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## ARTICLE

**Freedom Of Conscience And The Wall Of Separation**

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The thesis of this paper is that the fifty-year-old experiment of interpreting the First Amendment as a complete and absolute separation of church and state—a *wall of separation* as the familiar trope puts it—has not achieved the stated goal of producing civil peace between people with different views about religion. Further, the prospect of achieving this sort of peace in the near future does not seem likely.

In this paper, I will discuss the significance of public speech in a democratic polity. Then I will consider the complexity of the church-state-polity question, arguing that this complexity makes complete separation between these realms of democratic life difficult if not impossible, and in some deep sense not only unnecessary but inappropriate. Finally, I will consider the implications of thinking in terms of freedom of conscience rather than separation of church and state.

**THE PUBLIC AND PUBLIC SPEECH**

There are two interwoven concepts to be explored here: First is the meaning of *public*, and the second is the meaning of *public speech*, which is more than just speech that happens in public. The meanings of these social facts will be rooted in the work of Dewey (1927/1988) for a theory of the public and Tom Green (1994) for a theory of public speech. These are by no means the only people who have theorized either of these concepts, but they are robustly democratic conceptions, and I have chosen to use them because they create a productive frame for considering the problem of religion in the public life of a polity.

Dewey is a familiar enough figure in educational thought that I will not spend too much space in developing his idea. Rather, I will indicate the salient points he makes about the meaning and nature of a public. In *The Public and Its Problems*, Dewey (1927/1954/1988) confronts the fact that the modern age has done much to destroy community, a key and defining feature of which had been the interpersonal nature of relationships. His concept of democracy is rooted in communities—face-to-face associations. However, we cannot even conceive of governing a nation as a community unless citizens have strong roots in what Putnam (2000) refers to as mediating institutions. In short, one must belong to real, face-to-face communities, which then overlap, before one can conceive of a national community<sup>[1]</sup>.

Dewey's ideal of democracy is rooted in this sense of community. It is the experience of knowing others and their needs in context and complexity that allows us to care about others' welfare as fully as our own. As Dewey (1976/1980<sup>[2]</sup>) puts the claim in *School and Society*, "What the best and wisest parent wants for his own child, that must the community want for all of its children. Any other ideal for our schools is narrow and unlovely; acted upon it destroys democracy" (p. 5). There is certainly some hyperbole here: If we did not prefer our own children to the children of others we would be some entirely different species than we are, and not necessarily better for it. But the rhetorical point is a powerful one: While I may decently prefer my own children over others, I may not create social structures that work against the well-being of those others. And Dewey is not just speaking of education and children; his broader point is that, in a democratic polity, there must be concern for the well-being of others. This, Dewey tells us, is the essence of democracy, not "... universal suffrage, frequent elections, majority rule, congressional and cabinet government.," which are merely "devices" (p. 145).

Key, then, is the claim that democratic society must function as a community; at a national level it must be constituted as a *Great Community*.<sup>[3]</sup> What matters is the working of this public: when a public exists, we are aware of the fact, because we are aware of our membership in it. Further, the existence of community is the existence of democracy *and vice versa*: "... democracy is a name for a life of free and enriching communion" (Dewey, 1927/1954/1988, p. 184).

This brings us to Green's (1994) work on the nature and importance of public speech. Speech that calls a public into being and does its work, is, as Dewey puts it, "... a subtle, delicate, vivid, and responsive art of communication" (Dewey, 1927, 1954/1988, p. 184). Like Dewey, Green is concerned with the loss of something in public life—perhaps the loss of public life itself:

...[W]e now have practically a whole generation of students who in their entire lives have no major public leader speak to the nation powerfully about our ties to one another, much less with conviction about what gratitude we

owe our predecessors and what we owe our children. (p. 369)

And this was in 1994. Our current situation is largely the result of toxic speech that permeates and poisons the spaces that a public might inhabit, and is consciously used to undermine the notion of a public. Consider the importance of Ronald Reagan's division of the American public in the eighties: He convinced a potential public that we are each on our own, and that there is no such thing as a public or common good. "Are you better off than you were four years ago?" (Reagan, October, 1980) was his question, not, "Are we better off?" There was, for Reagan, no such thing as *we*. Similarly significant was his inaugural statement that "Government is not the answer to our problems. Government is the problem," (January, 1980) denies the possibility of democratic life as anything more than competition, since it denies that we can use government as a means to institutionalize solutions to common problems.

Like Dewey, Green is concerned about how we might address this lack. As Dewey considered the question of what a public looks and acts like, Green dealt with the question of how a public comes to be, and his insight is that "...the public is created by public speech" (p. 364). This seems simple, but it is not. How does public speech do its work, he asks? For Green, the beginning of understanding is to ask: What makes public speech public?

Green's central insight in this regard is that public speech does not become public merely by being spoken in the proximity of others. Under those circumstances it is possible that the speech will be public speech, but so too it might be mere noise, background, or static. Unless it is heard in a certain way, it is not public speech: "... *public speech occurs when what is said in one person's speech is heard by others as candidates for their own speech*" (p. 375, emphasis in original). This is what Green calls the Auditory Principle, and it is key not only to Green's construction of public speech, but Dewey's notion of a public itself. I must be able to imagine myself in the place of the speaker, thus making the other, less other.

The importance of this Auditory Principle is this: If Green is correct, then our mutual full membership in the democratic polity is not only dependent on our choice to participate, but further hinges on whether my speech is recognized by others as "candidates for their own speech." Beyond the effort, care, and vigor with which I claim my share of the public space, I am only in a public with those who are willing to listen to me, and that is a decision over which I can have very little effect. If X is not educated so as to hear the speech of Y (and vice-versa), then X denies Y membership in the public to which X belongs. This aspect of learning, of education for listening, is one of the reasons the democratic pedagogy of the sort described in Vivian Paley's *You Can't Say, You Can't Play* (1992) is so critical in the formation of democratic citizens. We have the power to effectively bar others from public membership—from citizenship, in any robust sense. We also have the moral responsibility not to do so.

It is important to note here that inclusion and recognition, what Kunzman (2006) calls "mutual respect" (first cited, p. 41), in no way implies consent or agreement, or even lack of blame. We can consider the claims on us that other people place, and then reject them. The Auditory Principle is not an obligation to agree, but to use my imagination to hear another's speech as possibly my own. I might then reject that position. If I reject it *prior* to such consideration, I am rejecting the idea of a public, and thereby contributing to its unmaking.

Publics are fragile, when they exist at all. They are an example of what Durkheim (1982, p. 1) referred to as a "public fact" something with no *real* ontological status, but no less real for that. A social fact, such as the existence of a public, exists when and if its members think (or, as Green would say, when we speak and listen) it into existence. If we act as though there is no public—in Dewey's terms, if I do not attend to the well-being of others in addition to my own; and in Green's terms, if I do not listen to another as though it was at least possible for me to share that person's point of view—then, in fact, there is no public, and, they would argue, no democratic life is possible. On the other hand, our actions in this regard can bring a true democratic society into being, if we choose to so act.

## CHURCH, STATE, AND POLITY

The precise nature of the proper relationship between church and state has varied in recent history. For much of the history of the United States, government neutrality has meant that government has been neutral within the frame of mainstream generic Protestantism—neutrality within a broad range of religious expression, but either silence or active discouragement outside that range: Roman Catholics, Jews, Muslims, and other religious traditions. Through much of this history, free exercise was deemed to exist if there was no absolute prohibition of religious practice (and, in some cases, even if there was: in the case of Mormons and Native Americans, for example); the lack of an official state church was deemed to meet the test of non-establishment. This is a far cry from what Nussbaum (2008) refers to, beginning with the title of her book, as

“liberty of conscience.”

This situation changed in the second half of the Twentieth Century. Beginning in 1947 with *Everson v Board of Education of Ewing Township*, the Supreme Court began applying the First Amendment, through the Fourteenth Amendment, to the actions of states as well as the federal government. Although the decision in this case affirmed the practice in question—state payment of transportation expenses for parochial school children—two aspects of the decision provided a preview of the coming so-called *culture wars*. First, that the decision was as close as it was, 5-4, indicated that there was a new interpretation of the First Amendment’s religion clauses, and that the understanding of *establishment* was being expanded. The second factor was the wording of the decision:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another... no tax in any amount, large or small, can be levied to support any religious activities or institutions... In the words of Jefferson, the clause against establishment of religion by law was intended to erect a “wall of separation” between Church and State. (*Everson v Board of Education Ewing Township*, 1947)

This is the first time that Jefferson’s wall of separation, a phrase taken from his letter to a group of Baptists in Danbury, Connecticut, was elevated to a Constitutional principle, one that does not follow necessarily from the religious clauses of the First Amendment. The Court crossed a conceptual divide here. Up to this ruling, the Court had guarded against federal interference with free exercise of religion and enforced a generic neutrality. From this point forward, there was a more active intervention against state actions encouraging, and even supporting, religion in general. Such practices had been seen as both permissible by the Court and desirable by state legislatures for most of our history.

The Court in this area, as in other cases involving minority rights at that time, was ahead of the popular will. In *Engel v Vitale* (1962) the Court ruled that prayer in public school may not be led or initiated by the teacher or other school official. The following year, the Court decided, in *Abington School District v Schempp* (1963), that Bible readings in schools also violated the First Amendment. These two decisions, in rapid succession, put a stop to two exercises of civil piety that had long been accepted in law and practice. These decisions were experienced by many citizens to be both federal limitations of free exercise and clear violations of public will. They became, along with issues like legalization of abortion and teaching evolution, ammunition used by the right wing of U.S. politics to make religion a political issue in a way it mostly had not been. Much of the deep mutual distrust and political division from which we have suffered in the past generation followed.

Meanwhile, John Kennedy had just been elected as the first Roman Catholic President of the United States. In pursuit of that goal, he had to convince skeptical Protestant Americans that they could trust a Roman Catholic as President. The fear was that he would serve the wishes of the Roman hierarchy, not the public good. In his 1960 speech to the Houston Ministerial Association, then-candidate Kennedy assured his audience that the public good, not the teachings of his Church or priests would guide his policy- and law-making. The separation of church and state, said Kennedy in this address, should be “absolute” (Kennedy, 1960)

And this is just the claim I want to challenge: It is not, I think, either possible or necessary. Or, more precisely, we can keep the church and the state technically and institutionally separate, but we cannot, nor should we, keep religion separated from politics, or morality from religion. This claim is rooted not just in the wording of the First Amendment, but in the nature of democracy. The problem with the wall of separation trope is that it calls such a wall into being, thus dividing the community. This division is quite effective and to the detriment of a public, or, more precisely, it divides the (potential) public into two or more publics who do not hear each other’s speech in the proper way, or not at all.

The problem with this state of affairs is not the plurality of publics itself: Publics are not unitary but several. The problem is that the resulting publics are being formed consciously and deliberately—in fact, proudly—on different sides of a separating wall. They are defined in opposition to each other, and not in communication with each other. For this plurality to construct a democratic polity, those several publics must overlap; that is the precondition of public speech.

The evidence is unfortunately strong that we have reached the point where the divide that has been labeled as the culture wars has not only been created, but has also been fortified to the point where quite different public languages have been created.<sup>[4]</sup> In these wars, religion in public life is one of the most intense flash points for conflict, and the result has been the creation of two broad publics, themselves made up of many overlapping mediating institutions, that are collectively non-overlapping. They do not incorporate the whole of the potential U.S. public by any means, but they do exclude a broad and perhaps growing percentage of the U.S. population from joining in public speech.

Consider even a partial list of political issues that with some consistency divide us into two non-overlapping publics, that is, publics not susceptible to considering the other's speech as candidates for one's own: abortion, LGBT rights, sexuality in general, marriage, evolution, global warming, prayer in school, and celebration of Christmas. It is not just that we disagree about such things; it is that we cannot even hear each other—we speak different languages in different public spaces to different publics. The different publics have different sources of news (Fox News, talk radio, and *National Review* versus NPR, *The Daily Show*, and *The New York Review of Books*, as specific examples). Most people who listen to one of those sets, and they number in the millions in both directions, do not also attend to the other. There is a silence between them. It is even more serious than that we do not hear each other's speech as candidates for our own: it is that we do not hear each other's speech *at all*.<sup>[5]</sup>

Now there is some hyperbole in that statement, but only some. Rush Limbaugh's listeners, for example, were given an opportunity to hear President Obama's inaugural address live, but with simultaneous running commentary from Limbaugh. This intervention into what might otherwise have constituted public speech prevented, and was designed to prevent, that outcome. Hannity, Beck, Limbaugh, Savage—the entire right wing propaganda empire—quote Obama, Democrats, and Progressives extensively, but only out of context. Thus do they work to prevent the danger a democratic public would present to their toxic populism.

My experience as a teacher in the so-called Bible belt is that listeners to that propaganda feel they are treated the same way—that Bush, for example, was consistently portrayed unfairly and that people of faith are treated with a distinct lack of respect by *intellectuals*. Nor are they entirely incorrect. Richard Dawkins was recently a speaker on our campus as part of a celebration of Darwin's work. The biggest applause lines of the night had to do with neither Darwin nor evolution, but were for his characterization of people of faith as stupid. And then, of course, there is the demonization of LGBT citizens by those who feel aggrieved by Dawkins. And so it goes.

This situation in which we talk *about* those who are different rather than *to* them is the essence of what I take to be the problem of non-overlapping publics—we do not just doubt each other's correctness, but sincerity, decency, or sanity. Or all three. *It is not just one's opinion that is challenged—it is one's standing and membership in the polity itself*. No democracy can long survive across that sort of wall of separation dividing the polity.

The shift in public sensibility can be measured by comparing Kennedy's 1960 speech, previously noted, to Mitt Romney's (2007) Faith Speech, in which he answered the sort of questions about his Mormonism that Kennedy had answered about his Catholicism. But his answers were very different. Instead of Kennedy's claim that his religion should be of interest to no one but himself, Romney rhetorically asked if it was legitimate to ask candidates about their religion, and answered, "Yes." He then proceeded to affirm his faith in Jesus Christ as his Lord and Savior. In contrast to Kennedy's claim that what mattered was the candidate's position on public policy issues, quite apart from religious belief or faith commitments, Romney's position was that these cannot be separated: "Freedom requires religion just as religion requires freedom." In contrast to Kennedy's appeal to the nation as a unity, one body politic (albeit it with policy disagreements), Romney concluded his address by pledging, "Any believer in religious freedom, any person who has knelt in prayer to the Almighty, has a friend and ally in me... we do not insist on a single strain of religion—rather we welcome our nation's symphony of faith." One can only wonder where those who do not kneel in "Prayer to the Almighty" stand with him, or how those citizens heard those words. Romney's was indeed public speech made to a conscious public, but a truncated and disfigured one, as was the case with Dawkins.

## Historical Digression

That something fundamental changed in the time between the two addresses is attested to by the fact that Mitt Romney's father, George, also a Mormon, also ran for President. That was in 1968. It is not the point of this paper to analyze the reasons for this change, but three things seem worth noting in passing: Watergate, politicizing of religion differences, and the increased diversity in U.S. society.

The political significance of Watergate may well have been to point to the importance of character and morality in selection of leaders. The failure of government captured in the term *Watergate* was not a failure of policy or competence (well, perhaps the competence of the burglars—a different issue), but of morality and character. For many voters, the faith of elected officials, as a place-holder for their morality, became more important.

A second change in this time was pointed at earlier in this paper: the introduction of doctrinally-charged issues such as abortion and prayer in school into public discourse. There have always been such issues in the background (which version

of the Bible to use for school readings, for example), but the centrality of such issues, and the number of single-issue voters forming around them, created a new political and civil reality.

The third, and perhaps underlying and unifying, issue that may be significant is the increased diversity of the U.S. polity. As mentioned earlier, government used to be neutral within a band of mainstream religious traditions, with policies toward other traditions ranging from oblivious to mildly hostile, while not quite establishing a religion or preventing free exercise. Members of mainstream religious traditions, the vast majority of voters, and an even vaster majority of policy-makers, saw the policies in place as meaningfully neutral, and those who disagreed were a small enough part of the policy to be either silent or silenced. This is no longer true. While a coercive public space may not technically violate the First Amendment, it certainly violates its intent.

It is a minor but perhaps significant point that the history of Court decisions from *Everson* on applied the First Amendment to questions it was never meant to address. The First Amendment, applied through the Fourteenth, is now construed to prohibit that which it was originally specifically designed to allow: the actions of state and local government that showed preference for religion in general, one religion over another, or even that actively interfered with the free exercise of religious practice. The First Amendment (as with all the Bill of Rights) limited the actions and prerogatives of the federal government *in order to allow those specific prerogatives to the states*. The Bill of Rights was designed to protect states' rights, not citizens'.

In point of fact, the states stopped at least the most egregious of First Amendment violations on their own, but it was the Fourteenth Amendment that then incorporated the Constitution entire to apply with equal force to limit the powers of the states and, as creatures of the states, of local governments.

This history is significant, because it means that the rather blunt instrument of broadly phrased prohibition of federal activities must now be employed in fine-grained detail where it was never intended to be used: crèche scenes on town greens, for example, or Intelligent Design in public schools. These are exactly the sorts of issues in which the federal government was never intended to be involved at all. This makes the concept of *original intent* quite literally meaningless, but it also offers no coherent means of splitting the difference between free exercise and establishment clauses of the First Amendment. The result is that, perhaps more than in most areas of jurisprudence, decisions are political, and unanimity in Supreme Court religious decisions is rare. Priority is given either to free exercise protection or establishment prohibition, and decisions differ accordingly.

Further, as the public space becomes increasingly diverse, in consequence, it also becomes more secular. There was a time when the public space could be Christian and seem neutral at the same time to the vast majority of citizens who belonged to or to some extent affiliated with some version of Christianity. This is no longer true. Under current conditions, people of deep religious faith can easily experience the government stance of neutrality as hostility and marginalization expressing a metaphysical, not just methodological, secularity. This need not be true in any objective sense or intent to be experienced as real and to therefore create a real problem of the public.

This again raises the importance of the question of the public and public speech. Where the stance of the state is essentially secular, those of some faith traditions experience the state as hostile, not neutral. They see state secularity as state hostility; the refusal to endorse religion, or even religiosity in general, as endorsement of a secular worldview. Those of other faith traditions, or none, find the state's efforts at neutrality more compatible with their beliefs, although many atheists feel that other state practices, such as the "under God" in the Pledge of Allegiance are still breaches in the wall of separation.

## AN ALTERNATIVE DEMOCRATIC VISION

I have no doubt that the experiment in absolute separation has been sincere and well-intentioned. I am less certain that it was well-conceived. I am almost certain that it has been a failure. I am hopeful that there are alternatives that will do what the First Amendment is intended at root to do: protect the equal rights, equal standing, and equal participation for all citizens.

So far I have argued that the effort to build a wall of separation between church and state and state has worse than failed: It has intensified the very civil strife it was specifically intended to avoid, or at least ameliorate. What does this imply for the democratic project of creating and sustaining a public across the realities of different publics?

In *Liberty of Conscience*, Nussbaum (2008) offers the conceptual foundation for an alternative approach to the First

Amendment. She argues that the organizing principle that should replace *separation of church and state* is *liberty of conscience*. Her point is that this nicely ties together the ideas of free exercise and non-establishment, while possibly constructing a more productive conversation around the questions of religion and public life than the wall of separation metaphor. There are, she argues, two competing traditions in American history: On the one hand, there is strong religious tradition that is implicated in the very roots of the colonial experience; on the other hand, there is a strong tradition of “absolute equality” of all people and all religions (p. 243).

Although the first of those traditions has been the more robust, there has always been the ideal of absolute equality to which dissenters can appeal, and it is that tradition that is bedrock, regardless of the extent to which we fall short of it. Nussbaum seeks a way to ground policy on that bedrock. Her bottom-line reconciliation of the religious clauses of the First Amendment is: “... no religion will become an orthodoxy that undercuts any citizen’s claim to equal rights” (p. 3) and that

Liberty of conscience is not equal, however, if government announces a religious orthodoxy, saying that this, and not that, is the religious view that defines us as a nation. Even if such an orthodoxy is not coercively imposed, it is a statement that creates an in-group and an out-group. It says that we do not all enter the public square on the same basis: one religion is the American religion and the others are not. It means, in effect, that minorities have religious liberty at the sufferance of the majority and acknowledge that their views are subordinate, in the public sphere, to majority views. (p. 2)

Her goal is to prevent placing non-establishment against free exercise by blending the two. But it is a bit more complex even than that, as Kunzman (2006) argues. What is at stake is, in some sense, whether public (i.e., state) speech recognizes the legitimacy of both religious and secular worldviews equally—indeed, whether public speech can contain talk about worldviews at all. Kunzman argues that the public square must allow all worldviews—secular and religious—full presence and weight in the public square: the key democratic virtue for Kunzman is mutual respect, which “... is not only instrumental in the pursuit of the common good, but partly *constitutive* of it” (42, emphasis in the original). It is insufficient, indeed, inappropriate and disrespectful, to relegate religion to the private realm only. Citizens come into the public square with their religious as well as their secular commitments, and these beliefs inform their views about proper social policy and order.

The point of liberty of conscience is to think in terms of maximum participation of all in the public square, religious and non-religious alike. It is about tearing down walls, not keeping them impermeable. As Nussbaum puts it:

Many if not most Americans think that religion is enormously important and precious, and they do not like being told by intellectuals that they should not bring their religious commitments into the public square. Even “separation of church and state” sounds to them like an idea that marginalizes or subordinates religion.... Many people think, then, that defenders of the continued separation of church and state are people who have contempt for religion. (p. 9)

Her view is that “religious fairness” is endangered by both “arrogant secularism” and “aggressively insular forms of Christianity” (p. 10). The struggle is to create a public space in which people do not have “*enough* freedom, but a freedom that is itself *equal*” (p. 19, emphasis in original). Her goal is a public where there is neither domination nor subordination. This is a difficult goal to achieve in a contentious, polyphonous public square, where every policy defeat can feel like either domination or subordination. She specifically states the obvious: Respect does not entail approval of any particular moral, theological, or policy position. More broadly, Nussbaum recognizes that there are “extreme views [that] might contradict, or even threaten, the very foundation of constitutional order,” and that, while “*people* are all respected as equals,... actions that threaten the rights of others may still be reasonably opposed” (Nussbaum, p. 24). The point I take her to be making is that the public speech will refrain from ruling out of bounds any kind of argument, which is as it should be. This inclusion would include religious reasoning on equal but not privileged footing. Humanists, atheists, agnostics would all be treated the same. That is, arguments would be evaluated on their merits—on their effects on civil life, not on their sources. This would, of course, open religious reasons to criticism, but could not be dismissed on the mere grounds that they are religious, which is occasionally the case now. As Kunzman cogently argues, this sort of criticism is the kind of respect one citizen owes to another.

Nussbaum’s view of the public square seems to be the sort of space for which Kunzman’s educational visions would prepare students. This would be a space in which faith and other grounds of ultimate reality and/or goodness are given a full airing. With real commitment to hear the different moral arguments for a policy in this space, we may come to enact the respect for others that underlies the creation of public speech, and thence of a public. Schools should not marginalize or exclude robust examination of different visions of the good, but should center such questions, teaching students to listen

to divergent visions of the good.

## FAILURE OF THE PUBLIC

The question of teaching Intelligent Design (ID) and evolution in public schools has been the subject of court cases (*Epperson v Arkansas* (1968); *Edwards v Aguillard* (1987); *Kitzmiller v Dover* (2005)) and political battles, especially in Kansas, where evolution was taken out of the state standards (1999), placed back in (2001), taken out (2005), and placed back in again (2007) as the religious balance on the state school board changed with successive elections. Similarly in the Dover, Pennsylvania, school district, the school board mandated the teaching of ID and was taken to court. The district lost the case in a decision that declared that ID was not a scientific theory and therefore could not be mandated in public school curriculum. The school board considered appealing the decision, but as was the case in Kansas, the next election changed the composition of the school board, with “liberals” replacing “conservatives,”<sup>[6]</sup> and the new board declined to appeal.

These cases have a few things in common. First of all, they attracted national attention and wound up as battles between national organizations, not as discussions among community members who potentially constitute a public. The result was that the people involved directly in the dispute were not, in fact, directly involved in the attempts to settle the dispute. In fact, there was not any concerted effort to settle the dispute; there were only efforts to win by defeating the other side. These were not seen as disputes within a public to be settled together for the good of all; they were constructed as epic battles between the godless humanists who wanted to delete all mention of God from public life on the one side and religious fanatics who wanted to impose a sort of soft theocracy on an enlightened public on the other. Seen in such terms, the default (but perhaps not the only possible) perception under a wall of separation metaphor, there is little chance that these disputes (one on-going culture war, really, with many arenas for elaboration) will be settled as a public problem. The language of the court system is not the language of a public.

When arguments are couched in the language of Constitutional rights, there is little talk there of common membership. It is not my intention here to attend to the details of the individual battles, but on the overall shape of the conflict. As stated, the assumption is that each of these specific contests is part of one national contest. And it *is* a contest. The intention of both sides is to win, not to find an accommodation. But that is part of the reality of Constitutional disputes: Each side must construct a dichotomously virtuous argument that places all right on its side, and none on the other. Constitutional lawyers do not argue in front of the Supreme Court or any appellate court by saying, “Well, yes, the other side has a point there.”

Further, the metaphor of a wall of separation to set the conditions of the relationship between religion and politics (which is not the same thing as talking about church and state, a distinction not consistently made) is absolutist in effect. Perversely, operating under that metaphor, neither side is likely to be satisfied with actual policies: no separation in the actual life of a democratic polity is likely to be enough for secular fundamentalists, while no accommodations are likely to be strong enough for evangelical fundamentalists who seek an avowedly “Christian nation.”

Once the disagreement is in the Courts, it is no longer a dispute within a public. The whole point of this sort of dispute is to *not* hear the speech of the other as a candidate for one’s own—to *not* engage in public speech, at least with one’s adversaries. Once the dispute becomes framed in the imperatives of rights, there is no longer ground for a solution that creates a *common* good: The claims are inherently disjunctive, and each side is precisely set to pursue its own good, not that of the commons.

This is not to say that the competing sides do not see their own good as consistent with the public good. Undoubtedly, they do. But they must assume, at least within the context of the dispute, that the public good and their own good coincide, and that the opposing side is not worthy of consideration because they do *not* have the common good at heart—at least not the *real* public good. This can be seen by the caricatures they draw of each other, both for the purpose of gaining political support and to assist with fundraising. Of course those who oppose teaching ID in schools are not opposed to religion at root<sup>[7]</sup>, just as those who favor ID do not really intend to establish a true theocracy, though they do no doubtless hope to restore religion in general or Christianity in general to the privileged position it held in the public square for so long, a restoration they see as both justified and for the good of the commons.

That the dispute becomes about absolute rights protected by the Constitution means that there is no compromise, and the loser must give way to the winner: X’s rights become Y’s obligations, and the duty of the state to protect. The adversaries do not need to converse with each other to resolve the issue between them. More than do not need to: They ought not do

so, for to do so might weaken their case in court. A court battle over competing rights is the death of public speech. The two cannot coexist on the same issue at the same time.

And this seems to me unnecessary (Covaleskie, 2008). Why not indeed allow ID to be considered as a reasonable complement to the metaphysical questions begged by the methodological materialism of science? Why not honestly consider ID, both as a reasonable, albeit nonscientific, explanation of the existence of the universe and as a non-scientific theory? This would have several advantages over the wall of separation that currently divides the public.

First, it allows for the nature of a *scientific theory* to be better understood as it is held against a counterexample. A point of comparison between ID and Darwinian theory is not that ID is wrong, but that neither is it science. It seeks to answer the sort of ultimate questions that science does not. Further, at least some of the answers given by ID—that is, the part that separated it from Darwinian evolution—are simply not the kind of questions susceptible to hypothesis and verification. I refer here to that species of ID that accepts the fact of evolution, but goes beyond those data to argue that the existence of the universe implies a creator. Beyond what the methodological materialism of Darwinian theory contributes, ID is not a scientific theory: It suggests no testable hypotheses beyond those generated by the theory of evolution itself. The theory that species have evolved through genetic diversity and differential reproduction and survival generates the same testable hypotheses whether the world comes into being by an act of divine creation or by some other, unspecified, means, while speculation about a creator generates no testable hypothesis. So, one advantage that follows directly from offering a comparison between the scientific theory of Darwinian Evolution and the non-scientific theory of Intelligent Design is that children might grow up with a better understanding of both the power of science and its limits, that is, the questions that science does not answer because they lie outside its purview. This might not be what the ID supporters imagine, but it would treat both science and the religious beliefs of many citizens with respect. And it would certainly be of general benefit for citizens to appreciate both the power and the limitations of the methodological materialism at the heart of the scientific enterprise. In addition, such teaching would allow for a clarification of the difference between methodological materialism and the metaphysical materialism. This might end some of the reference to science as “godless.”

Further, the comparative discussion would reasonably also present the metaphysical materialist alternative as well, that the universe itself fully came into being through natural means, which science has not yet figured out. And that *yet* is a powerful word, the implications of which need also to be addressed and considered. It implies the position that has come to be known as the *God of gaps* accommodation between science and religion: the idea that science will eventually answer those questions it cannot answer *yet*. But the position I suggest is stronger than that on the limits of science. I suggest that the limits of science are of two kinds: There are indeed questions that science has not answered *yet*, but which it likely (or at least possibly) will do so eventually, and then there are those that science cannot ask, let alone answer. In 1978, Duncan and Westin-Smith edited a collection of papers wonderfully titled *The Encyclopedia of Ignorance: Everything You Wanted to Know About the Unknown*. In it, the authors discussed scientific questions that were at that point topics of scientific inquiry, but which had not been answered, *yet*. Some of those papers posed questions that have since been answered; some posed questions that have not. But all the papers posed questions that could be answered by scientists or mathematicians working within the constraints and limits of the sorts of inquiries appropriate to their disciplines. “Does God exist?” was not among the questions asked.

That is because the question of God’s existence is not a question that science has not answered *yet*; it is simply the sort of question science does not ask at all. It is not a scientific question. But it *is* the sort of question that does make sense to ask, and that humanity has always sought to answer by both myth and reasoning beyond the data. One might even argue that the asking of such questions is as much what makes us human as the asking of scientific questions, the verifiability or falsification of the answers notwithstanding. And as such as Kunzman (2006) and Purpel and McLauren (2004) have argued, schools should help students engage in the answers wise people have developed over millennia. This does not mean that schools would endorse any of the answers, but nor does the First Amendment mean that schools cannot be places where such questions are asked and reasonable answers considered.

Now it is sometimes argued that it is all well and good for schools to do such questioning, but not within the sacred confines of science class. However, teaching ideas such as ID within science class helps to both contextualize the speculation that is ID, and it helps clarify, by contrast, what is scientific about science, and the difference between scientific theories and other forms of theories. This might go far in dispelling the power of the shibboleth that evolution is “just a theory.” It is not, of course, *just* a theory at all, but comparing scientific theories to theories like ID, which is, in fact, just a theory, may help young minds see the difference (and perhaps a few older ones in the process).

Similarly, one of the long-term advantages of working to bring even such fundamental disagreements into the light of day in pursuit of democratic education may just be that the children will learn how to hear a public into being when their turn

comes. Our democracy is threatened because civility is tattered, even among those paid to protect it, i.e., elected officials. The public must be restored, recreated, in each generation, and this task will be particularly important for the next generation since the public they will inherit is so torn and frayed. There will be differences of opinion in discussing ID and specifying accurately its difference from science in general and Darwinian evolution in particular. Not, I would insist, its deficiency or its inadequacy, but emphatically its difference. But children who will be citizens in a democratic polity must at some point learn how to engage in civil discourse about things that matter and about how to disagree where there is real difference. If they do not learn these skills and develop the requisite virtues in school, where is that likely to happen?

Finally, I want to briefly sketch an example of public speech to which I bore personal witness, and which left me with a deep belief in the potential for such a phenomenon to happen. In the late nineteen-eighties, there was a small rural school district that was facing the reality of an HIV-positive student in the high school. The identity of the students was not generally known, and so far as I know, never became so. This was a time in the US when there was a sense of panic over the spreading epidemic, a sense that was especially powerful when present in schools. It was early in the epidemic, and most people, even doctors, were not certain about how possible transmission was through even casual contact. The scientific community was beginning to gain insight in this regard, but the knowledge was not widespread, certainly not among the lay people of a small rural school district.

This was also the time when many similar communities, faced with HIV-positive individuals, reacted badly: Ryan White and his family were driven out of their town in Indiana, just as the Ray family were driven out of Arcadia, Florida, after their house was burned down. In the White family, Ryan was HIV positive, and in the Ray family, their three boys—Richard, Robert, and Randy, hemophiliacs exposed to infected blood by transfusion—were all positive. Their respective towns deliberately and completely chose to deny these families or their children membership in the public; it was, in fact, the public schools, that paradigmatic public institution, from which the exclusion took place. They were explicitly told: “We are not concerned with your welfare or the welfare of your children, because you are not part of ‘we.’” The failure here was that on the one hand, the public that did form refused to hear the speech of the Rays or the Whites; this public did not include them. They were denied membership. Now it is true that neither of these cases were directly religious in nature, they do exemplify the failure of the responsible people to act as—to *be*—a public.

In the district to which I refer, however, something quite different happened. When word was received that there was an HIV-positive student in the high school, there was, needless to say, the same sort of concern that led to such terrible behavior in the cases mentioned above. Here, however, that concern led in different directions. There were two initiatives that the district immediately took under the leadership of the superintendent and the curriculum supervisor. First, the district set to work on a health curriculum, to include comprehensive knowledge (as it was at the time) on the means of HIV transmission. Second, the district set up a series of town meetings (the real kind, not the toxic populism of the Tea Parties). What happened there was quite remarkable, and something that still shapes my thinking about the possibility of real publics happening. It is, I think, related to the fact that, as disconnected as Americans have become from their government in general, they are still connected to the schools where their children are educated, and they still feel both a stake and a potential to influence those schools. It was not, therefore, a mere coincidence that real town meetings happened in a school auditorium, facilitated by the school administration.

There was a series of meetings, attended by the district and building administrators, as well as many teachers and a good representation of the residents of the community. At these meetings, the curriculum director laid out the content of the health curriculum, including the content and details of the sex-education component, something as controversial then as now. In the language of today’s politics, the entire process was transparent.

The sex-education component was, as might be expected, the most controversial part of the health curriculum, which began in kindergarten with the germ theory of disease, and how bacteria and viruses were spread in cold and flu season. From there the discussion became more detailed as the age of the children increased. In fifth grade, sexual transmission of HIV was introduced, including a discussion of anal intercourse. There was some discussion of this detail at several of the town meetings. And it was at those meetings and in those discussions that I came to experience the meaning of *public speech* and *public*, though the theoretical frame of these concepts came later to me.

One parent in particular stood out. She spoke against the introduction of such complete information by pointing out that her daughter, in the fifth grade, still believed in Santa Claus, “and you want to teach her about anal sex.” Her fellow citizens listened to her, but responded with statistics about pregnancies in the middle school, even as early as fifth grade. And there it was, the two opposing points of view: children perceived as too young and innocent to hear all the facts of life *and* children of that same age getting pregnant and having children. On that note, this particular meeting ended, with the

next meeting scheduled for the next month.

That next meeting opened with the mother of the fifth-grade girl again speaking, and what she said was that she understood the need for comprehensive sex education, and she, like everyone else, wanted the community's children to be safe. She had heard, as candidate for her own speech, the concerns of others for the safety of children not her own. She accepted, though she found it difficult to understand, that there were fifth graders who needed the information in the curriculum. What she asked was that the district would send home information about the sex-education part of the health curriculum so that "my husband and I can talk with our daughter before she hears about it [anal sex] in school."

This is, I think, what Green meant by public speech. Though it was not a religious debate, it could easily have become one (in the manner, for example, of *Mozert v Hawkins*, 1987). This was an event no one outside the community knew about because it did work well; the public met, as a public, addressed a common problem with the intention of finding a solution that worked for the common good, not just individual good. It is not that there were no differences of opinion about what the common good required in this situation; it was that the members of the public heard each other's concerns, needs, and desires, and adjusted their individual preferences to accommodate the needs of the whole.

It is probably significant that this was a small town where people did in fact know each other in a variety of contexts before attending the meetings about curriculum, though the same was true in Hawkins County and Arcadia, Florida (population approximately 6500). While knowledge of one's neighbors may make forming a public easier, it is definitely not enough. There also must be the commitment to do so on the part of potential members. What members of the public did not do here was withdraw from their public and hire lawyers, fighting from the outside. It may at times be necessary for oppressed minorities to do exactly that, but we must note that at that point we have definitive evidence of the failure of the public to maintain itself. Nor did the majority here declare that others were to be excluded for one reason or another. They listened. They heard. They sought common solutions to their common problems.

If, as I argue, the metaphor of a wall of separation is counterproductive, perhaps it is time to try something else. Politics, no less than religion and schooling, is an educational institution. It is possible a positive change in any one of these public-making institutions can have positive effects in and on the others, just as we have seen the reverse, with toxic political speech leading to deleterious effects in both religion and education. I hope the spiral can be reversed.

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## Notes

<sup>[1]</sup>In this respect, Dewey's roots in the town meeting culture of New England democracy is significant to his theorizing of democratic life.

<sup>[2]</sup>The original publication date is a difficult issue, as the history of this particular text is a bit convoluted. The first three chapters were actually given as a series of addresses in 1896. Additional material was added and a version of this was published in 1899. Then it was revised and added to and published as a second edition in 1915. That work was then combined with a 1902 publication (*The Child and the Curriculum*) and published in its current form in 1956 by the University of Chicago Press. It is currently available as a publication from Arcturus Paperbacks, the most readily accessible to someone who wished to confirm or explore further the cited material. The current version is also the first chapter in Vol. 1 of *The Middle Works of John Dewey 1899-1924*, the standard reference work for Dewey scholars, but one not available in all libraries..

<sup>[3]</sup>But membership in local, *real* communities is a precondition for this, as Putnam (2000) explores in great detail. Note also that the idea of a *Great Community* seems to assume a substantially greater active concern for the good of others than is suggested by the metaphor of a Great Society.

<sup>[4]</sup>For example, someone who was unfamiliar with the native dialects would not easily be able to discern that *freedom of choice* and *right to life* were discourses constructed around the same phenomenon. But in a very real sense, they are not, and that is the point.

<sup>[5]</sup>I suspect, though have no way of knowing, that regular listeners to NPR have no idea of the implicit support for armed insurrection being provided to militia groups on a daily basis by the likes of Glenn Beck. Similarly, I suspect few of Beck's listeners tune in regularly to Diane Rehm.

<sup>[6]</sup>The quotation marks here are meant to point to the fact that there is nothing obviously liberal or conservative about this question if we understand those terms in the economic and political meanings they have traditionally had. However, it is true that in the US context, those who are what it makes some sense to call political conservatives are largely in support of

teaching ID (along with evolution usually, but this is a political concession and not the actually preferred policy) and those who are heirs of what has passed as liberals in the US context are largely in support of teaching evolution and banning ID.

[7] There are of course, exceptions such as Sam Harris (2004) and Richard Dawkins (2006), who are what we might think of as secular fundamentalists who desire to draw conclusions as far beyond the evidence as anyone connected with the ID movement.