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Is Religion the Lost Diversity in Education in an Era of 'Militant Secularists'?

Charles Russo
University of Dayton, charles_j_russo@hotmail.com

IS RELIGION THE LOST DIVERSITY IN EDUCATION IN AN ERA OF "MILITANT SECULARISTS?"[1]

CHARLES J. RUSSO, M.DIV., J.D., ED.D.*

I INTRODUCTION

'The [Supreme] Court … bristles with hostility to all things religious in public life'.[2]

Chief Justice Rehnquist's dissent in *Santa Fe Independent School District v Doe*,[3] invalidating student led prayer prior to the start of high school football games expressed a sentiment shared by

*Panzer Chair in Education, Director, Ph.D. Program in Educational Leadership, Research Professor of Law, University of Dayton, Dayton, Ohio, US.

[1] In a speech at Notre Dame University, Indiana, on October 11, 2019, Attorney General William Barr addressed attacks on religion and people of faith in the United States:

> And yet the forces of secularism ignoring these tragic results press on with even greater militancy. Among the militant secularists are many so-called progressives, but where is the progress? We are told we are living in a post-Christian era. But what has replaced the Judeo-Christian moral system? Today militant secularists do not have a live-and-let-live spirit…they are not content to leave religious people alone to practice their faith. Instead they seem to take delight in compelling people to violate their conscience.

Philip Bump, 'The Trump Administration Fans out to Defend Christianity across the Political Spectrum', *Wash. Post* (14 October 2019). Not surprisingly, Paul Krugman's, *N.Y. Times* (online, 14 October 2019) opinion column, 'God Is Now Trump's Co-Conspirator: Bigotry, both Racial and Religious, is the Last Refuge of a Scoundrel', inaptly attacked Barr's speech as 'the language of witch hunts and pogroms', <https://www.nytimes.com/2019/10/14/ opinion/trump-william-barr-speech.html>. Not to be outdone, Catherine Campbell's column in the *Wash. Post*, (14 October 2019) A 27 'Was Barr's Religion Speech a Cry for Help?', criticized Barr's speech as 'a tacit endorsement of theocracy'. See also Jack Jenkins, 'Liberal Christian Group Files Ethics Complaint against Attorney General Barr', *Religion News Service* (online, 29 October 2019) <https://religionnews.com/ 2019/10/29/liberal-christian-group-files-ethics-complaint-against-attorney-general-barr/?utm _ source=Pew+Research+ Center& utm_ campaign=b98291ef96-EMAIL_CAMPAIGN_2019_10_ 30_01_50&utm_medium=email &utm_term =0_ 3e953b9b70-b98291ef96-400258905> ('Faithful America, a Christian advocacy group that often champions liberal causes, has filed an ethics complaint against U.S. Attorney General William Barr, claiming he violated his oath to defend religious liberty for all Americans in a recent speech at Notre Dame University's law school'.).

[2] 530 US 290, 318 (2000) (Rehnquist, CJ dissenting) (invalidating prayer at the start of high school football games). For a commentary on this case, see Ralph D. Mawdsely and Charles J. Russo, '**Error! Main Document Only.**Student Prayers at Public School Sporting Events: Doe v Santa Fe Independent School District' 143 (2000) *Educ. L. Rep.* 415.

[3] Ibid. A more recent Pew Report reveals that while 55% of Americans agree "churches and religious organizations do more good than harm in American society, 20% said they do more harm than good and 24% think they do not make much difference. Further, by a margins of 63% to 23% respondents said that churches and other houses of worship should keep out of political matters; by a margin of 76% to 23% that churches and other houses of worship should not endorse political candidates; and 37% viewed churches and religious organizations as having too much influence in politics while 28% believed they did not have enough influence, and 34% said they had the right amount of influence. *Pew Research Center Religion & Public Life*, *Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics*: *Most say Religion is Losing Influence in American life* (Webpage, 15 November 2019) < https://www.pewforum.org/ 2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/?utm_source=Pew+ Research+Center&utm_campaign=048ac2e5b7EMAIL_CAMPAIGN _2019_11_15_03_01 &utm_medium=email&utm_term=0_3e953b9b70-048ac2e5b7-400258905>.

many Americans.[4] In light of Rehnquist's comment, one can argue that the United States (U.S.), a nation founded in part on an imperfect notion of freedom of religion,[5] a right once reserved for members of the dominant faith traditions in the early American colonies, particularly with the Congregational Church in Puritan Massachusetts,[6] seems to have lost its way. Despite the guarantee of religious freedom in the First Amendment,[7] in a country that has long prided itself on freedom of religion as an integral element in its national fabric,[8] Americans agree that the growing secular culture is increasingly hostile to religion,[9] seemingly repudiating the very Judeo-Christian values on which the U.S. was founded.[10]

Opponents of Christianity are often led by those 'on the political left . . . [who] have taken to calling themselves and their causes 'progressive'"[11] rather than liberal. These militantly secular critics are

[4] Ibid.

[5] Speaking to the military on 11 October 1798, John Adams, the second President of the U.S. and a Founder of the American Republic, said '[o]ur Constitution was made only for a moral and religious people …. It is wholly inadequate to the government of any other'. 25 Letter from John Adams to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), 9 *The Works of John Adams* 228, 229 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1854).

[6] See James W. Fraser, *Between Church and State: Religion and Public Education in a Multicultural Society* (John Hopkins University Press, 1999) 7-21.

[7] Pursuant to the First Amendment's Religion Clauses, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;…'.

[8] For a discussion of events surrounding the adoption of the Religion Clauses, see *Hosanna-Tabor Evangelical Lutheran Church and Sch. v Equal Employment Opportunities Comm'n*, 565 US 171, 182-185 (2011) (Hosanna Tabor) (holding that religious officials rather than the EEOC had the right to select ministers at a faith-based school). For a commentary on this case, see Ralph D. Mawdsley and Allan G. Osborne, *Shout Hosanna: The Supreme Court Affirms the Free Exercise's Clause Ministerial Exception*, 278 (2012) *Educ. L. Rep*. 693.

[9] 'Sixty-seven percent (67%) of [respondents] agree with Barr's Notre Dame remark that 'the problem is not that religion is being forced on others. The problem is that … secular values are being forced on people of faith'. Also, '… 47% agree there is 'an unremitting assault on religion and traditional values'. 'Americans Agree Religion Is Under Punishing Assault', *Rasmussen Reports* (Webpage, 17 October 2019) <http://www.rasmussenreportscom/ public_content/ lifestyle/general_lifestyle/october_2019/americans_agree_religion_is_under_punishing_assault ?utm_ campaign=RR10172019DN&utm_source=criticalimpact&utm_medium=email>.

[10] See, eg, *Wood v Arnold*, 915 F 3d 308, 312-13 (4th Cir, 2019), *cert. denied*, (25 October 2019) (rejecting a high school student in Maryland's claim that requiring her to complete an assignment about the Five Pillars of Islam, including writing out 'There is no god but Allah and Muhammad is the messenger of Allah[,]' a portion of a declaration known as the shahada… and her teacher's comment that the faith of the average Muslim was stronger than that of the average Christian, violated her First Amendment rights to freedom of religion and from compelled speech); *Eklund v Byron Union Sch. Dist*., 154 Fed. Appx. 648 at 648 (9th Cir, 2005), *cert. denied*, 549 US 942 (2006) (rejecting the claim that a simulation unit on Islamic culture in a social studies course in California that, among other things, directed students to wear identification tags displaying their new Islamic names, dress as Muslims, memorize and recite an Islamic prayer with the status of the Lord's Prayer in Christianity plus verses from the Uur'an, recite the Five Pillars of Faith, and engage in fasting and acts of self-denial 'were not . . . 'overt religious exercises' that raise[d] Establishment Clause concerns').

[11] Michael Allan Wolf, 'Looking Backward: Richard Epstein Ponders the "Progressive" Peril' 105 (2007) *Mich. L. Rev*. 1233, 1245 (n 50).

typically the antithesis of open-mindedness to diverse views not conforming with their own as they seek to punish believers.[12] Attempting to silence those with whom they disagree, especially if disputes are religion-based, some critics have gone so far as attempting to prevent people of faith from receiving judicial appointments[13] in violation of the Article VI to the *United States Constitution*, pursuant to which 'no religious test shall ever be required as a qualification to any office or public trust under the United States'.[14] Amid empty calls for tolerance and acceptance of diversity, progressive secularists demonstrate little or no respect for the perspectives of others, particularly if they are religious, unless they conform to their own politically correct flavours of the day.

Oblivious to the overt hypocrisy of their actions, many progressives, or social justice warriors[15] (SJWs), calling for diversity, typically limited to race and sexual orientation, while excluding viewpoints with which they disagree, are ironically doing all they can to ensure a new closing of the American mind with regard to religion.[16] These progressives refuse to respect positions with

[12] See, eg, Todd J. Gillman, 'Beto O'Rourke Says he'd Revoke Tax-exempt Status of Religious Groups that Oppose Same-sex Marriage' *The Dallas Morning News* (11 October 2019) WLNR 30715295 (reporting that former Democrat presidential candidate Beto O'Rourke from Texas would revoke the tax-exempt status of churches oppose to same-sex marriage).

[13] See for example Ramesh Ponnuru, 'In the Wings: Anthony Kennedy's Replacement should be Amy Barrett', *Chicago Tribune* (Chicago, 2 July 2018) (reporting that Sen. Dianne Feinstein, D-Calif., criticized Amy Coney Barrett, possible future Supreme Court nominee, during her confirmation hearings to the Seventh Circuit for her religious views: "'Dogma lives loudly within you,' she said, in said, in reference to Barrett's Catholic faith. Never mind that Barrett had already said that 'it is never appropriate for a judge to apply their personal convictions, whether it derives from faith or personal conviction.'" See also Jon Seidel, Lynn Sweet, & Lynn Sweet [sic], 'Chicago Judge Amy Barrett, Passed over for Supreme Court, will Stay in Spotlight', *Chicago Sun Times* (10 July 2018) (reporting that Barrett remains in consideration for future Supreme Court vacancies if Donald Trump retains the presidency); Ashley McGuire, 'Anti-Catholicism Lives Loudly in Democrats, *The Catholic Association* (Webpage, 28 January 2019) < https://www.realclearreligion.org/articles/2019/01/28/anti-catholicism_lives _loudly _ in_democrats_110207.html> (highlighting anti-Catholic rhetoric from various Democrat politicians).

[14] *United States Constitution* art VI.

[15] For reflections on SJWs, see, eg, J. Peder Zane, 'Social Justice Warriors are the New Vigilantes', *News & Observer* (Raleigh, NC) (online, 3 July 2019) < https://www.newsobserver.com/opinion/article232253777.html> (writing that '[i]nstead of the hardcore racists of the Jim Crow era, these new protectors of the realm are social justice warriors who form Twitter mobs in cyberspace where they condemn the accused without trials or basic facts'.); Jessica Chasmar, 'Bill Maher: Social justice Warriors 'a cancer on progressivism', *Wash. Times* (12 March 2019) WLNR 7790922 (reporting on the comments of a well-known talk show host, political commentator, comedian, and avowed liberal).

[16] This idea mirrors the title the seminal best seller, Allan Bloom, *The Closing of the American Mind: How Higher Education Has Failed Democracy and Impoverished the Souls of Today's Students* (Simon & Schuster, 1987).

which they disagree, demonstrating hostility to religion[17] in the educational marketplace of ideas[18] by filing litigation on an array of issues such as challenging aid to children in faith-based schools[19] or prayer in public schools[20] as well as to the use of religious symbols[21] or related patriotic materials addressing God.[22] Concomitantly, these SJWs have disrupted Christian worship services[23] and singled out and sued Christian operated businesses,[24] with mixed results, even if other options were available. For example, litigation ensued when proprietors refused to print materials for an organization advocating positions in conflict with their religious beliefs[25] as well as those unwilling

[17] See, eg, John Hirschauer, 'CNN's Anti-Religious Town Hall', *Nat'l Rev* (online, 14 October 2019) <https://www.nationalreview.com/2019/10/cnns-anti-religious-town-hall/> (reporting on how democrat contenders for the presidential nomination attacked religious freedom).

[18] Cited in more than seventy of its judgments, perhaps the Supreme Court's most apropos use of the term is in *Keyishian v Board of Regents*, 385 US 589, 603 (1967) ('The classroom is peculiarly the "marketplace of ideas"'. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection'.) (internal citations omitted) (invalidating statutes and regulations making membership in specified organizations prima facie evidence of disqualification for employment in public colleges and universities).

[19] See (n 63-71) and accompanying text for a review of these cases.

[20] See (n 72-75) and accompanying text for a review of these cases.

[21] See, eg, *Demmon v Loudoun Cnty. Pub. Schs.*, 342 F Supp 2d 474 (E.D. Va. 2004) (granting a parental motion for summary judgment where a board ordered the removal of bricks decorated with Latin crosses while allowing those with secular symbols to remain in a school's walkway of fame, treating such behaviour as impermissible viewpoint discrimination. But see *Seidman v Paradise Valley Unified Sch. Dist. No. 69*, 327 F. Supp.2d 1098 (D. Ariz. 2004) (rejecting parents' motion for summary judgment in a suit against their board for violating their First and Fourteenth Amendment rights over having to remove the word "God" from the proposed inscription 'God Bless Quinn We Love You Mom and Dad', and a similar one for their daughter that would have appeared on wall tiles on an interior school wall).

[22] See *Johnson v Poway Unified Sch. Dist.*, 658 F.3d 954, 958 (9th Cir, 2011), *cert. denied*, 566 US 906 (2012) (affirming that officials in California could order a high school teacher to remove two large banners from a classroom wall because their presence violated the *Lemon* test. The first proclaimed "In God We Trust", "One Nation Under God", and "God Bless America"; the second read 'All men are created equal, they are endowed by their Creator').

[23] Conceding that such protesters likely represent a fringe minority in their particularly egregious disrespect for Roman Catholic beliefs and sensitivities, on 10 December 1989, members of ACT-UP, an AIDS-awareness group, chained themselves to pews in New York City's St. Patrick's Cathedral, shouting down Cardinal O'Connor at a Sunday Mass; others pretending to "receive" the Eucharist spat it out, desecrating the Sacrament by stepping on the consecrated hosts. Mike Dorning, 'Religion, Gays, Politics Turn Parade into Battle', *Chicago Tribune* (15 March 1993) 1.

[24] While not involving litigation, a fast food chain owned by Christians bowed to pressure from LGBT activists who criticized it for making charitable contributions to the Fellowship of Fellowship of Athletes and the Salvation Army, two organizations disapproving of same-sex unions. 'Chick-fil-A Foundation ends donations to Two Nonprofits that have been Criticized by LGBTQ Activists', *Tulsa World* (Oklahoma, 18 November 2019).

[25] See *Lexington-Fayette Urban Cnty. Human Rights Comm'n v Hands on Originals*, ---SE 3d---, 2019 WL 5677638 (Ky. 2019) (ruling that the owners of a print shop that makes custom-made promotional materials such as shirts, and hats was not obligated to print flyers for a group which represents and advocates for the lesbian, gay, bisexual, transgender, queer, questioning, intersex, and allied community because doing so violated their sincerely held religious belief is approving of relations between members of the same sex and non-marital sexual relations between men and women).

to bake custom-made cakes for gay wedding ceremonies,[26] print customized invitations for such events,[27] photograph such activities,[28] sell flowers to be displayed at these gatherings,[29] and/or provide transportation to participants.[30]

Indeed, the same progressive SJWs who proclaim diversity as a virtue brook no dissent from those who stray from the preferred ideologies of the day on a wide range of issues are doing all they can to exclude even the vestiges of Judeo-Christian values, including Biblical views of sexuality.[31] Examples of other incidents evidencing hostility to religion resulted in attempts to restrict, if not eliminate, religious speech[32] on college and university campuses.[33]

As the progressive revolution proceeds, the judiciary has been at the epicentre of the culture wars[34] over the place of religion in education in the U.S., largely, but not exclusively, in elementary and secondary schools because cases have also arisen in tertiary institutions. Criticizing the judiciary, Justice Scalia suggested that judges have 'taken sides in the culture war, departing

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[26] See *Masterpiece Cakeshop v Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (reasoning that a panel of the Colorado Civil Rights Commission violated a baker's rights by demonstrating overt hostility to his Christian faith when he refused to make a custom cake for a gay wedding). For a commentary on this case, see Charles J. Russo, 'Kicking the Can Down the Road in Masterpiece Cakeshop: Is Finding a Happy Medium Possible or Will the Solution Remain Half-baked?' 44 (2019) *U. Dayton L. Rev*. 399.

[27] *Brush & Nib Studio v City of Phoenix*, 2019 448 P 3d 890 (Az, 2019) (holding that designers of custom made wedding invitations could not be compelled to prepare items for a same-sex union, at the risk of facing such draconian penalties as six months of jail time, $2,500 in fines, and three years of probation for each day city officials deemed them as breaking the law, because doing so violated their sincerely held religious beliefs that rejected such unions).

[28] See *Elaine Photography v Willock*, 309 P.3d 53 (NM, 2013), *cert. denied*, 134 S. Ct. 1787 (2014) (upholding an order declaring that a photographer violated the state's Human Rights Act in refusing to provide her services for a same-sex union did not her rights to Free Speech or the Free Exercise Clause of the First Amendment to the U.S. Constitution even though she would have had to act in manner inconsistent with her sincerely held religious beliefs).

[29] *See State v Arlene's Flowers*, 389 P 3d 543 (Wash, 2017), *cert. granted, jdgmt. vacated*, 138 S. Ct. 2671 (2018), *on remand*, 441 P 3d 1203 (Wash, 2019) (affirming that a florist violated the state's antidiscrimination law by refusing to make a floral arrangement for a gay marriage), *cert. petition docketed*, US Sup. Ct. 19-333 (12 September 2019).

[30] See Erin Cox, 'It's Back to the Bam for Wedding Trolleys', *The Balt. Sun* (26 December 2012) A1 (reporting that the owner of a trolley company in Baltimore who rented his vehicles for weddings announced that he would forgo what had been a profitable business activity rather than run the risk of having to serve same-sex couples in the wake of a recently approved change in state law legalizing such relationships).

[31] See, eg, Bradford Richardson, 'Churches Fight back against Iowa Bid to Silence Biblical Views on Sexuality, Gender Identity', *Wash. Times* (D.C, 7 July 7 2016) (reporting on efforts to prevent the implementation of the Iowa Civil Rights Commission's interpretation of state law that could bar churches from expressing biblical views on sexuality and gender identity, even from Sunday pulpits).

[32] See, eg, *Christian Legal Society v Martinez* (n 78) and accompanying text.

[33] See Charles J. Russo, 'Religious Freedom in Faith-Based Educational Institutions in the Wake of *Obergefell v Hodges*: Believers Beware' (2016) *Brigham Young Univ. Educ. & L. J.* 263.

[34] The term "culture war" apparently first appeared in James Davidson Hunter, *Culture Wars: The Struggle to Define America* (Basic Books, 1991); see also Bradley C.S. Watson (ed), *Courts and the Culture Wars* (Lexington Books, 2002).

from its role of assuring, as neutral observer, that the democratic rules of engagement are observed'.[35] If one accepts Scalia's interpretation, then the Supreme Court can be said to have turned its back on what can aptly be described as the first freedom,[36] given the leading place of religious freedom in the First Amendment to the U.S. Constitution. At the same time, the judiciary appears to be mirroring another comment of Justice Scalia who mused that activist members of the Supreme 'Court must be living in another world. Day by day, case by case, it is busy designing a Constitution for a country I do not recognize'.[37] With the appointments of Justices Gorsuch and Kavanaugh, though, a new day may be dawning in support of religious freedom.[38]

Regardless of whether one is a fan of President Donald J. Trump, it cannot be denied that he has kept his campaign promise[39] to appoint originalists[40] or strict constructionists[41] jurists to the Federal judiciary who interpret the Constitution as it is written. Trump has avoided appointing

[35] *Lawrence v Texas*, 539 US 558, 602-03 (2003) (Scalia J dissenting) (commenting on the Court's having invalidated a state sodomy law applied to consenting adults). See also *Romer v Evans*, 517 US 620, 652 (1996) (Scalia J dissenting) (in a case invalidating a state constitutional provision forbidding legislative, executive, or judicial actions protecting "homosexuals" from discrimination, he mused that '[w]hen the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins--and more specifically with the Templars, reflecting the views and values of the lawyer class all legislative, executive, or judicial action designed to protect homosexual persons from discrimination from which the Court's Members are drawn'.).

[36] For a book developing this thesis, see James Wood, *First Freedom: Religion and the Bill of Rights* (Baylor University, 1990).

[37] *Board of Cmty. Comm'rs v Umbehr*, 518 US 668, 711 (1996) (Scalia J dissenting) (affirming that the First Amendment protects independent contractors from the termination of or prevention of automatic renewals of at-will government contracts in retaliation for exercising their right to freedom of speech).

[38] For a discussion of the role of judges, especially as to Education Law, see Charles J. Russo, 'The Courts and Education Law: What Role Should Judges Play?*'* 13 (2019) *Int'l J. of Educ. L. and Pol'y* 7.

[39] *See* Colby Itkowitz, 'Trump's Judiciary Impact Expands', *Wash. Post* (D.C. 22 Dec. 2019, 2019 WLNR 38314900) (reporting that "After three years in office, President Trump has remade the federal judiciary, ensuring a conservative tilt for decades and cementing his legacy no matter the outcome of November's election. … Trump nominees make up 1-in-4 U.S. circuit court judges. Two of his picks sit on the Supreme Court. And this past week, as the House voted to impeach the president, the Republican-led Senate confirmed an additional 13 district court judges.
In total, Trump has installed 187 judges to the federal bench. See also Charles J. Russo, 'The Trump Administration-Looking Ahead', In S. Permuth, R.D. Mawdsley and C.J. Russo (Eds.), *Religion and Law in Public Schools* (Cleveland, OH: ELA, 2017) 502-503.

[40] See Charles C.W. Cooke, 'To Take the Slings and Arrows:' A Conversation with Justice Neil Gorsuch', *Nat. Rev.* (29 October 2019) 32 (reporting that 'Justice Gorsuch's animating conviction is that judges are there to understand and to enforce the Constitution as it was understood at the time of ratification, rather than read their own views—or the views they imagine are held by the majority of the citizenry—into the text'.).

[41] See Jim Dey, 'Durbin to Supreme Court on Gun-rights Case: Back off or else', *The News-Gazette* (Champaign-Urbana, IL, 20 August 2019) (identifying 'the [C]ourt's five conservative justices [as] John Roberts, Samuel Alito, Neil Gorsuch, Brett Kavanaugh and Clarence Thomas … [and its] four liberals - Stephen Breyer, Sonia Sotomayor, Elena Kagan and Ruth Bader Ginsburg'.).

activists who engage in 'judicial interpretive updating',[42] taking it on themselves,[43] to re-write the Constitution as they would like it to be. Consequently, with a minority of judicial activists or separationists on the high Court bench, led by eighty-five-year-old Justice Ginsburg,[44] if Trump is re-elected, he can change the course of the Court for a generation by expanding the slender majority the originalists currently enjoy.

Against this background, the first part of this article surveys key Establishment Clause cases from the Supreme Court during its modern era that began in 1947 with *Everson v Board of Education*[45] (*Everson*). Although *Everson* allowed aid, most of the Court's rulings over the better part of the next sixty years, grounded in the 'wall separation between Church and State',[46] language not in the

[42] *Hivley v Ivy Tech Cmty. Coll. of Ind*., 853 F 3d 339, 353 (7th Cir, 2017) (Posner J concurring) (stating that a woman who alleged she was subjected to employment discrimination due to her sexual orientation had a sex discrimination claim under Title VII of the Civil Rights Act of 1964).

[43] This concern arises when federal trial courts announce nation-wide injunctions, arguably exceeding the scope of their authority. *See* Jacqueline Thomsen and Brett Samuels, 'Trump Officials Target Authority of Judges to Issue National Injunctions', *The Hill* (8 May 2019); Zachary D. Clopton, 'National Injunctions and Preclusions', 118 (2019) *Mich. L. Rev*. 1, 1 (noting that 'Attorney General Jeff Sessions labelled these injunctions 'absurd' and 'simply unsustainable'. Justice Clarence Thomas called them 'legally and historically dubious', while Justice Neil Gorsuch mockingly referred to them as 'cosmic injunctions'. Scholars in leading law reviews have called for their demise',). See also *Department of Homeland Security v New York*, --- S. Ct. ---, 2020 WL 413786 (Mem) (2019) Staying a nation-wide injunction preventing the Trump Administration from denying residency and a pathway to citizenship to migrants who depend on welfare benefits). Excoriating such judgments, Justice Gorsuch's concurrence, joined by Justice Thomas, reasoned that 'The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them. Whether framed as injunctions of 'nationwide,' 'universal,' or 'cosmic' scope, these orders share the same basic flaw—they direct how the defendant must act toward persons who are not parties to the case'. Ibid *2.

[44] See Richard Wolf, 'The People's Justice:" After Decade on Supreme Court, Sonia Sotomayor is most Outspoken On Bench and Off', *USA Today* (online, 8 August 2019) <https://www.usatoday.com/story/news/politics/ 2019/08/ 08/justice-sonia-sotomayor-supreme-court-liberal-hispanic-decade-bench/1882245001/?utm_ source= feedblitz& utm_medium=FeedBlitzRss&u> (reporting that during the 2018-2019 term Sotomayor 'and Associate Justice Ruth Bader Ginsburg, the grande dame of the court's left flank, agreed in 93% of the court's cases…. Over the past two terms, as the court moved further to the right, Sotomayor has penned more dissents than any other justice'; also, acknowledging that '[c]onservatives currently outnumber liberals on the Supreme Court 5-4, but the past year featured a multitude of cases where conservatives — including President Trump's picks Neil Gorsuch and Brett Kavanaugh — sided with the liberal bloc'.

[45] 330 US 1 (1947), *reh'g denied*, 330 US 855 (1947).

[46] The metaphor "wall of separation" was popularized by Thomas Jefferson's letter of January 1, 1802, to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 Writings of Thomas Jefferson 281 (Andrew Adgate Lipscomb & Albert Ellery Bergh, eds. 1903). Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

The Supreme Court first used the term in *Reynolds v United States*, 98 US 145 (1878) (rejecting a Free Exercise Clause challenge to a federal polygamy statute involving members of the Latter-Day Saints).

First Amendment,[47] were not very accommodating to religion and people of faith. During this time, whether addressing aid or religious activity in public schools, the Court largely demonstrated judicial indifference, if not hostility, to religion.

As noted, the first substantive part of this article highlights cases illustrating the Supreme Court's separationist perspective because it may have unintentionally set the stage for current trend of hostility to religion. Put another way, in being unable to distinguish between maintaining a healthy separation between Church and state[48] and hostility to religion, proponents of diversity, particularly in education, continue to call for a multiplicity of perspectives in the marketplace of ideas as long as they are not faith-based; what goes on in schools is important because it a reflection of what is occurring in the larger society. This section then goes on to review cases wherein the Court is more favourably disposed to religious freedom and people of faith.

Reflecting on the status of faith in the marketplace of ideas, because the focus of this paper highlights the hostility religion faces in the United States, the second part of this essay briefly offers three preliminary suggestions about how educators, legislators, and others can foster respect for religion as another form of diversity. Educators can advance respect for diversity by teaching students that while they are, of course, free to disagree with those who do share their beliefs, they should do so without being disagreeable, meaning there is no need for rudeness or a lack of civility. To this end, aware of unfolding events in both Australia[49] and the U.S., this article should be of

[47] For the relevant language see (n 7). Insofar as the First Amendment explicitly applies only to Congress, the Supreme Court applied it to the states through the Fourteenth Amendment in *Cantwell v Connecticut*, 310 US 296 (1940) (invalidating the convictions of Jehovah's Witnesses for violating a law against soliciting funds for religious, charitable, or philanthropic purposes without prior approval of public officials). This judgment grants individuals the same rights in suits against the federal and state governments over the establishment of religion.

[48] See Philip Hamburger, *Separation of Church and State* (Harvard University Press, 2004) (viewing the Establishment Clause as a mandate for disestablishment under which there can neither be coercive attendance at services nor support for religion nor state interference in the governance of religious institutions).

[49] While this article deals with the position pursuant to the U.S. Constitution, it is worth briefly noting that the place of, and protection for, religion and religious freedom has been gaining importance in Australia at least since the 2017 amendments to the *Marriage Act 1961* (Cth) legalizing same-sex marriage (see *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Following those reforms, the federal government established the Religious Freedom Review to examine whether Australian law adequately protects religious freedom. In early 2018, the Expert Panel delivered its report to the Prime Minister <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>, and in 2019 the government issued its response in the form of the proposed Religious Freedom Bill 2019 (Cth). As the Bill was being considered, officials of Rugby Australia terminated the contract of rugby star Israel Folau due to comments he made in opposition to same-sex marriage and which polarized the country about whether freedom is available to those expressing religiously motivated views. See, eg, Judith Ireland, 'A Pox on both their Houses': Senator warns of Voter Backlash if Religious Freedoms not Protected', *The Herald Sun* (online, 6 July 2019) <

interest to readers in both nations and elsewhere where people are interested in religious freedom. The article ends with a brief conclusion.

II THE U.S. SUPREME COURT AND RELIGION – ERECTING THE WALL OF SEPARATION

A *Elementary and Secondary Education*

As noted, the Supreme Court ushered in its modern Establishment Clause jurisprudence on schooling and religion in *Everson*.[50] In *Everson* the Court upheld the constitutionality of a law from New Jersey permitting local boards to make rules and contracts to transport children to and from their faith-based schools under the child-benefit test. Pursuant to this legal construct, courts uphold aid as permissible because it flows primarily to students rather than their religious.

In *Everson*, as author of the majority opinion, Justice Hugo Black introduced a Jeffersonian metaphor into the lexicon of the Supreme Court's First Amendment jurisprudence, writing that '[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach'.[51] Given Black's membership in the Ku Klux Klan, a group that hated Blacks, Catholics, Jews, among others,[52] one can wonder whether his initial reliance on the wall permitting aid in *Everson* was a Trojan Horse that has subsequently been used to oppose aid.

A year later, in *People of State of Illinois ex rel. McCollum v Board of Education of School District No. 71, Champaign County* (*McCollum*),[53] the Supreme Court invalidated a program under which public school students left their classes to attend lessons taught by a Jewish rabbi, Catholic priests, and Protestant teachers. Students who did not attend religious classes went to other rooms to engage in secular study. The Justices vitiated the program both because it used tax-supported buildings to

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https://www.smh.com.au/politics/federal/a-pox-on-both-their-houses-senator-warns-of-voter-backlash-if-religious-freedoms-not-protected-20190706-p524qe.html>. To some extent, the Religious Freedom Bill 2019 (Cth) was drafted in response to the Folau affair. See, eg, Andrew Clennell, 'Inspired by Folau, Latham to put Bill on Religious Freedom', *The Australian* (25 September 2019) 2.

[50] See (n 45). But see *Wolman v Walter*, 433 US 229 (1977) (forbidding officials in faith-based schools from using buses to transport children to field trips because in deeming the activities curricular in nature, the Court categorized them as instruction rather than non-ideological secular services such as transportation to and from school).

[51] Ibid 18.

[52] See also Richard F. Duncan, 'Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto' 18 (2014) *Tex. Rev. of L. and Pol*. 255, 274 (discussing Black's extensive involvement in the Klan (internal citations omitted).

[53] 333 US 203 (1948).

disseminate religious doctrine and school officials gave religious groups invaluable, impermissible, aid in helping them by providing students for the classes via the state's compulsory education machinery.

Three years later, in *Zorach v Clauson* (*Zorach*),[54] the Supreme Court allowed officials in New York to release students from their public schools to attend religious classes elsewhere. Distinguishing *Zorach* from *McCollum*, the Justices upheld the practice as constitutionally permissible because public schools were not used for religious instruction, analogizing that release time was not unlike excuses for students who were absent for religious reasons.

The post-*Zorach* Supreme Court became increasingly separationist with decisions in back-to-back years invalidating prayer and Bible reading in public schools. In *Engel v Vitale* (*Engel*),[55] the Court's first case on point, it rejected a prayer composed by the New York State Board of Regents for suggested use in public schools to inculcate moral and spiritual values in students. The Justices observed that '[t]here can be no doubt that New York State's prayer program officially establishes the religious beliefs embodied in the Regents' prayer'.[56]

A year later, in *School District of Abington Township v Schempp* and *Murray v Curlett* (*Abington*),[57] disputes from Pennsylvania and Maryland, respectively, the Supreme Court invalidated prayer and Bible reading as part of the opening of school days as violating the Establishment Clause. In so doing, the Court enunciated what would become the first two parts of the *Lemon* test, writing that '[t]he test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment? . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion'.[58]

In an apparent attempt to avoid appearing anti-religious, the Justices explained that nothing in *Abington* forbade the secular study of the Bible in public schools in appropriate contexts such as

[54] 343 US 306 (1952).
[55] 370 US 421 (1962). The prayer was: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country' [422].
[56] Ibid 430.
[57] 374 US 203 (1963).
[58] Ibid 222.

literature or history: '[i]t 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'.[59]

Six years after *Abington*, in *Board of Education of Central School District No. 1 v Allen* (*Allen*),[60] the Supreme Court upheld the constitutionality of a statute from New York directing local boards to loan textbooks to all children in grades seven to twelve regardless of whether they attended faith-based non-public schools.[61] *Allen* was largely the outer limit of aid for students and their faith-based schools until *Agostini v Felton*,[62] another dispute from New York permitting the on-site delivery of educational services for students from families with low incomes who attended religiously affiliated non-public schools,

Lemon v Kurtzman (*Lemon*)[63] is the Supreme Court's most important case on the Establishment Clause and education. The Court struck down laws from Pennsylvania calling for the purchase of secular services and Rhode Island designed to provide salary supplements for teachers in non-public schools, enunciating the tripartite standard now known as the *Lemon* test. In creating this measure, the Justices added a third prong to the two-part test it created in *Abington*, on excessive entanglement, from *Walz v Tax Commission of New York City*,[64] which upheld the practice of providing state property tax exemptions for church property used in worship services, According to the Court:

> Every analysis in this area must begin with consideration of the cumulative criteria

[59] Ibid 225. Justice Brennan's concurrence added that '[t]he holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history….' [300].
[60] 392 US 236 (1968).
[61] For an earlier case reaching the same outcome, albeit under the Fourteenth, rather than First Amendment, see *Cochran v Louisiana State Bd. of Educ.*, 281 (1930) US 370 (upholding textbook loans to all students, including those in non-public schools).
[62] 521 US 203 (1997).
[63] 403 US 602 (1971). See also *Tilton v Richardson (Tilton)*, 403 US 672 (1971) decided on the same day as *Lemon*, upholding non-ideological aid to a faith-based colleges and universities in Connecticut because their student bodies were not composed of impressionable children and there was no excessive entanglement insofar as the grants were one-time and single-purpose); *Hunt v McNair*, 413 US 734 (1973) (finding that insofar as religion was not pervasive in an institution, South Carolina was free to issue revenue bonds to benefit the church-related college because it did not guarantee them with public funds).
[64] 397 US 664 (1970).

> developed by the Court over many years. Three such tests may be gleaned from our cases. 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."[65]

Addressing entanglement and state aid to religious institutions, the Supreme Court delineated three additional factors: 'we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority'.[66] While the Justices have used *Lemon* as a kind of one-size fits all standard regardless dealing with aid or religious activities, doing so has created no end of confusion[67] with some Justices calling for its being replaced.[68]

Over the next twenty-five years, while continuing to uphold text book loans,[69] the Supreme Court applied *Lemon* to invalidate aid such as instructional materials, including magazine subscriptions for libraries and instructional equipment, to faith-based schools.[70] The Court did allow the on-site of students in their religious schools to see whether they qualified for federal aid programs. Perhaps the nadir of the Court's Establishment Clause jurisdiction occurred in *Aguilar v Felton*,[71] wherein the Justices invalidated the on-site delivery of a federal instructional program in faith-based schools on the mere fear of excessive entanglement even though none was alleged.

In the first of two cases about prayer, *Lee v Weisman*,[72] the Supreme Court invalidated its use as part of a public school graduation ceremony in Rhode Island as Justice Kennedy's majority opinion created the psychological coercion test which maintained that audience members had the right not

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[65] *Lemon*, 403 US 612–613.
[66] Ibid 615.
[67] The Supreme Court has occasionally used two other tests in religion cases. In *Lee v Weisman*, 505 US 577 (1992), Justice Kennedy created the psychological coercion test to forbid prayer at public school graduation ceremonies. Earlier, in *Lynch v Donnelly*, 465 US 668, 687 (1984) a non-school case about allowing a Nativity scene in a Christmas display on public property, Justice O'Connor's plurality opinion created the endorsement test for religious activities in public settings.
[68] See (n 88) and accompanying text for a brief analysis of the Justices' views on *Lemon*.
[69] See, eg, *Meek v Pittenger*, 421 US 349 (1975); *Wolman v Walter* (n 50).
[70] Ibid.
[71] 473 US 402 (1985).
[72] 505 US 577 (1992). For an analysis of this case, see Charles J. Russo, '*Lee v Weisman*: The Court Divines the Unconstitutionality of School Prayer', 19 (1992) *Rel. & Pub. Educ.* 120. Conversely, the Sixth and Seventh Circuits, in cases from public universities in Tennessee and Indiana, respectively, upheld prayer at graduation ceremonies. The courts essentially agreed that the prayers did not violate the Establishment Clause because they did not involve young, impressionable students and attendance was voluntary. *Tanford v Brand*, 104 F 3d 982 (7th Cir, 1997), *cert. denied*, 522 US 814 (1997); *Chaudhuri v State of Tenn.*, 130 F 3d 232 (6th Cir, 1997), *cert. denied*, 523 US 1024 (1998).

to be exposed to beliefs with which they may disagree. Eight years later, eschewing *Lemon*, in *Santa Fe Independent School District v Doe*,[73] the Court affirmed that a board policy in Texas permitting student-led prayers prior to the start of high school football games violated the Establishment Clause,[74] primarily relying on the endorsement rather than the psychological coercion test.[75]

B *Higher/Tertiary Education*

In *Locke v Davey*,[76] the Supreme Court allowed officials in Washington to deny a student at a private Christian college even though he otherwise met all eligibility the opportunity to participate in the state's Promise Scholars Program because he was enrolled in a double-major including theology.[77] The Court wrote that while providing a general benefit for all degrees, including theology, would not offend the Federal Establishment Clause, the state had a legitimate interest in avoiding the establishment or endorsement of religion under its own constitution.

In *Christian Legal Society v Martinez*,[78] the Supreme Court rejected the claims of a Christian student organization which sought to apply membership qualifications. The Court affirmed that officials at a public law school in California could implement a policy mandating clubs to admit all-comers from the student body, including those who disagree with their beliefs, as a condition of becoming a recognized student organization even though doing so would have caused this group to violate its beliefs.[79] On remand, the Ninth Circuit rejected the group's remaining claim because

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[73] See (n 3).

[74] But see *Town of Greece, N.Y. v Galloway*, 572 US 575 (2014) (upholding a town board's practice of opening its monthly meetings with prayers even if they were explicitly religious as long as they did not praise one faith while denigrating others; relying on the coercion test and treating prayer as a form of ceremonial deism, an extension of a traditional practice rather than an attempt to establish a state religion, the Court avoided both the endorsement and *Lemon* tests). For a commentary on this case, see Eric Rassbach, 'Town of Greece v Galloway: The Establishment Clause and the Rediscovery of History', (2014) *Cato. Sup. Ct. Rev*. 71.

[75] See (n 72).

[76] *Locke v Davey*, 540 US 712 (2004).

[77] See also *Witters v State Comm'n for the Blind,* 771 P 2d 1119 (Wash, 1989), *cert. denied*, 493 US 850 (1989) (relying on the state constitution in refusing to extend a general vocational assistance program to a blind student who studied to become a clergyman at a religious college).

[78] 561 US 661 (2010).

[79] Ibid. But see *Mergens v Westside Cmty. Schs*., 496 US 226 (1990) (upholding the constitutionality of the Equal Access Act's allowing student-organized prayer and Bible study clubs to meet during non-instructional time and permitting them to set religious qualifications for their leaders. For a commentary on setting criteria for leadership positions, see Charles J. Russo, '*Mergens v Westside Community Schools* at Twenty-Five and *Christian Legal Society v Martinez*: From Live and Let Live to My Way or the Highway?' (2015) *Brigham Young Univ. Educ. & L. J.* 453.

organizational leaders failed to preserve their argument, that law school officials selectively applied the policy, for appeal.[80]

C *Dismantling the Wall*

Apart from *Everson* and *Allen*, with few exceptions[81] it was not until twelve years after *Aguilar* that the Supreme Court arguably began to dismantle the "wall of separation," ushering in an era of allowing greater aid, as it dissolved the injunction keeping *Aguilar* in place, thereby permitting the on-site delivery of services in *Agostini v Felton*.[82] The Court also modified the *Lemon* test by reviewing only its first two parts, purpose and effect, recasting entanglement as one criterion in evaluating a statute's effect when states provide aid to students who attend religiously affiliated non-public schools. Although not all of the Supreme Court's orders have supported religious freedom, as the following cases illustrate, the pace of dissembling the wall has quickened[83] with the appointment of John Roberts as Chief Justice in 2005.[84]

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[80] *Christian Legal Soc'y v Wu*, 626 F.3d 483 (9th Cir, 2010).

[81] See, eg, *Mueller v Allen*, 463 US 388 (1983) (upholding a law from Minnesota granting all parents state income tax deductions for the costs of tuition, textbooks, and transportation associated with sending their children to K–12 schools); *Zobrest v Catalina Foothills Sch. Dist*., 509 US 1 (1993) (permitting the on-site delivery of the services of a sign-language interpreter in a faith-based school in Arizona under the Individuals with Disabilities Education Act because there was no governmental participation in the instruction and the interpreter was merely a conduit effectuating the student's communications).

[82] See (n 62). For a commentary on this case see Allan G. Osborne and Charles J. Russo, 'The Ghoul is Dead, Long Live the Ghoul: Agostini v Felton and the Delivery of Title I Services in Nonpublic Schools', 119 (1997) *Educ. L. Rep*. 781. See also *Zelman v Simmons-Harris*, 536 US 639 (2020) (upholding vouchers under which most students attended faith-based schools because they did so due to the free choices of their parents rather than operation of the law).

[83] For cases not discussed elsewhere herein, see, eg, *Hein v Freedom From Religion Found*., 551 US 587 (2007) (rejecting a challenge to the use of federal money to fund conferences promoting President George W. Bush's "faith-based initiatives"); *Pleasant Grove City, Utah v Summum*, 555 US 460 (2009) (unanimously holding that in allowing the placement of donated monuments in a public park, city officials exercised governmental speech not subject to scrutiny under the First Amendment); *Salazar v Buono*, 559 US 700 (2010) (reversing an order mandating the removal of a large Latin Cross display in the Mojave National Preserve as violating the Establishment Clause because a trial court failed to conduct a proper analysis about the continued necessity for injunctive relief); *Burwell v Hobby Lobby*, 573 US 682 (2014) (ruling that because closely held for-profit corporations are legal persons, they do not have to comply with regulations imposing an abortifacient mandate not part of the Affordable Health Care Act insofar as even if the government had a compelling interest in requiring such coverage, it substantially burdened the free exercise of the owners' right to religious freedom where they failed to achieve their goal in the least restrictive manner). See also *Hosanna Tabor* (n 8), *Town of Greece* (n 74). But see *Christian Legal Society* (n 78).

[84] For an in-depth analysis on point, see Jerold Waltman, *Church and State in the Roberts Court: Christian Conservatism and Social Change in Ten Cases, 2005-2018* (McFarland, 2019).

In *Trinity Lutheran Church of Columbia v Comer* (*Trinity Lutheran*),[85] the Supreme Court reasoned that the Establishment Clause prohibits states from singling out faith-based institutions, and/or believers, by denying them generally available benefits simply because they are religious. In the underlying dispute, officials in Missouri sought to deny a faith-based preschool the opportunity to participate in a grant program to acquire a new surface for its playground simply because it was religiously affiliated.

As this article heads to press, the Supreme Court is set to conduct oral arguments in *Espinoza v Montana Department of Revenue*,[86] wherein a mother challenged a state regulation that forbade the faith-based school her daughters attended from participating in the state's tuition tax credit program. *Espinoza* is worth watching because in *American Legion v American Humanist Association*,[87] a non-school case upholding the presence of a cross on public property, a majority of Supreme Court Justices, albeit in a plurality because they did not all agree on the same rationale, would have invalidated the *Lemon* test.[88] If the Court does invalidate *Lemon* in *Espinoza* by following *Trinity Lutheran* and *American Legion*, it bears watching to see what replacement test the Justices craft. Perhaps the Justices will create what might be described as a chain link fence of separation allowing aid to flow more along with greater freedom of religious practice in public schools and the marketplace of ideas readily in cases involving the First Amendment Religion Clauses.

III DISCUSSION

Encouraged by militant progressive and secularist supporters, American politicians are threatening to revoke the long-time tax-exempt status[89] of faith-based institutions, including schools. While readily acknowledging that serious issues have arisen around the child abuse scandals in the Roman Catholic Church, in particular, even as similar infractions occur in public, or state, schools, there

[85] 137 S. Ct. 2012 (2017). For a commentary on this case, William E. Thro & Charles J. Russo, 'Odious to the Constitution: The Educational Implications of *Trinity Lutheran Church v Comer*', 346 (2017) *Educ. L. Rep.* 1.
[86] 435 P.3d 603 (Mont. 2018), *cert. granted*, 139 S. Ct. 2777 (2019). For a predictive commentary on this case, see Charles J. Russo, 'The Supreme Court and Tuition Tax Credits: Is Change on the Way?' *Sch. Bus. Affairs* (in press).
[87] 139 S. Ct. 2067 (2019). For a commentary on this case, see Charles J. Russo, '*American Legion v The American Humanist Association and the Bladensburg Cross*: Implications for Education' 46 (4) (2019) *Rel. & Pub. Educ*. 482.
[88] Ibid 6-8, 11.
[89] See *Walz* (n 64) 677 noting that 'Congress, from its earliest days, has viewed the Religion Clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies'.

can be little doubt that faith-based schools have well-served generations of students,[90] and continue to do so despite the egregious abuse of trust engaged in by a small minority of individuals.[91] Religious schools, their shortcomings notwithstanding, or more properly, their students, should not be punished because their leaders have steadfastly adhered to their sincerely held religious beliefs in the face of changing sexual mores. Such threats have increased in the wake of the Supreme Court's judgment in *Obergefell v Hodges*[92] mandating same-sex marriage nationally.

The emergence of political threats to religious freedom make it clear that the U.S. is at a crossroads. Americans will now either accept religious views as a form of the ideological diversity about which progressives preach, or the nation will become one where 'those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labelled as bigots and treated as such by governments, employers, and schools'.[93]

As noted, the U.S. Supreme Court had, until recently, generally adopted a position supporting the "wall of separation" metaphor, particularly as applied to education without generally being overtly hostile to religion.[94] The Court certainly has not encouraged the venomous language voiced by some politicians and opponents of religion. Yet, one must ask whether the Court's separationist views helped to create a culture wherein closed-mindedness and lack of respect could spawn. Even

[90] Conceding that it is an older case, the Supreme Court recognized the value of private, or non-public, schools, most of which are faith-based, in *Board of Educ. of Cent. Sch. Dist. v Allen*, 392 US 236, 247 (1968) (upholding a state law mandating the loans of textbooks for secular instruction to all children regardless of where they attended school): 'Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience'.

[91] See Charles J. Russo, "Child Abuse in Religious Institutions: Dealing with the Unspeakable." 13 (2012) *Educ. L. J.* 100.

[92] 135 S. Ct. 2584 (2015). For a commentary on this case, see (n 33).

[93] Ibid 2642-43.

[94] But see Justice Stevens' dissent in *Morse v Frederick*, 551 US 393, 446 (2007) (Stevens J dissenting) (upholding a principal's right to discipline a student for unfurling a banner promoting illegal drug use at a school-supervised event). Stevens wrote that 'I find it hard to believe the Court would support punishing [the student] for flying a 'WINE SiPS 4 JESUS' banner—which could quite reasonably be construed either as a protected religious message or as a pro-alcohol message…'. While perhaps not hostile, Stevens' mocking the faith of Roman Catholics who believe the sacramental wine undergoes transubstantiation into the blood of Christ was gratuitously disrespectful and beneath the dignity of a Supreme Court Justice.

though the Court has begun to push back in support of religious freedom, many Americans continue to view society as increasingly hostile to religion.[95]

Due to what he knew would be concerns about religious freedom, Justice Kennedy's unpersuasive comments, as author of the majority opinion in *Obergefell* making same-sex marriage the law of the land, purportedly protecting this cherished right failed to allay the fears of people of faith.[96] In fact, litigation continues against religiously affiliated schools for expecting their staffs to be in heterosexual marital relationships.[97] If anything, many share the concerns Justice Alito voiced in his dissent as he mused that in the post-*Obergefell* world, the Supreme Court's pronouncement 'will be used to vilify Americans who are unwilling to assent to the new orthodoxy . . . by those who are determined to stamp out every vestige of dissent'.[98]

In light of the seemingly dire picture Justice Alito painted for people of faith and their institutions, questions emerge about what can be done to allow individuals on both sides of the challenging questions surrounding human sexuality,[99] to disagree, even vociferously, but not be disagreeable on a personal level. Accordingly, the final part of the paper offers three preliminary suggestions for dealing with diversity of perspective. Moreover, because these issues are far from settled, these suggestions may well need to be further developed in light of forthcoming legal judgments. Even

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[95] See (n 9).

[96] See (n 92). Kennedy wrote:

> …it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.

135 S. Ct. 2607.

[97] See, eg, 'U.S. Justice Department supports Archdiocese of Indianapolis in Religious Freedom Case', *Becket: Religious Liberty for All* (Webpage, 30 September 2019) <https://www.becketlaw.org/ media/u-s-justice-department-supports-archdiocese-indianapolis-religious-freedom-case/> (reporting that U.S. Department of Justice filed a statement of interest, <https://s3.amazonaws.com/becketnewsite/DOJ-Statement-of-Interest.pdf>, supporting the Archdiocese's right to decide what it means to be Catholic without governmental interference when a former teacher filed suit after losing his job at a Catholic high school for entering a same-sex civil union in violation of his employment agreement). See also Charles J. Russo, 'Religious Freedom in a Brave New World: How Leaders in Faith-Based Schools Can Follow their Beliefs in Hiring' 45 (2014) *U. Toledo L. Rev.* 457 n 14, 49-50, 71-75, and accompanying text.

[98] *Obergefell*, 135 S. Ct. 2642.

[99] Having heard oral arguments on 8 October 2019, the Supreme Court is expected to resolve whether Title VII's prohibition against discrimination covers sexual orientation in *Bostock v Clayton Cnty., Ga.*, 894 F 3d 1335 (11th Cir, 2018), *cert. granted*, 139 S. Ct. 1599 (2019) and *Altitude Express v Zarda*, 83 F 3d 100 (2d Cir, 2018), *cert. granted*, 139 S. Ct. 1599 (2019) and those who are transgender in *R.G & G.R. Harris Funeral Homes v Equal Employment Opportunity Comm'n*, 884 F 3d 560 (6th Cir, 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

so, the author hopes these suggestions will serve as food for thought about what educators, lawmakers, and people of good faith can do, not only in schools, but also in the wider society, to foster appreciations of, and respect for, religion as a form of an increasingly overlooked, if not lost, form of diversity

A *Preliminary Suggestions for Addressing Diversity*

First, it is important to keep in mind that tolerance and respect are a two-way street. For instance, as described above,[100] a growing body of litigation in the U.S. evidences attempts to compel Christians, even where alternatives were available, to violate their sincerely held religious beliefs by providing services for individuals with whose lifestyles they disagree. Concomitantly, there has been an unfortunate rash of events at which individuals and groups of protesters have disrupted guest speakers on campuses with whom they did not agree, regardless of whether they addressed religion, often preventing them from expressing their views. Among the speakers who have been shouted down and/or disinvited to campuses are 'conservative pundit Milo Yiannopoulos, Christine Lagarde, International Monetary Fund Chief, and Condoleezza Rice, former secretary of state',[101] sociologist Charles Murray and Somali refugee Ayaan Hirsi Ali,[102] and conservative commentator Ann Coulter.[103]

Rather than seeking to compel Christians to act in ways inconsistent with their consciences or shouting speakers down, it would be more productive if those desiring services or protesters would listen to differing perspectives, engaging those with whom they disagree in dialogue in attempts to find common ground. If individuals on both sides of an issue can engage in serious debate, then there may be a mutual growth of respect even if they cannot come to full agreement in which event civility dictates that people should learn to agree to disagree respectfully.

In a related second point, rather than avoiding discussions of religious faith at almost all cost, curricula from early primary school through tertiary education should include at least one

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[100] See, eg, (n 25-29) and accompanying text.
[101] Dugan Arnett, 'Academia Wrestles Anew with how Freely Words can Flow', *Boston Globe* (7 September 2016).
[102] Thomas Gelsthorpe, 'Academia Promotes 'Diversity' yet Expects Group-think', *Cape Cod Times* (Hyannis, MA, 14 November 2018).
[103] Erin Allday and Lauren Hernández, 'Hundreds Protest Ann Coulter Speech at UC Berkeley, Arrests Made', *S.F. Chronicle* (CA, 21 November 2019) (reporting that 'police arrested multiple masked protesters Wednesday night at a rowdy demonstration against a scheduled speech by conservative pundit Ann Coulter').

mandatory course within which students are exposed to learn about the dominant religions in various parts of the world. This suggestion is consistent with Justice Brennan's concurrence in *Abington*, nothing in a secular society precludes 'teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history...'.[104]

Teaching students about different religions and world views can help those of other faiths, or the growing numbers of people with no faith,[105] or who are atheists,[106] to appreciate that while they may disagree with the tenets of different religious faiths, whether on sexuality or other matters, believers ordinarily act based on their sincerely held religious beliefs rather than discrimination. After all, how can students of all ages learn to appreciate diversity of perspective if they are not exposed to a variety of religions and systems of belief, in informative, rather than proselytizing, ways while still in school?

Third, of course, individuals should be free from discrimination. Still, like tolerance, efforts at pursuing equality should be a two-way street. Yet, in seeking to enact anti-discrimination laws, a serious question emerges over whether people of faith can be made to violate their consciences, resulting in what may be viewed as duelling statutes.

On the one hand, the U.S. House of Representatives approved the so-called Equality Act, intended to ban discrimination based on sex including sexual orientation and gender identity by a vote of 263-173,[107] largely along party lines. Among its provisions, this law would add sexual orientation

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[104] Abington (n 57) 300.

[105] See 'In U.S., Decline of Christianity Continues at Rapid Pace: An update on America's Changing Religious Landscape', *Pew Center, Religion and Public Life* (online, 17 October 2019) <https://www.pewforum.org/ 2019/10/17/ in-u-s-decline-of-christianity -continues- at-rapid-pace/?utm_source=Pew+Research+ Center&utm_ campaign =d8dae17adc-EMAIL_CAMPAIGN_ 2019_10_17_01_06&utm_medium=email&utm_ term=0_3e953b9b70-d8dae17adc-400258905> (reporting that in the U.S. 'the religiously unaffiliated share of the population, consisting of people who describe their religious identity as atheist, agnostic or "nothing in particular"', now stands at 26%, up from 17% in 2009). Illustrating his contempt for people of faith, columnist Nicholas Kristoff, *N.Y. Times* (online, 30 October 2019) <https://www.nytimes.com/2019/10/26/opinion/sunday/christianity-united-states.html>, wrote that this turn of events is due 'religious blowhards who have entangled faith with bigotry, sexism, homophobia and xenophobia. For some young people, Christianity is associated less with love than with hate'.

[106] Ibid. 'Self-described atheists now account for 4% of U.S. adults, up modestly but significantly from 2% in 2009; agnostics make up 5% of U.S. adults, up from 3% a decade ago; and 17% of Americans now describe their religion as "nothing in particular', up from 12% in 2009.").

[107] Final Vote Results for Roll Call 217 (Democrats in roman; Republicans in italic; Independents underlined), HR 5, Recorded Vote, 17-May-2019, 12:12 PM, Question: On Passage, Bill Title: Equality Act <http://clerk.house.gov/evs/2019/roll217.xml>.

and gender identity to the definition of "sex" in federal civil rights laws while rejecting differences between women and men as it denies conscience.[108] While the Act seeks to provide equal treatment for those covered by its provisions, it fails to protect for religious freedom and freedom of conscience.[109]

On the other hand, during the 115th Congress, Republican Senator Mike Lee of Utah author and primary sponsor, with twenty-one co-sponsors, introduced the *First Amendment Defense Act* (FADA).[110] The FADA would offer broad-based protection to persons of faith by compromising with those whose views on marriage differ radically. The FADA, which neither questions nor attacks the validity of same-sex marriages as enunciated in *Obergefell*, is designed to prevent the federal government from discriminating against people of faith, and others, who believe in marriage as a relationship between one man and one woman.

As it did in Title VII of the *Civil Rights Act* of 1964,[111] Congress should protect faith-based employers by recognizing bona fide occupation qualifications and ministerial exceptions.[112] Moreover, at least twenty-one states have enacted religious freedom restoration acts designed to limit, if not forbid, governmental regulations restricting religious freedom absent having compelling interests for doing so.[113]

Federal and state laws should also protect conscience exceptions such as those available to doctors who cannot be made to participate in medical procedures which violate their good-faith religious beliefs,[114] making it clear they cannot be forced to act in manners inconsistent with their faiths or

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[108] See (n 99) for pending litigation on this issue.

[109] Sandhya Raman, 'LGBTQ Equality Act passes House, pushing back on Trump's Religious Freedom Policies Democrats and Advocacy groups are Attempting to counteract these Policies through the Courts and Legislation', *Roll Call* (Webpage, 17 May 2019) <https://www.rollcall.com/ news/congress/focus-religious-freedom-medical-workers-proves-divisive>.

[110] S. 2525, 2d session, 115th Congress (8 March 2018).

[111] 42 U.S.C. § 2000e-2(a). For a discussion of Tile VII in hiring in faith-based schools is the U.S., see Russo, *Brave New World* (n 97). See also Keith Thompson and Charles J. Russo, 'Maintaining Religious Identity in Hiring in Faith-Based Schools: A Comparative Analysis of Australia and the United States' 26 (2017) *Int'l J. of L. & Educ*. 56.

[112] The exemptions are codified at 42 U.S.C. § § 2000e(b), § 2000e-2(e)(1), 42 U.S.C. § 2000e-1, & 2000-(e)(2)(e).

[113] 'State Religious Freedom Restoration Acts' (National Council of State Legislatures Research Council, 2020) < http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>; this website lists the citations for all of the state statutes.

[114] See, eg, *Franciscan Alliance v Azar*, 2019 WL 5157100 (N.D. Tex. Oct. 15, 2019) (permanently enjoining part of a federal rule that would have required doctors to perform gender-transition procedures even if they believed the treatments could harm patients; doctors who refused to violate their consciences would have faced severe

those of institutions. Providing such balance by retaining respect for religion, while also protecting individuals from non-discrimination for living according to the dictates of their religious values and/or consciences, is essential in free and open societies.[115]

IV CONCLUSION

Both religion and diversity play major roles in society. Thus, while all persons may not think alike on matters of faith, it is imperative to disagree respectfully, regardless of the nature of their differences. Only by having mutual respect can individuals and groups learn to disagree with one another without being personally disagreeable in recognizing the importance of true diversity of perspective, including religion, for the greater good.

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DEDICATION

I dedicate this article to the memory of my dear friend Gerry Allen, loving Husband and Dad, as this wonderful man of great faith "fought the good fight" St. Paul wrote about in his second letter to Timothy as he battled cancer. On January 24, 2020 Gerry succumbed in his valiant fight against the scourge of cancer. God bless Gerry and his family.

consequences, including the loss of their jobs). But see *New York v United States Dep't of Health and Human Servs*., ___F. Supp.3d___, 2019 WL 5781789 (S.D.N.Y. 2019) (invalidating conscience provisions for health care professionals who objected to procedures such as abortion and sterilization).

[115] An example of the threat posed to Christians emerged in Georgia when the governor, bowing to pressure from gay groups and the business community, vetoed a law designed to protect religious liberty. Jim Galloway, 'How State's Movie Biz has Muddled "Religious Liberty" Fight', *Atlanta J. Constitution* (31 March 2016) B1 2016. Among other provisions, the law would have protected religious leaders who refused to perform same-sex unions, institutions unwilling to hire or retain individuals not comporting with their beliefs, and organizations opposed to renting space to groups for events they consider objectionable. See also Luke Goodrich, *Free to Believe: The Battle over Religious Liberty in America* (Multnomah, 2019).