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## COMMENTARY

# Educating for Liberalism

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*Schools are expected to prepare students for liberal democracy, but what does that task entail with respect to students' rights to free speech, including their right to engage in religious expression in schools? This Comment distinguishes between two versions of liberalism, here called "detachment liberalism" and "classical liberalism." The first version, associated with thinkers like John Rawls and Richard Rorty, supposes that liberalism depends on citizens learning to separate strong beliefs from deliberation on crucial public matters. This supposition engenders an orientation that views religious expression in schools as undesirable. The second version, reflected in thinkers like John Stuart Mill, sees believing and the search for truth as central to life, personhood, and democracy. This understanding produces an orientation more congenial to the expression and consideration of belief, including religious convictions, in the schools. This Comment then uses this distinction to comment on the preceding Articles by Professors Green, Rogers, and Howarth.*

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## INTRODUCTION

In our society, commitments to liberal democracy, public education, and religion and religious freedom are deeply entrenched, and the interaction among these commitments has been an ongoing source of (sometimes) creative tensions. The three Articles on which I am supposed to comment<sup>1</sup> explore aspects of this interaction, and in doing so, exhibit these tensions. All three Articles clearly adopt a broadly “liberal” perspective, and yet they differ significantly both in their particular conclusions and in their overall directions or orientations.

In this Comment, I will first briefly outline some premises on which my own thinking about these subjects proceeds. These premises are hardly original: I assume that an important function of public schools is to prepare students for liberal democracy, and that how they should do this depends in part on what conception of liberal democracy we select. Using these premises, I will then offer some observations about the Articles. More specifically, I will argue that the Articles by Professors Green and Rogers resonate with a conception that I will call “detachment liberalism”; by contrast, the Article by Professor Howarth reflects a different, more classical (and, I will suggest, more attractive) conception of liberalism.

## I. EDUCATION AND DEMOCRACY

It is commonplace that in this country, schools are supposed to prepare young people to live and participate in a liberal democracy.<sup>2</sup> To be sure, preparing students for liberal democracy is not the only thing schools do — maybe not even the primary thing — but it is nonetheless a crucially important part of the schools’ function. Nearly everyone agrees on this much, but people disagree about what sort of

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<sup>1</sup> Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 UC DAVIS L. REV. 843 (2009); Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 UC DAVIS L. REV. 889 (2009); Melissa Rogers, *The Texas Religious Viewpoints Antidiscrimination Act and the Establishment Clause*, 42 UC DAVIS L. REV. 939 (2009).

<sup>2</sup> See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 200 (paperback ed. 1996) (“Society’s concern with [students’] education lies in their role as future citizens, and so in such essential things as their acquiring the capacity to understand the public culture and to participate in its institutions . . . .”); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 131 (1995) (“The United States Supreme Court has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic.”).

thing liberal democracy is and about how schools can best prepare children to participate in it.

#### A. *Two Versions of Liberalism*

Even among people with a sincere commitment to “liberal democracy,” conceptions of what liberal democracy is — its nature, its point — diverge. For present purposes, and simplifying drastically, it will be helpful to distinguish, in a rough-and-ready way, between two different conceptions, which we can call “detachment liberalism” and “classical liberalism.”<sup>3</sup>

Detachment liberalism (and I apologize for the inevitable simplifications here) emphasizes that liberal democracy is, among other things, a kind of strategy for addressing the challenge of pluralism that characterizes the modern Western world.<sup>4</sup> As seen in the so-called Wars of Religion, differences in belief can be divisive, sometimes destructively so.<sup>5</sup> Detachment liberalism attempts to tame that divisiveness by keeping the public sphere detached from strong beliefs, especially religious beliefs. So it tries to soften such belief or relegate it to the private sphere. This distancing of strong belief from civic life is easily discernible, I think, in John Rawls’s conception of a “public reason.” In this conception, when citizens address major public issues, they bracket their diverse “comprehensive doctrines” and try to talk within an area of “overlapping consensus.”<sup>6</sup> A similar tendency is apparent in Richard Rorty’s criticism of positions, both liberal and conservative, that try to tie democratic commitments to larger truth claims.<sup>7</sup>

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<sup>3</sup> Elsewhere I attempted to elucidate roughly the same distinction by contrasting the “modern Enlightenment” with the “classical Enlightenment.” See Steven D. Smith, *Recovering (from) Enlightenment?*, in *AMERICA AND ENLIGHTENMENT CONSTITUTIONALISM* 13 (Gary L. McDowell & Johnathan O’Neill eds., 2006).

<sup>4</sup> See, e.g., RAWLS, *supra* note 2, at xviii-xx (explaining how liberalism is response to pluralism).

<sup>5</sup> *Id.* at xxiv-xxvi.

<sup>6</sup> *Id.* at 133-72, 223-27.

<sup>7</sup> Rorty derides the inclination by both right-leaning and left-leaning thinkers to link democracy with truth. When the question of the relation between truth and freedom arises, Rorty says, both the political right and the political left “wax philosophical and produce theories about the nature of truth and freedom.” Thus,

[o]n both the original, rightist and the inverted, leftist account of the matter, there is a natural connection between truth and freedom. Both argue for this connection on the basis of distinctions between nature and convention and between what is essentially human and what is inhuman. Both accept the identification of truth and freedom with the essentially human. The

Sometimes the point is put in this way: in place of a commitment to the preeminent value of *truth* in human life,<sup>8</sup> including political life, detachment liberalism attempts to substitute “*reasonableness*,”<sup>9</sup> which entails something like sociability and a willingness to place core beliefs on hold in the interest of “getting along.” Judd Owen explains that “[t]he ‘virtue’ of getting along, of not insisting on anything (too) controversial, is elevated by Rawls to the highest possible plane . . . . Nothing, Rawls tells us, can be so important that it is worth disrupting the peaceful scheme of social cooperation.”<sup>10</sup>

From an older liberal perspective, by contrast — a perspective for which John Stuart Mill could be taken as a representative<sup>11</sup> — this effort to divorce liberalism from strong belief, or from claims about truth, is misguided. For one thing, the strategy cannot work: many have noted the conundrums and paradoxes of detachment liberalism’s efforts to avoid claiming truth for itself.<sup>12</sup> But even if liberal commitments could be severed from beliefs and truth claims, the cure in this case would be worse than the disease.<sup>13</sup> That is because, as I

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difference between them is simply over the question: Is the present socioeconomic set-up in accordance, more or less, with nature?

RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 115 (1999). In contrast to these approaches, Rorty recommends what he takes John Dewey’s position to have been:

Dewey offered neither the conservative’s philosophical justification of democracy by reference to eternal values nor the radical’s justification by reference to decreasing alienation. *He did not try to justify democracy at all.* He saw democracy not as founded upon the nature of man or reason or reality but as a promising experiment engaged in by a particular herd of a particular species of animal — our species and our herd.

*Id.* at 119 (emphasis added).

<sup>8</sup> Cf. THOMAS AQUINAS, *SUMMA CONTRA GENTILES* I, ch. 1, at 60 (Anton C. Pegis trans., 1955) (declaring that “[t]he ultimate end of the universe must . . . be the good of an intellect. This good is truth. Truth must consequently be the ultimate end of the whole universe, and the consideration of the wise man aims principally at truth.”).

<sup>9</sup> See Jody S. Kraus, *Political Liberalism and Truth*, 5 *LEGAL THEORY* 45, 55 (1999) (“Political liberalism’s preferred strategy is to substitute the idea of reasonableness for truth.”).

<sup>10</sup> J. JUDD OWEN, *RELIGION AND THE DEMISE OF LIBERAL RATIONALISM* 127 (2001).

<sup>11</sup> See generally John Stuart Mill, *On Liberty*, in J. S. MILL: ‘ON LIBERTY’ AND OTHER WRITINGS 5 (Stefan Collini ed., 1989) (discussing significance of human liberty).

<sup>12</sup> See, e.g., Kraus, *supra* note 9, at 55-57 (describing political liberalism as “conception of justice” and outlining contradictions in its application to comprehensive views due to focus on reasonableness instead of truth).

<sup>13</sup> The point here is similar to Madison’s in *Federalist 10*, in which Madison argued that even if the problems of faction could be solved by eliminating the liberty which gives rise to factions, “[i]t could never be more truly said . . . that [the remedy] was

have argued at length elsewhere, believing is central to what makes us persons.<sup>14</sup> Mill emphasized the crucial significance of lively, independent thought and “vigorous reason” to the good life.<sup>15</sup> To choose the complacent contentedness inherent in detachment liberalism over these would thus be misguided, even craven: far better to be “Socrates dissatisfied” than “a pig satisfied.”<sup>16</sup> In short, if we could somehow be educated out of our propensity to believe, our lives would be impoverished: we would become a race of “hollow men,” to borrow T. S. Eliot’s title.<sup>17</sup>

To be sure, the ideal of detachment seeks to regulate the public or civic sphere; it does not ask people to set aside their strong convictions in private. But it is doubtful that citizens can so divide themselves and their lives. Thus, John Tomasi observes that “[p]olitical norms, even gently and indirectly, cannot help but shape the character of a people in their own image.”<sup>18</sup> Moreover, even if people were able to separate out their beliefs from their role as citizens, a community systematically detached from its citizens’ deepest beliefs would have little claim on their attachment, and little ability to defend itself against rival views and political systems.<sup>19</sup>

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worse than the disease.” THE FEDERALIST NO. 10, at 73 (James Madison) (Clinton Rossiter ed., 1961).

<sup>14</sup> Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. 1233, 1260-62 (2003).

<sup>15</sup> Mill, *supra* note 11, at 34-36, 70.

<sup>16</sup> J. S. MILL, UTILITARIANISM 57 (Roger Crisp ed., 1998). Michael Zuckert wryly comments on the detached position by imagining a comment of Calvin:

For shame, Professor Rawls. Is a bit of threat to your comfort and safety all it takes to scare you off your ‘convictions’? . . . Do you men of Harvard know nothing of truth? Martin Luther said, ‘Here I stand, I can do no other.’ He knew the princes of church and state would give him no peace, no rest, yet he stood. And you Harvard philosophers, what do you say? ‘Here I sit. I dare do no more.’

Michael P. Zuckert, *Is Modern Liberalism Compatible with Limited Government? The Case of Rawls*, in NATURAL LAW, LIBERALISM, AND MORALITY 49, 72 (Robert P. George ed., 1996).

<sup>17</sup> I develop the point in Steven D. Smith, “Hollow Men”?: *Law and the Declension of Belief*, in CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH 197, 197-99 (Patrick McKinley Brennan ed., 2007).

<sup>18</sup> JOHN TOMASI, LIBERALISM BEYOND JUSTICE 11 (2001).

<sup>19</sup> Cf. Alan Levine, *Introduction: The Prehistory of Toleration and Varieties of Skepticism*, in EARLY MODERN SKEPTICISM AND THE ORIGINS OF TOLERATION 4 (1999) (“Far from attempting to justify liberalism to outsiders or on first principles, Rorty and Rawls prefer not to take up the challenge. Content to harmonize our pre-existing opinions, they do not and cannot address the fundamental challenges that Nietzsche,

Rather than trying to distance liberalism and citizenship from believing, classical liberalism encourages and embraces sincere, vigorous believing — in public as well as in private. But it couples this encouragement with other themes — emphases on fallibility (and hence on epistemic humility), tolerance,<sup>20</sup> mutual respect, the right to dissent, and the dangers of government-imposed standardization<sup>21</sup> or “thought control.”<sup>22</sup> Overall, the goal is not to flatten, marginalize, or quarantine diverse believing but rather to recognize, protect, and celebrate it — both the believing and the diversity.

### B. Liberalism in the Schools

So, what are the implications of these different versions of liberalism for speech and religion in the schools? I do not believe that either the Constitution itself or these different versions of liberalism on their own do or could generate any very specific set of doctrines governing the application of the First Amendment in the schools. Among other difficulties, specific prescriptions will be the product not simply of one’s conception of liberal democracy but of other things as well, such as one’s views about child and adolescent psychology and about the pedagogical implications of that psychology. All of these matters are complex and contested; as a consequence, my own views (insofar as I even have any views) on what specific constitutional doctrines should govern issues of student speech are highly tentative.

Still, it seems to me that the different versions of liberalism do tend to beget different *orientations*, as we might say. And these orientations will have implications for schools in their efforts to instill knowledge and values, and to contribute to the formation of liberal democratic citizens. More specifically, from the detached liberal perspective, democracy is thought to depend on citizens who do not let truth commitments threaten sociability or civic peace, and this dependence has pedagogical implications. Thus, the liberal in a detachment mode

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for example, poses.”).

<sup>20</sup> I argue for this position more fully in Steven D. Smith, *Toleration and Liberal Commitments*, in *NOMOS XLVIII: TOLERATION AND ITS LIMITS* 243, 243, 247-59 (Melissa S. Williams & Jeremy Waldron eds., 2008).

<sup>21</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state . . .”).

<sup>22</sup> Cf. *Kleindeinst v. Mandel*, 408 U.S. 753, 772 (1972) (Douglas, J., dissenting) (“Thought control is not within the competence of any branch of government.”).

will worry about the dangers of allowing strong belief into the schools, and will emphasize the importance of schools maintaining a stance of detached neutrality with respect to such beliefs. Students trained to set aside their strong convictions in a school setting will be equipped to do the same in civic life later on.

In this vein, Rorty explains approvingly that “[John] Dewey’s great contribution to the theory of education was to help us get rid of the idea that education is a matter of either inducing or educing truth.”<sup>23</sup> Instead, the purpose of education, at the primary and secondary levels anyway, is simply “socialization.”<sup>24</sup> Schools are supposed to socialize students to be good democratic citizens — meaning, as Rorty elsewhere explains, citizens who are “bland, petty, calculating and unheroic.”<sup>25</sup>

It need not follow that schools must wholly exclude religious beliefs. Indeed, a goal of detachment liberalism, as Stephen Macedo suggests, is

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<sup>23</sup> RORTY, *supra* note 7, at 118. Rorty elaborates:

I think that the conservatives are wrong in thinking that we have either a truth-tracking faculty called ‘reason’ or a true self that education brings to consciousness . . . . But I think the radicals are wrong in believing that there is a true self that will emerge once the repressive influence of society is removed. There is no such thing as human nature, in the deep sense in which Plato and [Leo] Strauss use this term . . . . There is only the shaping of an animal into a human being by a process of socialization. . . .

*Id.* at 117-18.

Rorty adds that at the college level this socialization would be “followed (with luck) by the self-individualization and self-creation of that human being through his or her own later revolt against that very process [of socialization].” *Id.* at 118. This qualification raises interesting and paradoxical questions. If there is no truth, no true self, and no “human nature,” as Rorty insists, then what criteria should guide this undergraduate self in its enterprise of “self-creation”? Indeed, if there is no “true self,” but only the socially-constructed self that education and society have produced, then where does the self come from that, once out of high school, becomes capable of “revolt” and “self-creation.” And wouldn’t that “self,” if it does revolt, necessarily have been socialized to revolt? If so, then in what sense is the revolt truly a “revolt”? Or might the real revolt consist of a refusal to revolt? One imagines the Rortian father complaining, “What did I do wrong? I tried to be a good liberal father. I brought my son up to revolt, but he’s finished four years of college and he still won’t revolt.” To which the son might reply, “I *am* revolting, Dad — by imitating you. By not revolting in the way you expected me to.”

<sup>24</sup> *Id.* at 118.

<sup>25</sup> RONALD BEINER, *PHILOSOPHY IN A TIME OF LOST SPIRIT: ESSAYS ON CONTEMPORARY THEORY* 12 (1997); see also Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 631 (2002) (suggesting that liberalism promotes kind of “cosmopolitanism” that “as a way of life is shallow, denatured, bereft of deep commitments”).



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to produce “wishy-washy” religion,<sup>26</sup> and depending on how it is done, teaching about religion may be an effective way to achieve that goal. Thus, the United States Supreme Court has long held that schools may teach about religion “objectively” and in a secular way.<sup>27</sup> Teaching comparative religion while presenting religion as a product of history, psychology, or sociology, seems more likely to dilute or subvert genuine faith in children than to nurture it. So it is not surprising that some devout evangelical parents I know refused to let their children take the school’s course about the Bible; they probably had gauged pretty accurately the likely tendencies of such a class.

The basic orientation of classical liberalism, by contrast, would emphasize that schools are supposed to teach truth, or the skills needed in the search for truth, and also to instill in students a love of truth. This sort of liberalism would be disinclined to insist on a stance or pretense of “detachment” on the part of schools; it would recognize that schools must and should teach (and should teach as good and true) values and beliefs favored by the communities that establish those schools. But the classical liberal orientation would not seek to *impose* particular truths on unwilling students and families. On the contrary, it would stress the dangers of standardization, and it would look for ways to respect diversity and accommodate dissent.

In practice, our own system and our constitutional doctrine reflect the influence of both orientations. But the orientations are in tension, and when that tension manifests itself we may be forced to think about which kind of liberalism we prefer. My own view, which I can only report here,<sup>28</sup> is that the classical liberalism typified by Mill is more attractive and admirable, and in the long run more viable, than detachment liberalism. That at any rate will be my orientation in commenting on the Articles by Professors Green, Rogers, and Howarth.

## II. RELIGION AND DISCRIMINATION IN THE SCHOOLS

As noted, my conceptions of detachment and classical liberalism are simplified constructs — useful, I hope, but too simplified to be

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<sup>26</sup> Stephen Macedo, *Transformative Constitutionalism and the Case of Religion: Defending the Moderate Hegemony of Liberalism*, 26 POL. THEORY 56, 61-63 (1998).

<sup>27</sup> See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”).

<sup>28</sup> I have argued more deliberately for this view elsewhere. See, e.g., Smith, *Enlightenment*, *supra* note 3 (arguing for classical over modern Enlightenment liberalism).

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entirely accurate descriptions of the sort of liberalism favored by anyone, including Professors Green, Rogers, and Howarth. Nonetheless, in their dominant themes and orientation, these authors' contributions to this symposium conveniently reflect the different liberalisms that I have tried to sketch.

A. *Detaching Religious Expression from the Schools?*

Professor Green's Article,<sup>29</sup> and perhaps to a lesser extent Professor Rogers's Article,<sup>30</sup> reflect what I call the orientation of "detachment liberalism." Both seem generally fearful about allowing religious expression in the schools. To be sure, neither proposes any categorical exclusion of religion from the schools; indeed, Rogers emphasizes that "[p]ublic schools should discuss, not dodge, the topic of religion."<sup>31</sup> But the thrust of Green's Article is that religion — or at least religion presented in a "believing" way, as opposed to the "objective" treatment that the Supreme Court has permitted<sup>32</sup> — is generally out of place in the public schools. In similar spirit, Rogers comprehensively criticizes a Texas statute designed to allow students to express religious views. Her position rests to a significant extent on perceived flaws in the particular statute, however, making it difficult to extrapolate any more general position.

Professor Green's Article critically and wistfully describes the shift in constitutional doctrine from the 1960s, as manifested in the school prayer cases. *Then*, the emphasis was on the requirement that schools be "secular."<sup>33</sup> *Now*, the emphasis is on equality or "even-handedness"; insofar as schools permit secular student speech, religious speech is presumptively permissible on similar terms.<sup>34</sup>

I think Green's description of the doctrine is largely accurate as far as it goes, although it is also imperative to emphasize — as he does not — that this shift is severely limited in its scope. In their own teaching, the schools themselves are not permitted to give equal time to religious and secular teaching; under prevailing doctrine, rather, they are still limited entirely to the secular.<sup>35</sup> Even if the schools teach

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<sup>29</sup> Green, *supra* note 1, at 886-87.

<sup>30</sup> Rogers, *supra* note 1, at 1037. Although Rogers appears to write from "separationist" commitments somewhat similar to Green's, she differs from him on some specific matters, and in general she seems less opposed to religious expression in schools.

<sup>31</sup> *Id.*

<sup>32</sup> See *supra* note 27 and accompanying text.

<sup>33</sup> Green, *supra* note 1, at 845.

<sup>34</sup> *Id.* at 861-68.

<sup>35</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating Louisiana's

about religion (in history or literature, for example), they must do so, as noted, in a secular or “objective” way.<sup>36</sup> It is only toward private student speech that the more recent cases that worry Green call for “equal” or “even-handed” treatment.

Green grants that equality may be an appropriate principle in some contexts, such as student clubs, but he worries that “equality creep” has gone too far in cases like *Good News Club v. Milford Century School*.<sup>37</sup> In the end, as noted, Green does not endorse any bright line test, but rather suggests a sort of multi-factor inquiry.<sup>38</sup> But the thrust of his argument suggests, for example, that students should not be allowed to bring religion into the classroom in the form of reports on historical figures.<sup>39</sup> Thus, when assigned to write a report to read to the class on the student’s most admired historical figure, Johnny should be able to write about George Washington or Martin Luther King, Jr., but Betty should not be permitted to read a report about Jesus. (She presumably will have to select her *second* most admired figure.) Rogers’s treatment of the Texas Religious Viewpoint Anti-Discrimination Act is more tentative but appears inclined to a similar stance on this issue.<sup>40</sup>

I would agree that *if* the more consistently secular emphasis of the 1960s decisions “got it right,” then the shift Green describes would be regrettable. But for me that’s a counterfactual *if*. The earlier position that Green commends held that a strong requirement of secularism kept the schools benignly neutral toward religion.<sup>41</sup> Conversely, Green emphasizes that permitting private religious speech into the schools, even on an “equality” or “even-handedness” basis, may make some students uncomfortable and subject them to cultural pressure.<sup>42</sup> He may well be right about the possibility of cultural pressure. But it is a mistake, I believe, to suppose that similar problems will not arise in schools that are more single-mindedly secular, or that this sort of

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“Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act).

<sup>36</sup> See *supra* note 27.

<sup>37</sup> Green, *supra* note 1, at 869-70 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001)).

<sup>38</sup> *Id.* at 885-86.

<sup>39</sup> *E.g., id.* at 881.

<sup>40</sup> *Cf.* Rogers, *supra* note 1, at 1016.

<sup>41</sup> Green, *supra* note 1, at 845.

<sup>42</sup> *E.g., id.* at 881-82.

secularity is inoffensively “neutral” toward religion in any non-question-begging sense.<sup>43</sup>

More generally, it is true that the concerns Green describes as “countervailing values” — namely, “subtle and indirect pressures” on students and an environment that conflicts with “the preferences of [some?] parents”<sup>44</sup> — can arise if schools permit even private religious expression. By the same token, those problems can also arise if schools do not permit private religious expression, so that the schools are thoroughly secular in the perspectives they present and permit.<sup>45</sup> Preferences and beliefs of students and parents vary tremendously, of course, so whether the schools are pervasively religious or aggressively secular or something in between, *some* students are likely to feel uncomfortable or alienated and *some* parents’ preferences will not be satisfied. Green fails to explain how these concerns are more real, or more serious, in schools that permit some private religious expression on an “even-handed” basis than in more rigorously secular schools.

Green briefly narrates — accurately, I think — the history of so-called “non-sectarian” education in the nineteenth century,<sup>46</sup> but in my view he fails to see the real lesson to be drawn from this story. Nineteenth-century proponents of non-sectarian schools *said*, and presumably managed for the most part to believe, that these schools were neutral toward religion.<sup>47</sup> Catholics accepted the Bible — didn’t they? — so what could be their complaint if a few verses from the Bible were read in school each day?<sup>48</sup> In retrospect, we may think that these educators were being studiously and self-servingly obtuse: with just a little effort and empathy, they should have been able to appreciate that reading from the *King James Bible* without

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<sup>43</sup> I add this qualification because, as is often noted, “neutrality” is a concept that makes sense relative to some “baseline,” and so it is always possible simply to stipulate a secular baseline and then conclude that a secular curriculum is neutral toward religion. “Secular” is “neutral,” in other words, if you start by basically *defining* “neutral” to mean “secular.” But this definitional ploy does nothing to address the real world conflicts to which “neutrality” is a common response. For further discussion, see Steven D. Smith, *The Pluralist Predicament: Contemporary Theorizing in the Law of Religious Freedom*, 10 *LEGAL THEORY* 51, 60-63 (2004).

<sup>44</sup> Green, *supra* note 1, at 850, 856.

<sup>45</sup> See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987) (considering challenge of Christian parents and students to school curriculum); *Smith v. Bd. Sch. Comm’rs*, 655 F. Supp. 939 (S.D. Ala. 1987), *rev’d*, 827 F.2d 684 (11th Cir. 1987) (considering challenge of parents and teachers against school system’s use of certain textbooks that promote “secular humanism”).

<sup>46</sup> Green, *supra* note 1, at 851-853.

<sup>47</sup> *Id.* at 852-523.

<sup>48</sup> See *id.* at 856-57.

commentary, as was common among Protestants, would strike Catholic students as a *Protestant* exercise. The moral Green takes away is that in a pluralistic society, any religion in the schools will be contrary to the wishes and beliefs of some students and parents.<sup>49</sup>

Probably it will. But again, what Green fails to acknowledge is that a similar analysis and conclusion can be directed with equal force to a secular public school system. Ironically, those like Green who suppose that a secular school curriculum is benignly neutral toward religion (or, more to the point, toward the various *religions*) are in the same position as the nineteenth-century proponents of non-sectarian education. As with the nineteenth-century figures, one would think that with a little effort in empathy (with, for instance, people like the plaintiffs in the much-discussed *Mozert v. Hawkins County Board of Education* case<sup>50</sup>) they ought to be able to see the troubling similarity.

There has been a lot of discussion of this issue over the years (and the shift that Green worries about reflects, I think, a growing recognition that the sort of neutrality claimed in earlier cases for purely secular schools is spurious). I will not try to rehearse the arguments<sup>51</sup>: hopefully, a couple of quick points will suffice.

First, secular teaching in the schools may directly conflict with the religious beliefs of some students. Once again, the *Mozert* case is a well-known illustration; the ongoing conflict over the teaching of evolution provides further evidence.<sup>52</sup>

Second, and this is a slightly subtler point (but not really *very* subtle), a relentlessly secular curriculum will have a tendency, for many students, to marginalize religion or suggest that it is unimportant or unnecessary to the various matters and concerns of life that schools do teach about — health, values, history, politics, and so forth. Green derides the notion “that the mere *absence* of religion [from the schools] indicates *hostility* toward religion rather than

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<sup>49</sup> See *id.* at 857, 886-87.

<sup>50</sup> Plaintiffs, Christian parents and students, objected to reading materials presenting themes which were contrary to their religious beliefs. *Mozert*, 827 F.2d at 1060.

<sup>51</sup> I have discussed the issue at greater length elsewhere. See, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 77-97* (1995) (discussing and criticizing various versions of neutrality); Smith, *supra* note 43 (discussing difficulties with neutrality).

<sup>52</sup> On the evolution controversy, see generally DAVID DEWOLF ET AL., *TRAIPSING INTO EVOLUTION: INTELLIGENT DESIGN AND THE KITZMILLER VS. DOVER DECISION* (2006) (criticizing decision in *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), which held that teaching “intelligent design,” alternative to evolution, in public school biology classes violated Establishment Clause of First Amendment).

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simply a regime of secularity.”<sup>53</sup> But consider a comparison: suppose that the schools systematically decline to teach about the perspectives, achievements, or lives of women, or of African Americans. “Matters of gender and race are controversial in this society,” the schools explain, “and people disagree, sometimes passionately, about how those subjects should be presented. Any presentation on such subjects is likely to make some students feel uncomfortable, alienated, even subtly coerced. So we think it’s best to remain neutral — to just leave those matters alone and let people talk about them at home, church, or in private associations organized for that purpose.” However pure the schools’ motivation, we would understand in this case that saying nothing about women or African Americans is likely to make them seem marginal. The same can be true of religion, or of a failure to present religious perspectives.<sup>54</sup>

Indeed, proponents of secularism have well understood this fact. Writing in *The Humanist*, Paul Blanshard (known for his sharply anti-Catholic writings<sup>55</sup>) observed: “I think the most important factor moving us toward a secular society has been the educational factor. Our schools may not teach Johnny to read properly, but the fact that Johnny is in school until he is sixteen tends toward the elimination of religious superstition.” Charles Francis Potter, a signer of the antireligious *Humanist Manifesto I*, wrote:

Education is . . . a most powerful ally of Humanism, and every American public school is a school of Humanism. What can the theistic Sunday schools, meeting for an hour once a week, and teaching only a fraction of the children, do to stem the tide of a five-day program of humanistic teaching?<sup>56</sup>

To be sure, proponents of the “equality” or even-handedness that worries Green may likewise claim “neutrality” for their position. Green criticizes Justice O’Connor for making this claim.<sup>57</sup> His criticism is well-taken: the equation of some version of “equality” with neutrality invites the same sorts of questions and objections that

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<sup>53</sup> Green, *supra* note 1, at 870 (emphasis added).

<sup>54</sup> Depending on how it is done, teaching about religion from a purely secular perspective might either help with or aggravate this problem. See *supra* text accompanying note 27.

<sup>55</sup> See PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 3-6 (1949).

<sup>56</sup> The quotations are taken from James Davison Hunter, *Religious Freedom and Modern Pluralism*, in *ARTICLES OF FAITH, ARTICLES OF PEACE* 54, 70 (James Davison Hunter & Os Guinness eds., 1990).

<sup>57</sup> See Green, *supra* note 1, at 847, 876-77.

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the equation of secularity with neutrality does. So then, does it follow that “equality” ought to be abandoned as an ideal for shaping the schools and their curriculum?

The question is complicated, I think. In this context, Green favors the older regime of “secularism” over the newer regime of “equality” and does so to detach schools from active religious expression even by students. In fact, however, detachment liberalism can find the idea of “equality” in matters of belief quite congenial. Think of it this way: ideas and propositions do not present themselves as equal; they present themselves as *true*, and hence as to be preferred over incompatible ideas and propositions that are *false*. So if you say that you are going to regard all ideas as equal, you are effectively adopting an attitude of detachment. You are refusing to engage with or take seriously their claims to truth and value.

Conversely, the classical liberal orientation sponsors a more ambivalent attitude toward the proposition that ideas should be treated equally. In this view, “equality of ideas” cannot be any sort of master principle, and it especially cannot be a master principle in schools, which are supposed to teach truth, and to teach students to care about truth. In their pedagogy, schools will *not* treat all ideas as equal; of necessity, they will be engaged in pervasive viewpoint discrimination. The propositions that “ $2 + 2 = 4$ ” and that “George Washington was the first President of the United States” are *true*; the propositions that “ $2 + 2 = 5$ ” and that “Alexander Hamilton was the first President” are *false*. There is no “equality of ideas” here.

Still, the equality proposition can be understood in a more limited sense: *some actors* (in particular, the government) should treat ideas *as if* they were equal *for some limited purposes*. If understood in this more qualified sense, the idea of equality or nondiscrimination may serve more instrumentally to avoid standardization and thought control, to protect dissent, and to acknowledge the diversity of belief that exists in a community. In this vein, a case like *Widmar v. Vincent*<sup>58</sup> or a statute like the Equal Access Act (which Green criticizes<sup>59</sup>) may serve a valuable and (classically) liberal function. The Texas statute that Green also criticizes and that Rogers discusses at length seems to be modeled on a similar “antidiscrimination”

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<sup>58</sup> *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

<sup>59</sup> Green, *supra* note 1, at 863. Rogers’s judgment is different on this issue. Rogers, *supra* note 1, at 1031 (“I am a longtime and enthusiastic supporter of the EAA, and I support the result the Court reached in the *Good News Club* case.”).

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principle (though it is entirely possible, as Rogers argues, that the statute has been clumsily crafted and ineptly implemented).<sup>60</sup>

The central idea, in the classical liberal orientation, would be that schools should neither shy away from truth claims nor seek to impose them. Schools themselves will necessarily teach that some ideas are true and others false, but in also attempting to foster tolerance and to avoid standardization they should, to the extent feasible, welcome consideration and expression of a diversity of ideas. And in principle, religious ideas might be included in this mix. To be sure, schools are subject to the constraints of finite time and resources. In our constitutional system, moreover, it may be that public schools themselves are forbidden explicitly to teach the truth of particular religious doctrines. Nonetheless, exposing students to religious ideas and inviting them to consider those ideas — including their possible truth — is in principle a practice to be cultivated, not condemned.

An incident related in Green's Article can serve to illustrate the point. Green recounts how as a high school student in Fort Worth, Texas, he was reprimanded and sent to detention hall for reading an excerpt from the *Bhagavad Gita* over the school intercom as part of a daily exercise in which a student was assigned to give announcements and read a religious text.<sup>61</sup> According to Green's current position, it seems that the school was right to censor his reading (and that the school should have censored more mainstream religious expression as well). From a more classical orientation, by contrast, it was the younger Green who was the wiser liberal. The best policy would not be to keep all religious speech and ideas (Christian, Hindu, or other) out of the school, but rather to find ways to accommodate students' expression of both Christian and non-Christian ideas.

### B. Accommodating Diverse Expression

This last suggestion can serve as a segue into Professor Howarth's Article,<sup>62</sup> about which I have less to say (mostly because my general reaction is "That's right" or "I agree").<sup>63</sup> If the Green Article and

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<sup>60</sup> Rogers, *supra* note 1, at 977-78.

<sup>61</sup> Green, *supra* note 1, at 857 n.82.

<sup>62</sup> Howarth, *supra* note 1, at 936-38.

<sup>63</sup> I do not mean to imply that I agree with everything in Professor Howarth's Article, of course. For example, although I think Howarth raises good questions about the decision in *Boy Scouts v. Dale*, I am not as critical of the decision as she is: the outcome in the case seems to me sound. More generally, I am not sure that the distinction between "belief" and "identity" can carry as much weight as Howarth seems inclined to place on it. *Id.* at 899-900.



perhaps the Rogers Article resonate with detachment liberalism, Howarth's Article is, I think, a thoughtful and courageous expression of the more classical liberal orientation.

Allowing a variety of student clubs and associations within the schools can be an effective way to accommodate belief — diversity of belief — within the schools. Moreover, as Howarth persuasively explains, for associations to function effectively in teaching and expressing beliefs, they must be free to determine the criteria governing their membership and leadership. We cannot force associations to accept as members or leaders people who oppose their basic beliefs and still expect such associations to perform their function in forming and expressing beliefs.<sup>64</sup> Consequently, as Howarth cogently observes:

[T]he High School Democrats can limit their membership and leadership to people who agree with the Democratic Party, otherwise known as Democrats; the Vegetarian Society can limit its membership to students who support vegetarianism, even limiting the group to students who pledge not to eat meat; and the Christian Legal Society (“CLS”) should be able to limit its membership and leadership to people who share its version of the Christian faith.<sup>65</sup>

Howarth's Article makes a powerful case in terms of constitutional doctrine and precedent that student associations should be able to determine their own criteria for membership and leadership, and that this freedom should not be subverted by the standardizing application of school anti-discrimination policies.<sup>66</sup> But her argument is not limited to the lawyerly citation of doctrine and precedent. More generally, Howarth articulates the connection between student speech and association and what I have been calling the “classical” conception of liberal democracy. “Expressive associations” are valuable in

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<sup>64</sup> Justice O'Connor succinctly expressed the basic justification for this proposition in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring): “Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.”

<sup>65</sup> Howarth, *supra* note 1, at 892. To be sure, in practice there will be limits on the kinds of student associations which schools can accommodate, and Professor Howarth proposes a number of such limits. *Id.* at 931-36. I will not comment here on her specific proposals, except to say that they seem in the main sensible and well thought out.

<sup>66</sup> *See id.* at 913-21.

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schools, she points out, because they “create opportunities for self-expression, advocacy, tolerance, and autonomy.”<sup>67</sup>

The concern to avoid standardization is manifest in her claim that “[t]he link between First Amendment freedoms and democratic participation attaches high value to students’ free expression, including student control of student organizations, *even when those student rights conflict with institutional nondiscrimination policies.*”<sup>68</sup> Given Howarth’s strong commitment to the values reflected in those nondiscrimination policies,<sup>69</sup> this contention reflects a depth and courage of conviction that, as the Article demonstrates, not all advocates of freedom of speech, and not all courts, have manifested.

The contrast with Professor Green’s perspective is perhaps most conspicuous in Professor Howarth’s discussion of “private student speech.” Green laments the Court’s recent tendency to treat private student speech, especially private religious speech, as deserving of constitutional protection in the school setting. On the assumption that even private religious speech may make some students feel “uncomfortable, ostracized, or pressured to conform,”<sup>70</sup> Green presumes that except in special circumstances, such as student clubs, schools should exclude such speech. He would affirm and expand the scope of the *Hazelwood School District v. Kuhlmeier*<sup>71</sup> case as a way of permitting greater censorship of students’ religious speech.<sup>72</sup>

Howarth, by contrast, views the recognition of private student speech as an opportunity to promote a school environment in which diverse beliefs can flourish. Rather than urging a retreat from the protection of private student speech, therefore, Howarth advocates an even more deliberate commitment to distinguishing *student* speech (which should be constitutionally protected) from speech attributable to *the school* itself. In this way, she argues, private speech in all of its diversity will have a place in the schools without inhibiting the schools from teaching and affirming the values that they and the communities they represent choose to present.<sup>73</sup>

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<sup>67</sup> *Id.* at 894.

<sup>68</sup> *Id.* (emphasis added); *see also id.* at 914 (“To create a public forum that includes organizations whose organizing principle is religious belief and yet not permit those organizations to make distinctions based on that faith is almost incoherent.”).

<sup>69</sup> *Id.* at 893.

<sup>70</sup> Green, *supra* note 1, at 882.

<sup>71</sup> *See generally* *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding school principal’s decision, while rejecting former students’ First Amendment challenge, to exclude articles about divorce and pregnancy from school newspaper).

<sup>72</sup> Green, *supra* note 1, at 877-886.

<sup>73</sup> *See, e.g.,* Howarth, *supra* note 1, at 927:

## CONCLUSION

The divergence between Howarth and Green regarding private student speech underscores the importance of the choice between conceptions of the liberal democracy for which schools are preparing students. More specifically, are strong convictions (especially religious convictions) and their expression to be viewed primarily as a threat to liberal peace and sensibilities — and hence as something to be tempered and restrained and quarantined as much as possible in the private sphere? Or should liberalism welcome and celebrate strong believing and its manifestations in expression, while also working to instill tolerance and accommodate diversity? As these Articles demonstrate, our answers to such questions will affect our orientation toward the issues of religious expression in the schools.

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Most clearly, the shift in Establishment Clause doctrine requires schools and universities to rethink their relationship and affiliation with student organizations. Specifically, it requires universities and schools to disengage, provide less oversight, and less of an imprimatur for student organizations that are recognized as part of a limited public forum. Separating the identity of the institution from the identity of the student group is necessary to accommodate this new, secularly entrenched landscape that brings student religious organizations to every level of schoolhouse.