**Providing Religious Liberty Through Schools**

Empowering religious minorities with a voucher system

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# I. Introduction

The Founding Fathers are the historic figures to which Americans look to for guidance in structuring a government that is ever changing to meet the demands of an increasingly complex polity. They are the ones that established the timeless values that Americans tout the world over. These values, however, are often the shroud that veils the reality: freedom, equality, liberty, and democracy are values to which many living in the U.S. do not have access. Minority groups of all types—racial, ethnic, ideological, religious, etc.—are victims of the very kind of faction rule the Founders feared. James Madison’s *Federalist Papers: No. 10* are especially poignant on the topic as he writes,

“A zeal for different opinions concerning religion, concerning government, and many other points, as well as speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.”[[1]](#footnote-1)

This acknowledgment of the danger and inevitability of factions led the Founding Fathers to create a democratic republic. While there is no doubt the type of governance the U.S. adopted has mitigated the oppression of certain groups, Madison’s words have nonetheless proven a reality. American history has been riddled with oppression and domination based on gender, race, ethnicity, religion, ability, and more.

When the Founders made their Declaration of Independence, they were specifically concerned with one type of tyranny: rule by religious factions and/or individuals. This concern is reflected in the Bill of Rights’ First Amendment, which states first that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…” Countless times throughout the history of the U.S.—and during the very making of its Constitution—conflict between the church and state and uncertainty about where the boundaries between the two are drawn have been brought to the forefront of national and state debates.

In a nation that was founded upon “Judeo-Christian” principles and with an obviously Judeo-Christian civil religion interwoven into national traditions, it is difficult to image the feasibility of a complete and uncontested separation of church and state. Religion, moreover, is deeply ingrained into the American culture. And while non-religious individuals comprise a larger percentage of the American population today than ever before, it is still true that a great majority of Americans are religious.

It is therefore inevitable that the “wall” between church and state, as Thomas Jefferson wrote about it in his Letter to the Danbury Baptists’ association, is not as clearly established as many Americans would like to think. Public institutions are consistently subject to legal battles revolving around this idea that church and state should be separate while at the same time allowing individuals to exercise their religious rites and beliefs freely.

Public schools especially have been centers of contention regarding the religious clauses of the First Amendment because of the nature of the service they provide and the type of people to whom they provide those services. The legal battles that have ensued because of schools or states overstepping their church-state boundaries demonstrate the way religious minority groups are unfairly denied their free exercise rights and are coerced into accepting secularism as the government-established ideology. This belies the very tenants of the U.S. Constitution and the values that the Founders—especially James Madison—had in mind. Public schools unnecessarily ensure that religion and the government will become excessively entangled. For example, whether “one nation under God” is taken out of the pledge or left in it, the government will be endorsing either religion or secularism—both of which are rooted in the “sphere of intellect and spirit.”[[2]](#footnote-2) This sphere is only to be protected by and from the government. Schools, however, because they are inherently made to develop the intellect, and even spirit, of children will always be points of dissension.

This paper will look at the meaning of the religious clauses of the First Amendment by examining the historical context in which they were written. In the following section, I will briefly discuss the evolution of the religious clauses and what trends jurisprudence regarding church and state follow today. Next, I will look at how these trends in jurisprudence impact religious and non-religious students within the context of schools. In this section, I will discuss how privatizing education and shifting to a voucher system is a best alternative for minimizing government entanglement with religion—especially in an institution that has such important implications for human and democratic development.

# II. Religious liberty as the oft-forgotten priority

Contradictions between the Establishment and Free Exercises Clauses of the First Amendment have certainly shown their faces in the inconsistent way the Supreme Court Justices have decided many cases. Indeed, “actions demanded by ‘free exercise’ according to some Justices violate ‘no-establishment’ according to others.”[[3]](#footnote-3) There is, despite the tests created for the very purpose of consistency, seemingly no rule or rhyme for the way religious liberty cases are decided. While jurisprudence is an increasingly complex issue because of the population growth and the ensuing flourishing of diversity, looking at the context in which our centuries-old Constitutional rights were developed provides some insight into where the Justices have gone wrong.

The *Smith* case of 1989 marks a clear shift in the priorities of the Justices from accommodation/exemption for religious minorities to an emphasis on upholding generally applicable law. Furthermore, because the Court refused to apply the Sherbert test to *Smith*, all possibilities of more consistent rulings were thrown out. In this case generally applicable law took priority over religious free exercise. This case, controversial as it was, indicates quite clearly how the Supreme Court has lost touch with the very purpose of the religious clauses of the First Amendment and the Constitution more generally.

The Constitution—which is the embodiment of governance in the U.S.—arose from the principles proclaimed in the *Declaration of Independence*, which holds “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.” Lopped into this list of unalienable rights is “that religion or duty which we owe to our Creator…”[[4]](#footnote-4) The duty to the Creator is esteemed by Madison to be the most important duty any human has and therefore it supersedes democracy and governance. Most important to Madison was Americans’ right to exercise their religious practices and beliefs, unfettered by the government. Refusing to endow the government with the ability to establish any religion was first and foremost meant to be a protection of the religious liberties of others. Madison writes, “Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same easy any particular sect of Christianity, in exclusion of all other Sects?”[[5]](#footnote-5) It was, indeed, evangelicals and Enlightenment rationales that were most likely to support disestablishment because they did not want the majority to infringe upon their rights to exercise their religion or their rights to refuse to exercise any religion. Religious liberty was the primary concern of Madison, who was perhaps most influential in the creation of the religious clauses of the First Amendment.

American traditions are laced with references to and expressions of the U.S. Judeo-Christian civil religion. These traditions date back to the very beginning years of the nation’s establishment and provide insight into the world in which the Founders lived. They came from a place and a history in which religion and the state were intimately bound. They came from a time in which acceptance and appreciation for diversity were not important principles. The men that founded the U.S. were relatively wealthy, educated white men who owned slaves and took land from Native Americans. Therefore, when Americans look at the roots of their traditions, we must heed this caveat and be conscious of the fact that how we define our values today were differently defined by the Founding Fathers. Just because our traditions endorse Christianity does not mean that they may acceptably do so today. We have a different understanding of what it means to accept and appreciate diversity in this country. Drawing upon the ideals espoused by James Madison in *Memorial and Remonstrance* about religious liberty provides a template for what religious liberty means in today’s context of diversity. With his emphasis on the importance of a person’s ability and freedom to exercise his religious duties, it is not exactly speculative to assume that even and especially in today’s pluralistic society protection of religious liberty takes precedence over protection of generally applicable law.

# III. Reevaluation of American ideals

Americans have adapted the traditional ideals of liberty, freedom, equality, justice and democracy as the Founders knew them to fit the present era. Doing so has given black Americans their civil rights and women the vote. This is, indeed, the only way those ideals can be timeless, and it often means tweaking, expanding or authenticating the definition of the principles these terms represent. ‘Religion’ is one such term that needs to be reassessed in order to adapt to the times.

Religious affiliation demographics are shifting in the U.S., and in order to maintain a democracy, its policies should reflect this shift. The longstanding Protestant majority now teeters on the edge of minority status. Only 51.3 percent of Americans identify themselves as Protestant Christians. Twenty-six percent of the adult population claims to be part of Evangelical churches and 18.1 percent claim to be part of mainline Protestant churches. Catholics make up 23.9 percent of the adult population. Other religions—Judaism, Buddhism, Muslim, etc.—account for 4.7 percent of the population.[[6]](#footnote-6) The greatest demographic shift has occurred among those who claim to be unaffiliated with any organized religion. These make up 16.1 percent of the population. Atheists make up 1.6 percent of the adult population; agnostics 2.4 percent; secular unaffiliated 6.3 percent; and religious unaffiliated 5.8 percent.[[7]](#footnote-7) The unaffiliated group has made the biggest gains in the “religious competition” as they have more people joining this group and less people leaving it.[[8]](#footnote-8)

It is no wonder, with increasing religious diversity and an increasing unaffiliated population, that Supreme Court decisions regarding religious liberty—especially in schools—tend toward secularism. In essence, the government has endorsed secularism over organized religion. What the endorsement implies is that secularism is a default status, which undermines the potentially antithetical nature of secularism and religion. It further undermines the implications that secularism has on the teaching of certain social, intellectual and ideological norms. It assumes that secularism is a norm and that religiosity—especially among affiliates of minority religions—is something wholly “other.” Government endorsement of secularism pits some religious persons against the government and vice versa.

It is a mistake to assume that secularism is merely a manner of conveying a message or simply the type of a subject. On the contrary, secularism, much like religiosity, can be a way of life. It is a culture with implied norms and specific normative standards. Secularism, as it is upheld in the U.S., means the absence of that which is religious. This encompasses things like God or gods, rites and ceremonies, art and imagery, texts and scriptures, certain garb, and specific rhetoric, among others. Secularism does not necessitate anti-religious sentiment, but certain religious adherents may certainly perceive it as anti-religious. Indeed, many, such as mainline Protestants and some Catholics, have an inherent and distinct separation between what is sacred and what is secular. To make policies assuming that everyone else does, however, is engaging in the kind of otherization that fosters oppression and domination of minority groups. Insisting that government institutions—like public schools—must be secular is a violation of many minority religions, which hold secularism to denounce what they believe; just as mandating school prayer is a clear violation of religious liberty.

When the government decides what ideologies will be disseminated by public schools, it is acting out of paternalistic tendencies that often threaten the life or livelihood of minority groups of all types. Indeed, public schools have served as institutions whose purpose is to ideologically homogenize a diverse society and thereby maintain the status quo in which white, ruling-class Christians (predominately men) retain power. The idea that people’s ideologies can be homogenized is one against which historical figures like John Locke and Roger Williams have vehemently argued. In Locke’s *A Letter Concerning Toleration* and in Williams’ *The Bloody Tenent of Persecution for Cause of Conscience,* both men denounce persecution of religious persons as a means of homogenizing the religion of a country. Religious persecution, Williams writes, only makes a martyr out of a believer; it does not challenge or change their true belief. In the same way, requiring schools to endorse a single ideology—secularism—does not ensure that every pupil will adopt it. Moreover, it creates a possibility for some students to feel like outsiders in their own country. Witte and Mero (2007) accurately state that the “coercive imposition of paternalism has become one of the greatest ironies of a free nation”.[[9]](#footnote-9)

And yet this imposition has been “a central historical theme in the relationship between the federal government and indigenous, immigrant, and religious minority groups.”[[10]](#footnote-10) In a country that boasts of its diversity, the public education system in the U.S. does an exceptional job of teaching children that there is only one “norm.” In schools that abide by federal and state law, that norm is secularism; and in schools that push the boundaries between church and state, that norm is usually some version of Christianity.

Eerily reminiscent of this current conflict between schools and religious minorities is the history of educating Native American (and black) children in the 1800s. Union Army General Richard Henry Pratt took the lead role in establishing schools with the objective of “not simply … [educating] Indian children, but to permanently control and transform indigenous societies in ways designed to suit Pratt’s political constituency.”[[11]](#footnote-11) It was, in other words, to “‘kill the Indian and save the child.’”[[12]](#footnote-12) Public schools, Pratt said, “‘are fundamentally and supremely the Americanizers of all people,’ and he utilized a historical period of ethnic, racial and religious turmoil to gain power.”[[13]](#footnote-13) This was a man that others respected and considered to be a “Christian man, a man possessing high moral integrity and a man who believed deeply in the Americanizing value of the government public school system.”[[14]](#footnote-14) The parallels between treatment of Native Americans and blacks in the 1800s (and still today) and the treatment of religious minorities are subtle but all the more dangerous. Of course, white Americans of the 1800s had overt prejudices against Native Americans and blacks, and their policies reflected this. Today, however, prejudices against religious minorities are hidden behind rulings that prioritize generally applicable law above religious liberty and behind the government’s endorsement of supposedly neutral secularism.

To make matters easier for the state to discriminate against religious individuals or groups, the Court has in recent years basically turned religious free exercise into “a subspecies of speech,” meaning that to the “extent religion is more than speech, it possesses almost no constitutional protection under current precedent.”[[15]](#footnote-15) Because schools and other public institutions, have “adopted policies explicitly discriminating against religion in an effort to avoid Establishment Clause litigations, free exercise of religion is impeded.[[16]](#footnote-16) This certainly belies the very purpose of the Establishment and Free Exercise Clauses, which is to protect religious liberty. When the Courts uphold secularism at the expense of religious liberty, it is in clear violation not only of the Constitution but of American ideals and tradition.

# IV. Maintaining religious liberty *through* schools

It would be equally as contrary to religious liberty to allow government provided schools to hold prayers, read from the Bible, celebrate Christmas, etc. Doing this would cause non-Christian and non-religious students to be otherized the same way religious minorities are when government schools endorse secularism. Government entanglement with religious liberty, therefore, is inevitably excessive in public schools. To be sure, government entanglement in the “sphere of intellect and spirit” is inevitably excessive when so many mandatory institutions are government-provided. Especially in an institution like schools, where cognitive and non-cognitive skills are acquired and the character of students is shaped, the government is the least efficient means of providing education. This is essentially why I advocate a more localized, community-based approach to schooling, which would perhaps best be addressed by a voucher system.

The voucher system has become a hotly debated issue, especially since the Supreme Court upheld it as constitutional in *Zelman v. Simmons-Harris* in 2002. The reasons for opposition to the voucher system are wide and varied. The National Education Association, the largest teachers union and one of the largest lobbies in the U.S., is hostile toward the voucher system primarily because it undermines public schools by taking funds away from them rather than pumping more money into them to ameliorate problems within the existing system. Further, the NEA states that the voucher lottery is “a terrible way to determine equal access to education. True equity means the ability for every child to attend a good school in the neighborhood.”[[17]](#footnote-17) Many, including the NEA, speculate that a voucher system “would only encourage economic, racial, ethnic and religious stratification in our society.”[[18]](#footnote-18) The NEA goes on to say that “America’s success has been built on our ability to unify our diverse populations.” This is a clear indication that the NEA, and the many primary and secondary teachers that comprise the organization, do not understand the way history has worked. The U.S. has, in fact, unified this diverse country by marginalizing groups that do not fit the traditional, white American mold. Other concerns reflect a narrow understanding of the voucher system. There is no one-size-fits-all voucher system. What opponents fail to grasp is that voucher system policies could accommodate their concerns; it would simply take strategic planning among various groups. The issue is not as black and white as it is painted by voucher opponents.

One of the most often raised critiques of the voucher system is, inevitably, the question about whether religious liberty is threatened by this system. Americans United lists at the top of its “10 Reasons Why Private School Vouchers Should Be Rejected” that vouchers undermine religious liberty.[[19]](#footnote-19) The organization notes that 76 percent of private schools have a religious affiliation and that most of these “religious schools seek to indoctrinate as well as educate.”[[20]](#footnote-20) The problem with this, as opponents explain, is that it forces taxpayers to pay taxes that support religion. The AU makes this argument, however, without noting that religious minorities are forced to pay public school taxes—whether they attend private schools or not, and whether they believe in the secular doctrine that schools teach or not. Furthermore, the government affords religious properties a tax exemption, thereby withholding a financial burden from them. The reason religious properties have been historically given this tax exemption is because “even in the midst of strengthening State and Federal governments, … these organizations, with their well-established structures and programs, were able to fill a gap in social welfare programs where the young Government’s efforts proved insufficient.”[[21]](#footnote-21)

Looking at the facts of the *Zelman* case, the state of Ohio authorized the voucher system because of the same kind of sentiment: private schools could “fill a gap” that public schools had created because of their abysmal quality in Cleveland. In fact, the federal district court “declared a ‘crisis of magnitude’ and placed the entire Cleveland school district under state control” because only “one in ten district ninth graders could pass a basic proficiency examination, and more than two-thirds of district high school students either dropped out or failed out before graduation.”[[22]](#footnote-22) Of the more than 3,700 students that participated in the voucher program, 96 percent enrolled in a religiously affiliated school. More than half of those “students were from families at or below the poverty line.”[[23]](#footnote-23) These statistics demonstrate what choice means for many families: it means better quality schools and it means the ability to afford attending a school that teaches students what their parents want them to be taught. For many people in the U.S., accessibility to private schools is not feasible because of the financial burden. Vouchers provide the government with a way to bypass excessive entanglement with religious liberty in schools by giving to the *individual* the choice to spend his/her money where he/she wants.

It is important to note, given the prejudicial context in which this and other religious liberty debates have arisen, that anti-Catholic sentiment cannot be ruled out as a potential reason many groups, like the Interfaith Alliance, oppose the voucher system. Although the number has declined in recent years, Catholic schools make the 42.8 percent of all private schools in the U.S., according to 2009-2010 figures. The next largest denominational private schools are nonsectarian (13.6 percent) and conservative Christian (15.2 percent).[[24]](#footnote-24) Nonetheless, it is not only Catholics that face discrimination in the form of voucher opposition, but schools affiliated with other sects and religions as well. For example, Louisiana State Representative Valarie Hodges retracted her support of a voucher system because “she had no idea that Gov. Bobby Jindal’s overhaul of the state’s educational system might mean taxpayer support of Muslim schools.”[[25]](#footnote-25) Conservative Christians, too, are victims of the prejudicial attitudes of voucher opponents. The letter written by the president of the Interfaith Alliance to Louisiana Governor Jindal states, “I was appalled to learn that private schools—funded with my taxes—will teach our children that evolution does not exist …”[[26]](#footnote-26)

 As noted in the previous section, when the government is allowed to determine what is the “norm,” individuals and groups automatically become otherized by their own country. The First Amendment guarantees every person, from every affiliation or non-affiliation, the right to “participate in the formation of public opinion.”[[27]](#footnote-27) This right, however, is undermined when the government controls the very factories in which public opinion is developed: schools. Providing vouchers to students so that they may choose where they want to go to school and therefore what they will be taught enables religious free exercise. The religious clauses in the First Amendment were specifically written with a primary objective in mind: preserve free exercise of religion—i.e. that “duty to the Creator.” Those that take the establishment clause out of its context forget “that the reason why Congress and the states (since incorporation) are prohibited from making an establishment is that religious establishments tend to abridge religious liberty.”[[28]](#footnote-28)

Enlightenment figures—to whom we owe many of our American ideals—stood for the ability of all people to express themselves because, as John Milton explicitly states, “the truth would always win in a fair fight in the marketplace of ideas.”[[29]](#footnote-29) Restrictions on “religious, moral, and historical debates” interfere with that right to participate in the formation of public opinion.[[30]](#footnote-30) Volokh (2011) provides an important and relevant reason government restriction on speech, religion, morality, and historical debates are detrimental to society. As has been proven by government provided schools throughout their history, “coercive government regulation is likely to be more a product of interest group biases … than of an impartial judgment about the truth.”[[31]](#footnote-31) Allowing this kind of bias against religious minorities to prevent the government from providing vouchers for people to choose what they will be taught in schools belies the very values Americans tout. As a nation, Americans are prideful of the fact that the First Amendment protects the most important and profoundest expressions of selfhood. When people, especially those that have been historically marginalized by Americans in power, do not have the political clout or financial means to exercise their rights, it is the government’s duty to enable them. When the government acts “as subsidizer, employer, educator, and the like,” it “necessarily and properly makes judgments about what is true and what is false.”[[32]](#footnote-32) This contradicts the notion of democratic self-government, and it opens the door for the very kind of faction rule Madison feared. When the government creates a national holiday for Martin Luther King, Jr., but ignores Malcolm X, for example, the government—and thereby the Americans in power—is making a statement about what is true and false, good and bad, right and wrong.

# V. Empowering America’s minorities: it’s about time

For too long minority groups in the U.S. have been marginalized and their problems and issues swept under the rug or addressed in ways that miss the real mark. As Martin and Finke (2012) demonstrate in their quantitative assessment of Free Exercise cases in the U.S., “not all religious groups have equal success at earning redress when they feel their liberties have been violated.”[[33]](#footnote-33) Religious outsiders, i.e. religious minorities, turn to the Courts disproportionately and yet are far less likely to achieve a favorable ruling. In fact, save for Native American religions, “the odds that sects, cults, and Muslims will receive a favorable ruling are about one-third of the odds for mainline Protestants.”[[34]](#footnote-34) Discrimination by government institutions is inevitable because primarily the “mainstream” majority dominate these institutions.

Fortunately, although the Courts have seen numerous cases regarding religious liberty, the government of the United States is not the sole determinant of who may and may not exercise their religious freedoms. Most issues are resolved by common people with no government affiliation. Most issues can and should be left to the people to decide—without any obligations to a government that is largely insensitive to minority groups’ issues. Instead of forcing families that cannot afford for their children to attend private schools to be excluded within the secular or religious context of public schools, they should be enabled by the government to exercise their religious rights freely via a voucher system. It is contradictory to the mission of this country—to enact policies that promote the flourishing of religious pluralism—to oppress religion or non-religion within public schools. Placing the choice into the hands of the people empowers minority groups that otherwise face overt and covert discrimination. It’s about time American policies empowered marginalized minority groups.

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