive,<sup>100</sup> would seem to apply just as well to school-organized student-led prayers at public school commencements, an issue

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91. *Id.* § 4071(a)-(b).

92. *Id.* § 4071(c)(1).

93. *Id.* § 4071(c)(2).

94. *Id.* § 4071(c)(3).

95. *Id.* § 4071(c)(5).

96. *Id.* § 4071(a).

97. *Cf.* Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?*, 64 ALB. L. REV. 225, 236-38 (2000) (surveying religious clubs in Ohio public schools).

98. 120 S. Ct. 2266 (2000).

99. *Id.* at 2282.

100. *Id.* at 2279.

that received considerable attention from the lower courts in the 1990s.<sup>101</sup> Setting these issues aside, there remain a number of ways in which public school students may engage in voluntary collective prayers, and the clarification of these opportunities constitutes an additional optional step to this proposal.

It may be helpful to this project for either the Kansas Attorney General or Kansas Board of Education to specify by formal guidelines the kinds of voluntary student prayer activities on school premises that are legal. As a starting point, these guidelines could follow the 1998 revised standards for Religious Expression in Public Schools issued by the United States Department of Education.<sup>102</sup> These standards indicate various ways in which public school students may pray or speak about religious matters to other students "in a nondisruptive manner when not engaged in school activities or instruction," for example, in cafeterias and hallways, or "in before or after school events with religious content, such as 'see you at the flag pole' gatherings, on the same terms as they may participate in other noncurriculum activities on school premises."<sup>103</sup> In addition, the state guidelines could specify the more formal opportunities for noncurriculum-related student meetings for Bible study and prayer activities that can be made possible by school districts establishing limited open forums, as already discussed.<sup>104</sup>

More adventurously, the opportunities for using school premises to conduct student prayer activities *before* and *after* formal graduation ceremonies might be specified. These entirely voluntary events that are neither organized by the school nor imposed on the participants at a graduation ceremony would appear to fall outside the scope of *Lee v. Weisman*,<sup>105</sup> in which school-organized prayers at public school graduation ceremonies were held to violate the Establishment Clause,<sup>106</sup> as long as the school opens its facilities to all groups wishing to conduct

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101. See generally Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 139-42 (2000) (discussing student-led prayers at graduation ceremonies); Strossen, *supra* note 9, at 626-31 (discussing Supreme Court jurisprudence concerning graduation prayer); Colin Delaney, Note, *The Graduation Prayer Cases: Coercion by Any Other Name*, 52 VAND. L. REV. 1783 (1999) (analyzing case law on the coercive nature of school-organized prayer). See also *Chandler v. Siegelman*, 120 S. Ct. 2714 (2000) (vacating a court of appeals decision that upheld student-led prayer at a public school graduation and asking the court of appeals to reconsider its decision in light of *Doe*).

102. U.S. DEP'T OF EDUC., *supra* note 23.

103. *Id.* at 6-7.

104. See *supra* Part IV.D.

105. 505 U.S. 577 (1992).

106. *Id.* at 599.

private celebrations before and after the ceremony.<sup>107</sup> These prayer events might be held to come under the purview of the Equal Access Act, and thus require the school district to have established a limited open forum for all kinds of noncurriculum-related student meetings. On the other hand, while these prayer events may seem subject to the literal terms of the Equal Access Act that apply to any "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstruction time,"<sup>108</sup> it may be argued that graduation-related events like student prayers before or after the ceremony fall outside the scope of the Equal Access Act. This Act was aimed at regulating student meetings during the regular school calendar, and prayer events before and after commencement ceremonies are likely to involve parents, religious leaders, and other community members, as well as students. If the Equal Access Act does not apply, school districts could allow voluntary collective prayer events on school premises before and after graduation ceremonies as long as they offered equal opportunities to other groups.

Finally, any guidelines promulgated by the Kansas Attorney General or Kansas Board of Education might take up the difficult question of voluntary student prayers before special public school events such as athletic events or theatrical performances. School coaches and teachers should not lead their groups in such prayers, for this involves the state in *promoting* or *endorsing* religion in a manner very similar to teacher-led classroom prayers. But, by contrast, there would seem to be nothing illegal or immoral if students wish to pray collectively before they engage in a particular event that happens to be connected to a public school, as long as the prayer is not "disruptive" of the activities of other students. Certainly a group of students may gather together in a nondisruptive way on public school premises to pray before an examination under the 1998 guidelines of the U.S. Department of Education,<sup>109</sup> and this is so even if the prayer on school property may exert subtle coercive pressure upon others who necessarily will observe the prayer.<sup>110</sup> If this activity is permissible as a matter of free speech and the free exercise of religion, it would seem that collective student-initiated prayers before other school events, say athletic events or

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107. U.S. DEP'T OF EDUC., *supra* note 23, at 7.

108. Equal Access Act, 20 U.S.C. § 4071(b) (1994).

109. U.S. DEP'T OF EDUC., *supra* note 23, at 6.

110. *See id.* ("Students may also speak to, and attempt to persuade, their peers about religious topics . . .").

theatrical performances, may also be permissible if nondisruptive to the activity.

Admittedly, other students on the team or in the theatrical troupe may have to observe the prayer in silence, and thus perhaps experience subtle coercive pressures to join or participate in the prayer, just as students in a school hall observing the prayer of other students might experience. Moreover, athletic teams and theatrical troupes about to go on may usually be in relatively tight physical spaces from which nonparticipating students may not escape, and perhaps these smaller spaces should support a distinction between these prayers and student-initiated collective prayers before examinations. On the other hand, athletic teams and theatrical troupes may reasonably need a minute or two to prepare themselves mentally for the performance to be demanded of them,<sup>111</sup> and if some or even a majority of students choose to pray together, this would seem to be the same kind of free speech and religious practice as collective prayers before an examination. Consider this argument by analogy: an individual student athlete decides to pray before taking the field, or perhaps three student athletes decide to hold hands while they pray before taking the field. There would seem to be no constitutional violation in these situations, and how are they essentially different from a student athlete starting a collective prayer and most of her team joining her? Public schools impose special demands on their student athletes and actors, even if these roles are voluntarily assumed. In this perspective, it seems appropriate to characterize an entirely voluntary collective prayer initiated by student athletes or student actors as a "private activity" that is constitutional, rather than as a "public activity" that is unconstitutional.

## V. CONCLUDING THOUGHTS

Americans are justly proud of American science and science-based technology, and at the same time are the most religious of peoples among Western democracies.<sup>112</sup> As science and religion advance, it is not surprising that conflicts between these two realms arise periodically, as they have in public discourse and public education since the second half

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111. Cf. Ben Marcus, *Praise the Lord and Pass the Football: What the Supreme Court Doesn't Know About Playing to Win in Texas*, TIME, July 10, 2000, at 120 (discussing player bonding through collective prayers).

112. See GEORGE GALLUP, JR. & D. MICHAEL LINDSAY, SURVEYING THE RELIGIOUS LANDSCAPE: TRENDS IN U.S. BELIEFS 119-24 (1999) (comparing the religious practices of Americans with those in other Western democracies).

of the nineteenth century.<sup>113</sup> Moreover, in the past forty years, such conflicts have been enhanced by the insecurities of the global economy, new flexible labor markets, and the increasing recognition in law and public opinion that America has become a more diverse multicultural society.<sup>114</sup> The current debates over religion, science, and the public schools are understandable as part of a long historical tradition.

In this context, the democratic education of our citizens is as important as ever, if not more important, even though specific issues have adopted new configurations. As Amy Gutmann contends, democratic education requires a strong system of public education that is based on a healthy balance between the different perspectives of diverse parents, teachers (who are the professional experts), and state and local policymakers.<sup>115</sup> This balance requires, of course, that respect and weight be given to quite different perspectives that often conflict, for otherwise bureaucracy, professional expertise, or the localism of determined minorities will run roughshod over other perspectives. This proposal's fundamental justification, then, is its attempt to promote the democratic education of citizens by bringing religion into the multicultural mix of our public schools, maintaining careful respect for our cultural differences about religion and science, and establishing civic discussions of these issues in such forums as parent-teacher organizations, local school boards, and the state legislature. This proposal, of course, is also intended to promote a healthy balance of different educational perspectives about public education among the parents, students, teachers, citizens, and policymakers of Kansas.

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113. *E.g.*, FRASER, *supra* note 3; LARSON, *supra* note 41.

114. The increasing recognition that America is multicultural includes such diverse phenomena as the Supreme Court's decisions invalidating prayer in public schools, the civil rights movement in both politics and law, the white flight from inner cities, and the increasing isolation and distance of different social groups from each other in terms of their residences and places of work. *See generally* FRASER, *supra* note 3, at 127-240 (charting the evolution of America into a multicultural society).

115. *See* GUTMANN, *supra* note 7, at 42 (stating that democratic education requires educational authority to be shared among states, citizens, parents, and professional educators).

