

Accommodating “Neutral Dreams” in Liberal States: Responding to Consciously and Religiously Motivated Challenges in Multicultural Public Education

Rashad Ibadov*

INTRODUCTION

In the last few decades, the influx of newcomers¹ has considerably affected the prevailing form of social integration and cooperation in liberal-democratic states.² Although these changing demographics have led to extensive, progressive contributions, they have also exposed some significant challenges³ confronting the organization of public space.⁴ In particular, the relationship between religion and public education has become even more

* Assistant Professor of Law & Founding Director of Law Program, ADA University, Baku, Azerbaijan. I would like to specially thank Professor Gerald L. Neuman (Harvard Law School) for inviting me to participate in the symposium on “Indirect Discrimination on the Basis of Religion” organized at Harvard Law School in April 2020. A very special gratitude goes out to the staff of the Human Rights Program (“HRP”) at Harvard Law School, who offered me the utmost support while I was an HRP fellow in the spring semester of 2020. Lastly, I would like to take this opportunity to thank ADA University for their continued support and encouragement while I was away from Azerbaijan.

1. For example, the latest statistical data show that 15.4% (51 million) of the U.S. population is composed of international migrants. See *International Migrant Stock 2019: Country Profiles*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, <https://www.un.org/en/development/desa/population/migration/data/estimates2/countryprofiles.asp>. Similarly, the 27 European Union (“EU”) Member States granted citizenship to 672 thousand persons in 2018, with 21.8 million people (4.9 %) of the population of the Member States composed of non-EU citizens as of January 2019. See *Migrant and Migrant Population Statistics*, EUROSTAT, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=migration_and_migrant_population_statistics#Migrant_population:_21.8_million_non-EU-27_citizens_living_in_the_EU-27_on_1_January_2019.

2. For a definition and brief overview of the four dimensions of social integration, see George A. Hillery, Jr., Charles J. Dudley & Thomas Thompson, *A Theory of Integration and Freedom*, 20 SOC. Q. 551, 553–54 (1979); see also Jürgen Habermas, *Intolerance and Discrimination*, 1 INT’L J. CONST. L. 2, 7–8 (2003); Tariq Modood & Nasar Meer, *Contemporary Citizenship and Diversity in Europe: The Place of Multiculturalism*, in CHALLENGING MULTICULTURALISM 25, 25–51 (Raymond Taras ed., 2012). See generally Steven Dijkstra, Karin Geuijen & Arie de Ruijter, *Multiculturalism and Social Integration in Europe*, 22 INT’L POL. SCI. REV. 55 (2001).

3. There are a number of cultural challenges (e.g., formation of new cultural values, norms, and patterns; increased sense of self-defense in dominant, local cultures), ideological challenges (e.g., competing ideological views, primarily emanating from secular or dominant religious doctrines), political challenges (e.g., public policies for administering migration, religious diversity, and social integration; distribution of political power and resources), and legal challenges (e.g., new regulations for managing diversity; an increased number of court cases that are primarily related to freedom of religion and to

complicated⁵ and discriminatory.⁶ In response, states must find an efficient constitutional model or policy strategy that will entirely, equally, or reasonably accommodate or exclude all competing religious and non-religious conceptions of the good in public education. However, it has always been a concern that some reasonable conceptions of the good may remain at a disadvantage in the public space.⁷

Accordingly, a central question of this Essay is the following: “*How should modern liberal states respond to discriminatory challenges raised by consciously- and religiously-motivated individuals or groups in multicultural public education, and through these responses thereby maintain autonomy, promote citizenship, and safeguard religious equality?*” In response to this question, I argue that a liberal state should rely on a conception of accommodative neutrality, as designed in this paper, aimed at recognizing some equally permissible room for *reasonable* religious claims in public education, particularly, when the claims: (1) can be legitimately justified as providing fair and meaning-

religious discrimination particularly in public education and in the workplace) which have contributed to the complex nature of religion and state relations in modern multicultural societies.

4. See MYRIAM HUNTER-HENIN, LAW, RELIGIOUS FREEDOMS AND EDUCATION IN EUROPE (2011); Colin Macleod, *Tolerance, Children and Education*, 42 EDUC. PHIL. & THEORY 9, 11–12 (2010). See generally ROGER TRIGG, RELIGIOUS DIVERSITY: PHILOSOPHICAL AND POLITICAL DIMENSIONS 4–22, 98–106 (2014); Samuel Scheffler, *Immigration and the Significance of Culture*, 35 PHIL. & PUB. AFFS. 93; VEIT BADER, SECULARISM OR DEMOCRACY? 49–62 (2007); Peter Cumper, *Multiculturalism, Human Rights and the Accommodation of Sharia Law*, 14 HUM. RTS. L. REV. 31 (2014).

5. This Essay is not claiming that religiously motivated challenges exist in public education because of the arrival of newcomers. In fact, the discussion on whether religion is permissible in public education takes its origins from the works of John Locke, David Hume, Immanuel Kant, and John Stuart Mill. In Stanley Fish’s reading of John Locke’s *A Letter Concerning Toleration*, any plausible solution for the challenges deriving from the relationship between religion and the state has not “advanced one millimeter beyond” Locke’s treatment even though three hundred years have passed. See Stanley Fish, *Mission Impossible: Settling the Just Bounds between Church and State*, 97 COLUM. L. REV. 2255, 2278 (1997).

6. See, e.g., Benjamin L. Berger, *Religious Diversity, Education, and the “Crisis” in State Neutrality*, 29(1) CAN. J. L. & SOC. 103 (2014); Andrew Koppelman, *And I Don’t Care What It Is: Religious Neutrality in American Law*, 39 PEPP. L. REV. 1115, 1119–27 (2013); NORMAN DOE, *Religion, Education, and Public Institutions*, in LAW AND RELIGION IN EUROPE 188 (2011); Dimitrios Kyritsis & Stavros Tsakyrakis, *Neutrality in the Classroom*, 11 INT’L J. CONST. L. 200 (2013); see also Julie Ringelheim, *Rights, Religion and the Public Sphere: The European Court of Human Rights in Search of a Theory?*, in A EUROPEAN DILEMMA: RELIGION AND THE PUBLIC SPHERE 283, 283–304 (C. Ungureanu and L. Zucca eds., 2012).

7. See, e.g., KENT GREENAWALT, *Excluding Grounds that Are Nonaccessible, Based On Comprehensive Views, Or Based On Controversial Ideas of the Good Life*, in PRIVATE CONSCIENCES AND PUBLIC REASONS 72, 80 (1995) (questioning the content of education and the possibility of pursuing objective teaching in regard to some topics, such as the lives of actively gay men and women, asking, “should the schools present a gay sexual lifestyle as unacceptable, as acceptable but not as good as a heterosexual lifestyle, as ‘good’ as a heterosexual lifestyle, or as a matter of personal choice about whose desirability the school has no view? Or, should the schools avoid the subject altogether?”). Furthermore, not every religious or cultural holiday is celebrated in public education as extensively as, for example, Christmas and Easter in Italy, or Ramadan in Turkey. Many other cultural festivals or religious holidays may not be celebrated in the same fashion or with the same popularity in the course of schooling, putting them at a slight disadvantage.

ful opportunities for maintaining the “self-determination”⁸ of individuals and groups, (2) do not essentially impede on realizing the civic goals of modern public education, and (3) do not violate the fundamental rights and freedoms of others. Hence, if a liberal state’s ideal is to ensure “neutral dreams”—i.e., maintaining autonomy as “self-determination,” promoting citizenship, and safeguarding religious equality—while providing consistent solutions for religiously-driven claims in modern public education, the state should rely on a conception of accommodative neutrality.⁹

I. NECESSITY AND REASONABLENESS: DEMARCATING RELIGIOUS BELIEFS IN PUBLIC EDUCATION?

The research question of this Essay requires the demarcation of the “borderlines” for reasonable religious beliefs,¹⁰ defined as beliefs that do

8. See Alan Patten, *Liberal Neutrality: A Reinterpretation and Defense*, 20 J. POL. PHIL. 249, 253 (2012); see also Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 726 (1992).

9. The discourse on state neutrality is fairly complex, raising long-standing questions such as: whether neutrality requires equal prohibition or equal accommodation, whether it requires a passive or active response from the state with regard to the choices of citizens, whether neutrality is an intrinsic or instrumental concept, and whether it should be defined in regard to neutral aims, neutral reasons, or neutral outcomes in the process of law and policy making. These questions have created a polymorphic environment in academia and jurisprudence. Classical philosophers, like John Locke, viewed neutrality as settling just bounds between the government and religion. See e.g., John Locke, A LETTER CONCERNING TOLERATION AND OTHER WRITINGS 7, 12–15 (Mark Goldie ed., 2010). In contrast, modern liberals explain neutrality from various constitutional and policy-driven perspectives, elaborating on the liberal-democratic state’s neutral attitudes or positions in relation to competing conceptions of the good life, which its citizens may choose to follow in their lives. See e.g., JOHN RAWLS, A THEORY OF JUSTICE 93–97 (1971); John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFFS. 251, 260–63 (1988) [hereinafter RAWLS, PRIORITY OF RIGHT]; JOHN RAWLS, POLITICAL LIBERALISM 191–92, 243 (1993) [hereinafter RAWLS, POLITICAL LIBERALISM]; RONALD DWORKIN, A MATTER OF PRINCIPLE 190–98 (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272–78 (1977); CHARLES E. LARMORE, *Liberalism and the Neutrality of the State*, in PATTERNS OF MORAL COMPLEXITY 40–50 (1987); BRUCE ACKERMAN, *The Liberal State*, in SOCIAL JUSTICE IN THE LIBERAL STATE 6–11 (1980); WOJCIECH SADURSKI, MORAL PLURALISM AND LEGAL NEUTRALITY 129–37, 176–77, 371 (1990). While some argue that neutrality is aimed at ensuring neutral intentions in the process of lawmaking (e.g., furthering or hindering religion), others submit that legislative or policy justifications shall not be attached to principled public preferences (e.g., dominant religious views). Furthermore, some idealist defenders of neutrality believe that laws and public policies should provide equally consequential effects on the choices that citizens make. In the discourse of religious neutrality, numerous conceptions and types have been developed in the last decades. See e.g., Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 54–55, 65 (2007) (describing substantive neutrality); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1007–11 (1990) (coining the term “disaggregated neutrality”); BADER, *supra* note 4, at 26, 82–86, 153–75 (discussing relational neutrality); Walz v. Tax Commission, 397 U.S. 664, 669 (1970) (discussing benevolent neutrality); Robert Audi, *Moral Foundations of Liberal Democracy, Secular Reasons, and Liberal Neutrality toward the Good*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 197, 206–12 (2005) (discussing liberal neutrality); Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 4–6, 96 (1961) (discussing formal versus strict neutrality); Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 37–38 (1989) (discussing “category neutrality” and “incentive neutrality”).

10. See generally Wojciech Sadurski, *On Legal Definitions of “Religion”*, 63 AUSTL. L. J. 834 (1989); Jesse H. Choper, *Defining “Religion” in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982); Kent

not substantively contradict the values of a constitutional-liberal democracy and pass the “subjective-sincerity” test for defining religion in public education.¹¹ For the sake of avoiding *ad hoc* justice and discrimination in the context of public education, it is important to carefully consider each disputed belief under objectively-developed guidelines.¹² For this end, we may refer to the subjective-sincerity approach,¹³ which is based on three interrelated premises: (1) deeply and undisputedly held sincerity, (2) a sense of consciousness, and (3) good faith. According to the criterion of sincerity, a disputed belief is to occupy a meaningful place in the life of a claimant, comparable to the position religious beliefs occupy in the lives of believers adhering to traditional religions.¹⁴

Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); George C. Freeman II, *The Misguided Search for the Constitutional Definition of “Religion”*, 71 GEO. L. J. 1519 (1983); Mark Tushnet, *The Constitution of Religion*, 50 R. POL. 628 (1988); William A. Galston, *Religion, Conscience, and the Case for Accommodation*, 51 SAN DIEGO L. REV. 1045 (2014).

11. See, e.g., Frederick Ferré, *The Definition of Religion*, 38 J. AM. ACAD. RELIGION 3, 16 (1970). Furthermore, Kent Greenawalt argues that judges need to distinguish religious claims from non-religious ones. See KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 109 (vol. 1, 2006). Likewise, Wojciech Sadurski submits that for “real-life cases” it is important to find out in a general and non-discriminatory way “whether a given belief, group or purpose is ‘religious’ or not.” Sadurski, *supra* note 10, at 840; see also WOJCIECH SADURSKI, MORAL PLURALISM AND LEGAL NEUTRALITY 176 (1990). Richard Baer also acknowledges the necessity of providing a functional definition of religion for sorting out questions related to teaching a religious course in public education. See Richard A. Baer, Jr., *Why a Functional Definition of Religion is Necessary if Justice is to be Achieved in Public Education*, in VALUES IN THE PUBLIC SCHOOLS 105, 106 (James Sears & James Carper eds., 1998). Philip H. Phenix finds that functional and cultural descriptions of religion are a fundamental necessity for understanding the relationship between education and religion. See Philip H. Phenix, *Religion in Public Education: Principles and Issues*, 14 J. CHURCH & STATE 415, 421 (1972). Robert Audi argues that a reasonably clear conception of religion is instrumental in finding a proper balance between “excessive separation” and “insufficient separation.” See ROBERT AUDI, *The Separation of Church and State*, in RELIGIOUS COMMITMENT AND SECULAR REASON 31, 56 (2000).

12. Sadurski, for instance, submits that the scope and limits of religiously-motivated “actions” should be found between the principles of “under-inclusiveness” and “over-inclusiveness.” See Sadurski, *supra* note 10, at 839.

13. See generally REX AHDAR & IAN LEIGH, *Legal Protection of Religious Freedom*, in RELIGIOUS FREEDOM IN THE LIBERAL STATE 98, 115–122 (2005). As an alternative to the subjective-sincerity approach, the substantive-content approach is aimed at examining shared common experiences of “ecclesiastical structures, institutional forms, dogmas, expressions of piety, codes of ethics, sacred writings and religious traditions, and so forth.” RICHARD C. McMILLAN, *A Legal Definition of Religion*, in RELIGION IN THE PUBLIC SCHOOLS: AN INTRODUCTION 55, 55–56 (1984); see also Ahdar & Leigh, *supra*, at 148–54. Under the substantive-content approach, a religious belief should have three elements. First, it should primarily consider inquiries with an “ultimate” nature, where, for example, the essence of life and the meaning of death or the conception of right and wrong are questioned. See *Africa v. Pennsylvania*, 662 F.2d 1025, 1033 (3d Cir. 1981). Secondly, a disputed religious belief is to provide “comprehensive answers” to the presented questions, offering a comprehensive belief system. See *Malnak v. Yogi*, 592 F.2d 197, 209 (3d Cir. 1979). And finally, a disputed religion is to enjoy organizational structure and signs for external representation. See *id.* at 210; see also *R. v. Sec’y of State for Educ. & Emp’t* [2005] 2 AC 246 (HL) 15, 22–23 (appeal taken from Eng.); *Church of the New Faith v. Commissioner of Pay-Roll Tax (Victoria)*, [1983] 154 CLR 120 (S. Ct. Vict.).

14. See, e.g., *United States v. Seeger*, 380 U.S. 163, 176 (1965) (stating that a “sincere and meaningful belief . . . occupies in the life of its possessor a place parallel to that filled by the God” of traditional religious believers). For some criticism on the difficulties of evaluating the element of “sincerity,” see SADURSKI, *supra* note 9, at 172–74.

However, it would be difficult to evaluate the sincerity requirement without examining whether a belief plays a functionally fundamental role in the life of a claimant, transcending a mere sense of duty or obedience to constitute a sense of consciousness.¹⁵ For example, a claimant may sincerely believe in the existence of the supernatural, or the sacred qualities of marijuana,¹⁶ without being able to provide sensible justifications. In this sense, a sincere belief may be explained as an unqualified desire to believe in something, whereas a sense of consciousness could be construed as a rational psychological force, emanating from our perceptions, experiences, or cognition, which may impose certain important duties on us. As a result, weighing whether the belief rises to the level of a sense of consciousness may verify how deeply one is attached to a belief, which would help to identify the place of the belief in a claimant’s life.¹⁷ Finally, the good faith element requires that a disputed belief not contradict human dignity, as well as fundamental rights and freedoms. It should be neither “fictitious nor capricious,”¹⁸ and must attain a “certain level of cogency, seriousness, cohesion and importance.”¹⁹ By adopting the subjective-sincerity test, a state using an accommodative neutrality approach can consider not only traditional religions, but also equally protect those beliefs and views that are sincerely held, consciously driven, and coherently manifested.

II. ACCOMMODATIVE NEUTRALITY IN PUBLIC EDUCATION

The problematic relationship between religion and public education has urged modern liberal states to find effective legal frameworks and policy strategies that can provide fair responses to religiously-motivated discrimination cases in multicultural public education.²⁰ In this regard, there are

15. See, e.g., *Welsh v. United States*, 398 U.S. 333, 340 (1970) (holding that sincere religious beliefs include “beliefs that are purely ethical or moral in source and content but that nevertheless impose upon [the believer] a duty of conscience”).

16. See, e.g., *United States v. Kuch*, 288 F. Supp. 439 (1968) (rejecting a religious claim that psychedelic substances, such as LSD and marijuana, were sacramental foods or manifestations of the Grace of God).

17. On relatively similar lines, the Canadian Supreme Court developed a “factual” test for measuring sincerity. In their reasoning, first, it is crucial to clarify the “credibility of claimants’ testimony,” namely how deeply the applicants hold their beliefs, and secondly, to examine whether a particularly disputed religious claim is “consistent with [the claimants’] other current religious practices.” *Syndicat Northcrest v. Amselem* [2004] S.C.R. 47 (Can.).

18. *Id.* at 52.

19. *Chappell v. United Kingdom*, App. No. 10461/83 (Mar. 30, 1989), <http://hudoc.echr.coe.int/eng?i=001-57459>; see also *X v. Federal Republic of Germany*, App. No. 4445/70, 37 Collection 119, 122 (1970); *X v. United Kingdom*, App. No. 7291/75 (Apr. 10, 1977), <http://hudoc.echr.coe.int/eng?i=001-74370>; *Kokkinakis v. Greece*, App. No. 14307/88 (May 25, 1993), <http://hudoc.echr.coe.int/eng?i=001-55756>.

20. See, e.g., Michel Troper, *French Secularism, OR Laïcité*, 21 CARDOZO L. REV 1267 (2000) (describing the distinctiveness of *laïcité*, or French secularism); Silvio Ferrari, *Models of State-Religion Relations in Europe*, in *THE FUTURE OF RELIGIOUS FREEDOM: GLOBAL CHALLENGES* 202, 202–15 (Allen D. Hertzke ed., 2012) (describing in detail State-religion relations in France, Italy, and England); Ira C.

two traditional leading models of state-religion relations, applicable to public education: the separation model and the cooperation model.

The separation model mainly operates on the idea of “formal or strict neutrality,” which does not recognize any substantial place for religion in public education, defines religious matters as exclusively private, and does not provide any financial assistance toward any religion. In other words, any cooperation with religion in public education would entail promotion of a particular religious good in public education, and would therefore not be tolerated. Only a total rejection of religion from public education would fulfill the model of strict neutrality.²¹

However, strict neutrality has become notoriously complicated for either satisfying or rejecting all competing reasonable conceptions of the good, including religious ones.²² Whereas pursuing the strict neutrality toward religion in public education is theoretically possible, it may ultimately jeopardize the religious freedoms of students, as well as the reasonable religious interests of parents and teachers. In particular, it would undermine one of the main purposes of liberal public education: to mold future citizens and autonomous agents. Lack of sufficient opportunities for exercising self-determination, insufficient religious exposure, and distorted knowledge on competing religions²³ may consequently undermine the reorganization of social cooperation and integration in a multicultural society. For example, offering non-obligatory religious education in public schools will primarily create opportunities for children to secure and develop their own identities and help them understand the advantages and disadvantages of following a religious or non-religious life. Secondly, it will be instrumental for promoting citizenship in multicultural societies.²⁴ This type of education will objectively inform students on various religious denominations co-existing in

Lupu, *Models of Church-State Interaction and the Strategy of the Religion Clauses*, 42 DEPAUL L. REV. 223 (1992) (defining two models of church-state interaction under the law: the model of conflict, and model of church-state alignment); CLAUDIA E. HAUPT, RELIGION-STATE RELATIONS IN THE UNITED STATES AND GERMANY: THE QUEST FOR NEUTRALITY (2012) (offering a comparison of American and German approaches to neutrality); BADER, *supra* note 4, at 153–64 (describing broadly Western state approaches to public education in the context of religious diversity).

21. See SADURSKI, *supra* note 9, at 193; Robert Audi, *The Separation of Church and State and the Obligations of Citizenship*, 18 PHIL. & PUB. AFFS. 259, 268 (1989); BADER, *supra* note 4, at 84.

22. See Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667, 1687–94 (2003); Steven G. Gey, *Vestiges of the Establishment Clause*, 5 FIRST AMEND. L. REV. 1, 5–12 (2006); see also Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233–37 (1994); Michael Walzer, *Drawing the Line: Religion and Politics*, 1999 UTAH L. REV. 619, 620–23 (1999); Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

23. For example, Kant supports the teaching of religious knowledge in schools because in its absence, children are likely to acquire distorted religious knowledge in their families or in the society in which they live. See Immanuel Kant, *Lectures on Pedagogy*, in ANTHROPOLOGY, HISTORY, AND EDUCATION 434, 480 (Robert B. Louden & Gunter Zoller eds. & trans., 2007).

24. See Siebren Miedema, *Contexts, Debates and Perspectives of Religion in Education in Europe*, in RELIGION AND EDUCATION IN EUROPE: DEVELOPMENTS, CONTEXTS AND DEBATES 267, 268 (Robert Jackson et al. eds., 2007); WARREN A. NORD & CHARLES C. HAYNES, TAKING RELIGION SERIOUSLY ACROSS THE CURRICULUM 15–16, 19, 57 (1998).

their society, which will significantly enhance mutual respect and tolerance among different religions in public life. As future citizens, it will additionally empower them to get involved in religiously-motivated public policy deliberations.²⁵

Furthermore, strict neutrality proves to be impractical in practice, as religious patterns are always persistent in public education, not only through studying courses like history, literature, ethics, or geography, but also in various extracurricular events, like art projects, music festivals, or holiday celebrations. In addition, it is often argued that modern liberal countries have directly or indirectly privileged certain religions in public education because of the historical, social, and political bonds of the majority of people living in a particular society.²⁶ On the other hand, a government is not acting strictly neutral when it excludes reasonable religious claims, while actively ‘supporting, favoring, and aiding secular enterprises and perspectives’ in public education.²⁷ In this sense, Michael McConnell, testifying before the House of Representatives, submitted that it is time to shift the paradigm of constitutional law by distinguishing substantive neutrality from secularism,²⁸ towards impartially ensuring the genuine equality of different viewpoints in the marketplace of ideas.²⁹ Hence, the liberal-neutral state should not distinctively favor secular viewpoints or ideologies over religious ones in the implementation of public programs.³⁰

Given the drawbacks and impracticalities of the strict neutrality model, modern liberal states should turn instead to the cooperation model to respond to religiously- and consciously-motivated challenges in public education, as guided by the premises and conditions of accommodative neutrality.³¹ This model primarily defends the institutional separation of religion and the state, does not give preference to any religion or belief in

25. Miedema, *supra* note 24, at 278.

26. BADER, *supra* note 4, at 84, 134–35, 156.

27. STEPHEN V. MONSMA & CHRISTOPHER J. SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* 45 (2nd ed. 1997); *see also* Warren A. Nord, *Religion, Pluralism and Public Education in America*, 31 *RELIGION & EDUC.* 11, 16–17, 19–20 (2005). Professor Nord, for example, argues that the syllabi of economics courses taught in public schools are exclusively taught through the lens of neoclassical economic theory, while ignoring “traditional religious ways of thinking about the economic domain of life.” *Id.* at 19.

28. *See* McConnell, *supra* note 8, at 719 (arguing that substantive neutrality is conceptually better equipped for providing effective protection for and fair treatment of religious claims in culturally diverse societies).

29. *See* Religious Liberty and the Bill of Rights: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary, 104th Cong. 118 (1995) (statement of Michael W. McConnell).

30. *Id.*

31. *See* BADER, *supra* note 4, at 154–55; *see also* Ira C. Lupu & Robert W. Tuttle, *Instruments of Accommodation: The Military Chaplaincy and the Constitution*, 110 *W. VA. L. REV.* 89, 101–15 (2007); McConnell, *supra* note 8, at 694. Some European countries, including Germany, Belgium, the Netherlands, and Portugal pursue the cooperative approach toward religion. For example, Art. 7 (3) of the Basic Law of the Federal Republic of Germany states that: “Religious instruction shall form part of the regular curriculum in state schools, with the exception of non-denominational schools. . .”. Grundgesetz [GG] [Basic Law], *translation at* <https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510>.

the public domain, maximizes respect for individual religious liberty, including recognition of religious communities, and provides substantial equal opportunities for the participants of public education.

Based on the principles of the cooperation model, I submit four general premises of accommodative neutrality³² that are crucial for realizing the legitimate, neutral dreams in public education. First, a conception of accommodative neutrality should have a primarily facilitative nature³³ with respect to reasonable religious claims. In other words, modern neutral states are tasked with creating a free environment for exercising freedom of religion and expression in public education, where students, parents, and, in some respect, teachers are able “to assess and recognize the worth of good ways of life”³⁴ that they are determined to pursue.³⁵

Second, under accommodative neutrality, the state may pursue a flexible strategy in particular cases,³⁶ especially when a government act or policy imposes a substantial religious burden³⁷ that can be lifted with only small or reasonable “secular costs.”³⁸ It is important for the state to find a flexible equilibrium between beneficiaries and non-beneficiaries of religious accommodation that will not ultimately lead to the endorsement of a religious belief.³⁹ In finding this balance, the state can grant certain benefits to reasonable religious claims without causing a substantial burden on the interests of the other participants in public education.⁴⁰

Third, the state’s accommodative neutrality approach should be responsive to “what its citizens actually value”⁴¹ in a multicultural society.

32. Alternatively, Ira C. Lupu and Robert W. Tuttle, discussing in a narrow sense the permissibility of some state programs, submit three criteria delineating the fair conditions for accommodating religious claims: “[R]espond[ing] to a distinctive burden on religion,” providing “religion-neutral” justifications, and protecting others from “unreasonable burdens.” Ira C. Lupu & Robert W. Tuttle, *The Forms and Limits of Religious Accommodation: The Case of RLUIPA*, 32 *CARDOZO L. REV.* 1907, 1919–21 (2011).

33. See McConnell, *supra* note 8, at 688–89, 716. For the difference between facilitation and promotion of a religious belief in public education, see *Wallace v. Jaffree*, 472 U.S. 38, 58–60 (1985).

34. Will Kymlicka, *Liberal Individualism and Liberal Neutrality*, 99 *ETHICS* 883, 894 (1989).

35. See McConnell, *supra* note 8, at 688.

36. See, e.g., *Walz v. Tax Comm’n of New York* 397 U.S. 664, 673, 691 (1970) (holding that passively aiding religious enterprises through a tax exemption is not seen as increasing secular costs, as it is part of broad exemptions for nonprofits); *Jaffree*, 472 U.S. 38 at 71–73 (1985) (O’Connor, J., concurring, contending that a “moment of silence” was a small secular cost to be incurred by each student because it is not inherently religious, nor is the student forced to compromise their beliefs); *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61, 66 (finding that the display of a crucifix on classroom walls was not shown to have an influence on students).

37. Greenawalt notes that it might be difficult to measure the degree of religious burden under a general theoretical framework, which is why each case needs to be individually examined. See Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 *W. VA. L. REV.* 343, 349 (2007).

38. Jonathan E. Nuechterlein, *The Free Exercise Boundaries of Permissible Accommodation under the Establishment Clause*, 99 *YALE L.J.* 1127, 1141 (1990).

39. See *id.* at 1138–39.

40. See Greenawalt, *supra* note 37, at 351, 353.

41. Andrew Koppelman, *Ronald Dworkin, Religion, and Neutrality*, 94 *B.U. L. REV.* 1241, 1247 (2014); see also Lupu & Tuttle, *supra* note 31, at 103 (describing how accommodative states can be

Demographics and diversity tend to evolve rapidly in liberal societies,⁴² and states should pay particular attention to these changes⁴³ in public education. In this regard, the government’s educational policy should not only accommodate the reasonable religious interests of dominant groups,⁴⁴ but also fairly consider the arguments of minority religious or cultural groups.⁴⁵ Along similar lines, Veit Bader argues that the morality of a liberal state requires minimizing the influences of the prevailing majority in public education.⁴⁶ It is crucially important for the state to provide substantive and fair opportunities for religious minorities, aimed at reconciling injustices committed against various groups.⁴⁷ Indeed, constructing a harmonious and discrimination-free environment in public education is also likely to have greater societal implications, creating durable foundations for renegotiating the fair terms of social cooperation and integration in a multicultural state.⁴⁸

Finally, accommodative neutrality is not designed to wash away the political history and religious traditions of a nation, which would certainly create “tremendous costs in efficiency and stability.”⁴⁹ It is not even possible to neutralize established historical effects and influences.⁵⁰ For example, in *Lautsi v. Italy*, in deciding whether the placement of the Christian crucifix on classroom walls in Italian public schools violated the state’s neutrality and Article 9 of the European Convention on Human Rights, the European Court of Human Rights (“ECtHR”) had to weigh parental interests, the rights and freedoms of others (those students and parents whose normative interests might be indirectly endangered), as well as the cultural and religious values that have historically been shared by the majority of Italian society.⁵¹ The Grand Chamber of the ECtHR concluded that there is no direct nexus between the displaying of passive historical and religious symbols, such as a crucifix, and their possible indoctrinating effects on other non-Christian students and parents.⁵²

“responsive to parental need, rather than motivated by the state’s own agenda in support of religious instruction”); Nord, *supra* note 27, at 15.

42. See Sarah V. Wayland, *Immigration, Multiculturalism and National Identity in Canada*, 5 INT’L J. ON MINORITY & GROUP RTS. 33, 46, 50 (1997) (discussing how fast demographics shifted in the Canadian experience). The numbers and size of a group may play an instrumental role in the recognition of a given interest. See Avishai Margalit & Joseph Raz, *National Self-Determination*, 87 J. PHIL. 439, 450 (1990).

43. See Koppelman, *supra* note 41, at 1247.

44. See Macleod, *supra* note 4, at 19.

45. McConnell, *supra* note 8, at 693.

46. BADER, *supra* note 4, at 155.

47. *Id.* at 155, 158.

48. See Koppelman, *supra* note 41, at 1247.

49. Kyritsis & Tsakyrakis, *supra* note 6, at 209.

50. See RAWLS, POLITICAL LIBERALISM, *supra* note 9, at 193–97.

51. *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61.

52. *Id.* at 66.

In conclusion, the general premises of accommodative neutrality are the principles attached to the cooperation model. However, in order to provide fairly articulated responses for the variety of reasonable religious claims in public education, further analysis is required. We still need to develop coherent theoretical conditions of accommodative neutrality that are constitutionally legitimate. In the next Section, I propose to examine reasonable religious claims in relation to the three constitutional dreams of accommodative neutrality.

A. *The Dream of Autonomy as 'Self-Determination'*

Autonomy⁵³ as self-determination⁵⁴ is the first legitimate ground of accommodative neutrality for responding to a particular set of reasonable religious claims in multicultural public education.⁵⁵ Such claims are inherently related to the formation of dignity,⁵⁶ identity,⁵⁷ and self-empowerment⁵⁸ of both individuals (students) and groups (parents). Koppelman notes that religion is an inalienable part of religious people, where “. . . life without religion is no more possible than life without carbon atoms.”⁵⁹ It may occupy such a central place in people’s minds, feelings, and hearts that they are ready “to die for, to suffer for, to rebel for, to emigrate for, to fight to control the government for [it].”⁶⁰ Ignoring religion’s place in history, society, and public education may produce discrimination, intolerance,⁶¹ hostility,⁶² social incoherence,⁶³ and immense human suffering.⁶⁴ In this

53. For various accounts of autonomy, see generally JOSEPH RAZ, *MORALITY OF FREEDOM* 369–70, 378–90, 407–12 (1986); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 75–106 (1995). For a general philosophical sketch, see generally John Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 *ETHICS* 109 (1988).

54. See Patten, *supra* note 8, at 251, 253, 268–69; see also Laycock, *supra* note 9, at 65.

55. Wearing religious dress or symbols, eating religious food during religious festivals, organizing religious holidays, utilizing spaces for praying, and requesting exemptions from religious courses are leading examples that may fall under the sphere of autonomy.

56. See generally Leslie M. Henry, *The Jurisprudence of Human Dignity*, 160 *U. PA. L. REV.* 169 (2011); MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012); Gerald L. Neuman, *Discourses in Dignity, in UNDERSTANDING HUMAN DIGNITY* (Christopher McCrudden ed., 2013).

57. See generally Jurgen Habermas, *Religious Tolerance: The Pacemaker for Cultural Rights*, 79 *PHIL.* 5, 16–18 (2004).

58. See generally Jack Donnelly & Rhoda E. Howard, *Assessing National Human Rights Performance: A Theoretical Framework*, 10 *HUM. RIGHTS Q.* 214, 234 (1988).

59. Koppelman, *supra* note 6, at 1128.

60. Douglas Laycock, *Religious Liberty as Liberty*, 7 *J. CONTEMP. LEGAL ISSUES* 313, 317 (1996). On the basic social role that religion plays in people’s lives, see PETER BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* 37–121 (1969); see also RONALD DWORIN, *RELIGION WITHOUT GOD* 105–37 (2013).

61. See Habermas, *supra* note 2, at 5.

62. See Amy Gutmann, *UNDEMOCRATIC EDUCATION* (1963), *reprinted in* *PHILOSOPHY OF EDUCATION*, VOL. III: SOCIETY AND EDUCATION 28, 39 (Paul H. Hirst & Patricia White eds., 1998).

63. BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 331 (2000) (arguing that teaching religion in schools prevents children from developing a “narrow sectarian standpoint”).

64. Laycock, *supra* note 60, at 317.

regard, the goal of the liberal constitutional state, which is committed to creating fair conditions for renegotiating the terms of social cooperation and integration in a multicultural society, is to maximize opportunities for ensuring autonomy as self-determination in public education.

Accordingly, autonomy as self-determination in public education can be interpreted as a two-sided concept, encompassing both personal and group autonomy. The first side includes the conditions for ensuring personal autonomy, aimed at providing individuals with the opportunity and capacity to rationally deliberate, enjoy rights and freedoms, acknowledge mutual respect, preserve tolerance, value distinctiveness, and make choices in the course of their education on the available conceptions of the good—such as whether to follow a religious or non-religious life. Likewise, freedom of religion or belief is regarded as one of the foundational components of autonomy as self-determination. Hence, there are autonomy-based, reasonable religious interests of children or students, which should be fairly accommodated in multicultural public education. These interests include freedom from religious indoctrination or coercion, as well as the right to choose and practice one’s religion, including the right to wear religious dress or symbols, to organize religious festivals or exhibitions, or to listen to religious music. In other words, these are negative rights, which require liberal-constitutional states to impartially accommodate them in the course of education. On the other hand, due to the obligatory nature of school education, accommodative neutrality additionally places positive obligations on the state to guarantee equal substantive rights to students,⁶⁵ such as providing religious food during religious festivals, a prayer room to worship, or non-compulsory religious education.⁶⁶

Complementary to personal autonomy is cultural or group autonomy, which constitutes the second side of autonomy as self-determination in the context of public education.⁶⁷ Cultural or group autonomy is primarily aimed at providing fair opportunities for realizing the legitimate religious interests of parents⁶⁸—such as the preferred religious upbringing of their

65. See SYLVIE LANGLAUDE, *THE RIGHT OF THE CHILD TO RELIGIOUS FREEDOM IN INTERNATIONAL LAW* 58–61 (2007). See generally MONSMA & SOPER, *supra* note 27, at 26. For a theoretical account on the concept of substantive entitlements, see ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 294–97, 334–43 (Julian Rivers trans., 2002).

66. LANGLAUDE, *supra* note 65, at 61.

67. Article 18 of the International Covenant on Civil and Political Rights (1966) combines both freedom of religious belief and the right of parents to ensure the religious and moral education of their children in conformity with their own convictions under its religion clause. In this regard, public education is a leading example, where parental autonomy (group or cultural autonomy) complements personal autonomy. See International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, S. Exec. Rep. 102–23, 999 U.N.T.S. 171.

68. In defense of parental interests, for example, Fried powerfully argues that a child and a parent are one being, in that they interrelate and represent each other, meaning that interfering with the values of a child is interfering with one’s own right to formulate his or her own values. CHARLES FRIED, *RIGHT AND WRONG* 152–55 (1978). Gutmann, criticizing Fried’s claim, argues that parental authority shall not be interpreted as a moral wall, insulating children from being introduced to different ways of life.

children in public education⁶⁹—which are sincerely claimed to be part of their cultural, religious, or philosophical identity. For example, claims with regard to receiving exemptions from mandatory religious courses⁷⁰ or non-religious mandatory courses organized on non-working days,⁷¹ or suspending the education of Amish children after the eighth grade,⁷² are helpful examples of self-determination that allow respect for the cultural or religious identity of parents. However, it is also important to note that a conception of parental autonomy should not be aimed at tyrannizing the future of children, and instead should aim to create fair possibilities for maintaining parental hopes in public education.⁷³ Consequently, maintaining autonomy as self-determination in multicultural public education shall significantly affect the formation of “internal kernels”⁷⁴ and fundamental social entitlements, as well as the development of the participants in public education, helping them gain a deeper perspective on who they are, why they exist, and how they should live in a liberal state.⁷⁵

However, religions are usually overwhelmed with important practices, and the critical question becomes, for example, whether it is possible to request exemptions from schooling for celebrating all religious holidays of a particular religion. Indeed, it might not be possible to accommodate all these requests in public education, as they may endanger the functionality of the entire educational system. In this sense, self-determination as part of autonomy requires examining the subjective and objective aspects of religious “representation.” From the subjective point of view, students and parents possess the main *locus standi* to represent their religious claims. Yet, in certain educational institutions, such as foster care and public orphanages, a representative of a religious community or the state may represent religious claims on behalf of children who are not familiar with the idea of religion.

Gutmann, *supra* note 62, at 29. For an interesting discussion on the scope of parental authority in education, see Shelly Burtt, *The Proper Scope of Parental Authority: Why We Don't Owe Children an 'Open Future'*, 44 NOMOS 243 (2003).

69. See e.g., William A. Galston, *Parents, Government, and Children: Authority over Education in the Liberal Democratic State*, 44 NOMOS 211, 226 (2003).

70. See e.g., *Angeleni v. Sweden*, App. No. 10491/83, 51 Eur. Comm'n H.R. Dec. & Rep. 41 (1986) (rejecting application from Seventh Day Adventists for a religious exemption from attending school on Saturdays, their day of total rest).

71. See e.g., *Casimiro v. Luxembourg*, App. No. 44888/98 (Apr. 27, 1999), <http://hudoc.echr.coe.int/eng?i=002-6286>.

72. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court found the suspension of Amish students' education after the eighth grade to be justified with respect to three cultural-political grounds: (1) the Amish have an entirely exceptional and distinct lifestyle; (2) they place no economic or social burden on the state; and (3) they have long lived the life of partial citizens. See Amy Gutmann, *Civic Education and Social Diversity*, 105 ETHICS 557, 569 (1995).

73. See EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* 132, 145 (1997).

74. See MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 9 (2012) (describing dignity as an “inner, transcendental kernel”—something intangible that all human beings carry inalienably inside them that underlies the moral claims that they have just by being human”).

75. See Hugh LaFollette, *Freedom of Religion and Children*, 3 PUB. AFFS. Q. 75, 82–84 (1989).

On the other hand, “objective” aspects of representation would clarify whether a particular religious claim has a fundamental representational effect or status within that religion or belief.⁷⁶ More precisely, the objective measure of representation gauges whether it is such a central religious tenet that it directly affects the core religious dignity of a believer.⁷⁷ In this regard, it is the responsibility of a claimant to prove that a given religious claim occupies a central representation within their religious belief.⁷⁸

Finally, autonomy as self-determination should not be comprised of symbolic entitlements or philosophical concepts, and instead should make fair and meaningful opportunities accessible in public education. Accessibility may require organizing voluntary field trips to different religious sites, creating fair opportunities for students in acquiring practical knowledge on, and getting acquainted with, various religious denominations. Accessibility also means that exemptions from religious courses should not be followed by internal social pressure exercised by peers or teachers. A leading example is the *C.J., J.J. & E.J.* case, in which the ECtHR surprisingly did not find any violation of Article 3 and Article 9 of the European Convention on Human Rights.⁷⁹ The case concerned a twelve-year-old girl who had obtained exemptions from a religious course on Catholicism and was frequently questioned and pressured by her teachers and peers while waiting in a school corridor when religious classes were held.⁸⁰ Because of the discriminatory environment, she had allegedly developed psychological distress, depression, nervousness, and a feeling of being rejected, eventually causing her to join the classes against her father’s wishes.⁸¹

The accessibility of religious freedoms becomes even more meaningful in the case of foster care institutions, public orphanages, and special public schools for disabled people, where many children are deprived of parental support for ensuring their religious interests, including the right to receive religious education and the right for religious identification or recognition.⁸² In these institutions, a state committed to the conception of accom-

76. See Nomi Maya Stolzenberg, “He Drew a Circle That Shut Me Out”: Assimilation, Indoctrination, and the Paradox of Liberal Education, 106 HARV. L. REV. 581, 628–29 (1993).

77. It is not always an easy task to identify which beliefs or manifestations objectively represent the ‘core’ within a religion. See TRIGG, *supra* note 4, at 172–73. It should also not be the responsibility of state institutions to identify the core of a religion. See e.g., Lupu & Tuttle, *supra* note 32, at 1914–18.

78. See Stolzenberg, *supra* note 76 at 631–32.

79. *C.J., J.J. & E.J. v. Poland*, App. No. 23380/94, 84 Eur. Comm’n H.R. Dec. & Rep. 46 (1996), <https://hudoc.echr.coe.int/fre?i=001-2659>.

80. *Id.* at ‘The Facts.’

81. *Id.*

82. Ensuring the right to religious affiliation of children, especially younger children, who do not understand much about religion, is particularly important for democratic-liberal states. In this regard, a state committed to accommodative neutrality should not create an environment where children can be indoctrinated under a particular religious or non-religious doctrine. Accordingly, a student’s religious affiliations could be identified based on parental desire (if such exists), through the child’s placement family, placement religious institution, or could be left for the child to decide after a certain age. See Gregory A. Horowitz, *Accommodation and Neutrality under the Establishment Clause: The Foster Care Challenge*, 98 YALE L. J. 617, 625–26 (1989).

modative neutrality must impartially assume the primary responsibility of ensuring all children fair and equal access to the exercise of reasonable religious rights.⁸³

B. *The Dream of Promoting Citizenship*

It is plain that we cannot offer legitimate legal solutions for all religiously and consciously motivated claims within public education solely under the premises of autonomy as self-determination. In this respect, there is a distinct set of complex religious challenges in modern public education,⁸⁴ primarily related to the content of the curriculum,⁸⁵ neutral or objective teaching⁸⁶ and teaching materials,⁸⁷ religious symbols,⁸⁸ and religious freedoms of teachers.⁸⁹ All of these contexts require fair consideration from the perspectives of civic citizenship—an ancient political dream for building a harmonious society, which could predominantly be achieved through building adequate public education. More precisely, the principle of accommodative neutrality necessitates the examination of certain types of religiously motivated cases with respect to the goals of liberal public educa-

83. See, e.g., *Wilder v. Bernstein*, 848 F.2d 1338, 1348 (2d Cir. 1988).

84. Macleod groups these claims as 'doctrinal' (i.e., issues related to the content of the curriculum, including teaching materials, topics, and views presented to the students in the course of education) and 'symbolic' (i.e., issues related to the display of religious symbols in schools, or wearing a headscarf by a student or a teacher in public schools) controversies in public education. See Macleod, *supra* note 4, at 10.

85. See ACKERMAN, *supra* note 9, at 157–58; see also *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) at 20–24, 28–29, 50–54 (1982); *Folgero v. Norway*, 2007-III Eur. Ct. Hr. 85, 95 (2006). Furthermore, in the U.S. context, there is a longstanding debate on the question of whether a separate course on creationism should be taught as an alternative to evolution theory, with the aim of providing a 'balanced treatment' in the science curriculum. See e.g., Robert T. Pennock, *Should Creationism be Taught in the Public Schools?*, 11 SCI. & EDUC. 111 (2002); John A. Campbell & Taz Daughtrey, *Teaching the Contexts: Why Evolution Should be Taught As An Argument and How it Might be Done*, 33 RELIGION & EDUC. 14 (2006).

86. See e.g., Peter Gardner, *Neutrality in Education*, in LIBERAL NEUTRALITY 106 (Robert E. Goodin & Andrew Reeve eds., 1989); see also Charles C. Haynes, *A Teacher's Guide to Study About Religion in Public Schools*, 8 J. L. & RELIGION 297, 299–303 (1990); NORD & HAYNES, *supra* note 24, at 47, 50–55.

87. See e.g., WARREN A. NORD, RELIGION AND AMERICAN EDUCATION: RETHINKING A NATIONAL DILEMMA 159–60 (1995).

88. See e.g., Rainer Forst, *A Critical Theory of Multicultural Toleration*, in MULTICULTURALISM AND POLITICAL THEORY 292 (Anthony Simon Laden & David Owen eds., 2007); see also *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 32, 66, 71–72, 77–78, 81.

89. See e.g., *Ross v. New Brunswick Sch. Dist.* [1996] 1 S.C.R. 825 (Can.) (supporting the removal of schoolteacher Malcolm Ross for anti-Semitic writings and publicly making racist and discriminatory comments about Jewish people); *Downing v. West Haven Board of Education*, 162 F. Supp. 2d 19 (D. Conn. 2001) (defending the school's position, which limited the high school music teacher's right to wear a t-shirt to the school with religious content); *X. v. United Kingdom*, App. No. 8010/77, 16 Eur. Comm'n. H.R. Dec. & Rep. 101 (1979) (upholding the dismissal of a mathematics and English teacher in a public secondary school for advertising his Evangelical and anti-abortion beliefs through posters and stickers on school premises); *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R. (refusing to recognize a Muslim woman's right to wear a headscarf in a public school); see also Committee on the Rights of the Child, *Concluding Observations: Germany*, U.N. Doc. CRC/C/15/Add.226, ¶ 30 (2004) (citing 2 BvR 1436/02, Case Ludin).

tion.⁹⁰ Rawls, for example, suggests that education should prepare children “to be fully cooperating members of society” by “encourag[ing] the political virtues” such as toleration, mutual respect, and a sense of fairness and civility, “so that they want to honor the fair terms of social cooperation in their relations with the rest of society.”⁹¹ Indeed, if the degree of toleration and sense of mutual respect are fragile, a modern multicultural society is destined to face direct or indirect discrimination, racism, hatred, and social imbalance.⁹² Equally important, the commitment to reciprocity demands teaching skills that will empower children to participate in and organize deliberations over politically relevant issues in their societies.⁹³ Accordingly, the main goals of multicultural public education are to teach those virtues and capacities that would enable future citizens, *inter alia*, to make rational and moral choices for a good life or preferred ends, to maintain a socially peaceful society, and to participate in democratic decision-making processes.

Hence, the liberal state, pursuing accommodative neutrality, should primarily adhere to civic preferences if there are substantial contradictions between the goals of modern public education and certain types of religious interests. These conflicts could be particularly challenging with respect to the religious claims of parents and teachers who are not willing to offer reasonable and legitimate justifications for their controversial claims in public education,⁹⁴ thereby rejecting their civil commitments in the process of re-organization of social integration and cooperation in a modern multicultural society.⁹⁵ Accordingly, one plausible legal solution under accommodative neutrality is to examine whether a religiously or consciously driven claim is proportionate or functional with respect to the legitimate aims of public education. For example, a claim to wear a religious head covering or dress, such as a niqab⁹⁶ or jilbab,⁹⁷ might not be proportionate

90. The literature on the aims of public education is vast. For discussions on autonomy-based education, see generally Ian MacMullen, *Faith in Schools? Autonomy, Citizenship, and Religious Education in the Liberal State* (2007); Harry Brighouse, *Civic Education and Liberal Legitimacy*, 108 *ETHICS* 719 (1998). For discussions on the civic goals of education, see generally STEPHEN MACEDO, *DIVERSITY AND DISTRUST* (2000); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1999).

91. RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 199; see also MACEDO, *supra* note 90, at 136.

92. See Habermas, *supra* note 2, at 5; see also Gutmann, *supra* note 72, at 559, 561.

93. See Eamonn Callan, *Political Liberalism and Political Education*, 58 *REV. POL.* 5, 9–10 (1996); see also Gutmann, *supra* note 62, at 39.

94. See, e.g., Jurgen Habermas, *Religion in the Public Square*, 14 *EUR. J. PHIL.* 1, 5, 8 (2006); RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 217; see also AUDI, *supra* note 11, at 86–100.

95. See RAWLS, *POLITICAL LIBERALISM*, *supra* note 9, at 157.

96. See e.g., Hamburgisches Oberverwaltungsgericht [OVG] [Higher Administrative Court of Hamburg] Jan. 29, 2020, 1 Bs 6/20, <https://justiz.hamburg.de/contentblob/13559388/9242aa42410904155315ac93feb0bd92/data/1bs6-20.pdf>. Religious claims to wear a niqab or burka in public schools and universities has been strongly debated in both Germany and Austria in the past few years. For example, the authorities of the State of Baden-Württemberg have revealed their plan of banning girls from wearing burkas and niqabs in schools. See The University of Giessen, *Studentin darf mit Nikab nicht zur Uni*, DER SPIEGEL (May 13, 2014), <https://www.spiegel.de/lebenundlernen/uni/nikab-student-in-der-uni-giessen-muss-schleier-fuer-seminare-ablegen-a-969167.html>; Kiel University, *Guidelines by*

and functional with regard to the civic goals of public education, where students are expected to share their social experiences, learn from each other in open communications, and participate in teamwork. In contrast, wearing a headscarf⁹⁸ or a kirpan⁹⁹ both at schools and universities should not create substantial obstacles for realizing the civic goals of public education, although the ECtHR surprisingly struck down claims in a number of similar cases, justifying its decisions on the premises of equality, secularism, protection of the rights and freedoms of others, and public order.¹⁰⁰

Another group of religious claims are those related to the content of curricula, where religious parents, for instance, have objected to their daughters' participation in mixed-gender swimming classes in public schools,¹⁰¹ their children's participation in sex education classes,¹⁰² or the reading of religiously controversial textbooks in elementary schools.¹⁰³ These claims should be proportionately and fairly examined in relation to the goals of liberal public education. In these types of cases, proportionality and fairness may require careful consideration of how a particular type of religious claim contributes to the actual development of children. As future citizens and autonomous individuals, the state should aim to make children ready to do three things: (i) lead respectful, meaningful, and worthwhile lives; (ii) gain objective information on the political, cultural, and social

the University Board at the CAU on wearing a niqab (face veil) (Jan. 29, 2019), <https://www.uni-kiel.de/gf-praesidium/de/recht/interne-richtlinien/richtlinie-gesichtsschleier> (having both banned full-face coverings in classrooms, though allowing them on campus). Austria has adopted a new "Anti-Face-Covering Act" which forbids wearing of any clothes or other objects for covering facial features in public places or in public buildings. *Consolidated federal law: Entire legal provision for the Anti-Face Veiling Act* (Mar. 31, 2021), <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=20009892>.

97. See *e.g.*, *R (SB) v. Governors of Denbigh High Sch.* [2006] UKHL 15, [2007] 1 AC 100 (appeal taken from Eng.).

98. See, *e.g.*, *Raihon Hudoyberganova v. Uzbekistan*, CCPR/C/82/D/931/2000, No. 931/2000, U.N. Hum. Rts. Comm., Views adopted by the Committee at its 82nd session (Nov. 5, 2004); see also U.N. Comm. on the Rts. of the Child, Concluding Observations: France, ¶¶ 25–26 U.N. Doc. CRC/C/15/Add.240 (2004).

99. See, *e.g.*, *Multani v. Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256 (Can.); *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995).

100. See *Leyla Şahin v. Turkey* [GC], 2005-XI Eur. Ct. H.R. 173, ¶¶ 16, 39–40, 70–71, 79–82, 87–88, 92, 98, 100–2, 109–11, 113–15. The ECtHR has also rejected a set of applications concerning the expulsion of pupils from schools for wearing conspicuous symbols of religious affiliation, like headscarves or keskis, during class. See, *e.g.*, *Aktas v. France*, App. No. 43563/08 (June 30, 2009), Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-93697>; *Bayrak v. France*, App. No. 14308/08 (June 30, 2009), Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-93698>; *Gamaleddyn v. France*, App. No. 18527/08 (June 30, 2009), Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-93699>; *Ghazal v. France*, App. No. 29134/08 (June 30, 2009), Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-93700>; *J. Singh v. France*, App. No. 25463/08, Eur. Ct. H.R. (2009); *R. Singh v. Fr.*, App. No. 27561/08 (June 30, 2009), Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-93701>.

101. See *e.g.*, *Osmanoğlu v. Switzerland*, App. No. 29086/12 (Jan. 10, 2017), Eur. Ct. H.R., <http://hudoc.echr.coe.int/eng?i=001-170436>; see also *Moody v. Cronin*, 484 F. Supp. 270, 272, 277 (C.D. Ill. 1979) (exempting children from participating in mandatory physical education classes, as the wearing of "immodest attire" in the mixed-sex gym classes offended the religious interests of some parents).

102. See *e.g.*, *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) (1976).

103. See *e.g.*, *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

realities of their societies; and (iii) come up with fair reasons while deliberating on controversial issues.¹⁰⁴ In other words, certain religious or consciously-driven claims should not bar educators from introducing youngsters to “a continuously changing world.”¹⁰⁵

However, in realizing this scholastic mission, accommodative neutrality faces further conceptual challenges, such as whether it is possible to establish fair criteria for teaching knowledge or information with religious content, to develop a strategy for training so-called “neutral teachers,” and to provide opportunities for teachers to enjoy some of their fundamental religious freedoms in multicultural public education. In this regard, the ECtHR has famously explained that information or knowledge of a religious or philosophical kind can be taught in public schools so long as it is conveyed in an “objective, critical and pluralistic manner.”¹⁰⁶ Yet, the criterion of objectivity is a difficult concept to fully comprehend, creating considerable ambiguity. In the context of religious teaching, objective teaching has been explained with regard to mere exposure, free inquiries, or “disciplined intersubjectivity.”¹⁰⁷ The teaching should consider facts, employ alternative sources or interpretations for testing the credibility of the argument, and pursue non-favoritism towards different religious or philosophical beliefs. For example, if the aim is to objectively present a controversial topic, such as the Trial of Jesus, then teachers should openly and fairly discuss the facts, as well as alternative opinions that represent the Jewish, Islamic, or other religiously and academically trustworthy sources. Secondly, critical teaching requires questioning some fundamental theological issues related to God, creation, existence, moral values, and other comprehensive conceptions of the good. In other words, critical teaching requires non-avoidance with respect to challenging issues, allowing students to “experience and deal with conflicts of opinion over very basic matters.”¹⁰⁸ Finally, the pluralistic criterion requires fair balancing with respect to quantitative and qualitative information taught in the course of religious education.¹⁰⁹ It should provide comparative discussions on different religious cultures, with the aim of building social bridges among children and teaching them “how to be different in the right way.”¹¹⁰ Pluralistic criteria are an effective tool in fighting against religious discrimination, hatred, or aggregated tension in the school environment.

104. See Berger, *supra* note 6, at 115.

105. HANNAH ARENDT, *BETWEEN PAST AND FUTURE: SIX EXERCISES IN POLITICAL THOUGHT* 189 (1961).

106. *Kjeldsen v. Denmark*, 23 Eur. Ct. H.R. (ser. A) ¶ 53 (1976).

107. Phenix claimed that objectivity does not mean being value-free; but rather “entering into the subjectivity of persons other than oneself in a disciplined way—*disciplined intersubjectivity*.” See Phenix, *supra* note 11, at 424.

108. Harvey G. Cox, *Challenges to Our Educational System: The Relationship Between Religion and Education*, in *RELIGION AND PUBLIC EDUCATION* 99, 103 (Theodore R.Sizer ed., 1967).

109. *Folgero v. Norway*, 2007-III Eur. Ct. H.R. ¶ 95 (2006); see also BADER, *supra* note 4, at 159.

110. MICHAEL WALZER, *ON TOLERATION* 74–75 (1999).

Furthermore, in order to overcome some of the discrimination-based or indoctrination-related religious claims in public education, the liberal state should require teachers to complete specialized professional pedagogical training, which would empower them with certain capacities for managing sensitive topics with religious or philosophical content. Teachers should primarily accept that they represent the liberal state, and they should be careful in providing interpretations of controversial religious issues, as schools “are meant to develop civic virtue and responsible citizenship and to educate in an environment free of bias, prejudice and intolerance.”¹¹¹ Teachers should teach students to be disciplined in religiously controversial discussions, thereby developing tolerance in the face of manipulation and irrational appeals.¹¹² In addition, teachers may also consult experts representing various religious beliefs and integrate the practical religious experiences of pupils, representing different religious views in the course of teaching.¹¹³

Although teachers are usually considered the symbol of objectivity and neutrality, they should still be entitled to enjoy certain religious and academic freedoms in public education so long as they do not contradict the goals of multicultural public education and endanger the self-determination of children and parents. For example, in response to the *Dahlab* case,¹¹⁴ a commentator argued that wearing the Islamic headscarf in public schools might actually contribute to strengthening toleration in a multicultural society, as pupils from an early age would understand that they live in a religiously diverse society.¹¹⁵ Furthermore, there are a few more controversial and provocative issues, such as whether it is legally permissible for a teacher to keep religious books on the classroom shelves or their desk,¹¹⁶ or to read a religious book in their free time, or to accept or reject a research paper of a student written on a controversial religious issue (e.g., sympathizing with the life of Bin Laden, or justifying ‘religious’ terrorism),¹¹⁷ which are hard cases to respond to solely from the perspective of the civic goals of public education.

111. B.C. Coll. of Teachers v. Trinity W. Univ. [2001] S.C.R. 772, 774 (Can.).

112. See KANT, *supra* note 23, at 438.

113. See NORD AND HAYNES, *supra* note 24, at 50–51.

114. *Dahlab v. Switzerland*, 2001-V Eur. Ct. H.R.

115. See PAUL M. TAYLOR, FREEDOM OF RELIGION, UN AND EUROPEAN HUMAN RIGHTS LAW AND PRACTICE 172 (2005); see also Ute Sacksofsky, *Religion and Equality in Germany: The Headscarf Debate from a Constitutional Perspective*, in EUROPEAN UNION NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES ON MULTIDIMENSIONAL EQUALITY LAW 353, 361–62 (Dagmar Schiek & Victoria Chege eds., 2009).

116. See KENT GREENAWALT, DOES GOD BELONG IN PUBLIC SCHOOLS? 2–3 (2005); see also *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (dismissing the right of a fifth-grade teacher to keep two religious books in the classroom library and to silently read the Bible during a silent reading period).

117. For example, in *Settle v. Dickson County School Board*, a teacher refused to accept a research paper written by a ninth-grade student titled “The Life of Jesus Christ.” 53 F.3d 152 (6th Cir. 1995). The Sixth Circuit Court of Appeals, examining the tension between the student’s freedom of expression and the teacher’s academic freedom and authority, concluded that teachers should generally enjoy broad discretion over their course content, including grading, paper topics, reading materials, and so on. *Id.* at 155–56.

C. *The Dream of Safeguarding Religious Equality*

In adopting an accommodative neutrality approach, the liberal state’s responses would either defend autonomy as self-determination or proportionately support the compelling civic goals of public education. This strategy would also enhance the process of reorganization of social cooperation and integration in a multicultural society. However, the absence of theoretical safeguards for securing substantive religious equality would undermine the legitimacy and functionality of accommodative neutrality in public education. Consequently, the question becomes whether it is possible to ensure substantive religious equality among the permissible religious views or claims in multicultural public education, which would not endanger the freedoms and rights of others, and at the same time, would help the state to effectively minimize or eliminate opportunities or incentives for discriminating against unpopular or minority religious views.¹¹⁸ To this end, the principle of “equal care and respect”¹¹⁹—which is aimed at treating all reasonable religious conceptions of the good in modern multicultural public education with equal objective importance—is worth considering.

This principle has a few important implications for creating a substantive and discrimination-free environment in multicultural public education. Foremost, equal care and respect imposes a positive obligation on the state to create and maintain a fair and hostility-free environment in which cultural, religious, national, or ethnic entitlements should not become grounds for pursuing any indirect or direct discriminatory approaches. Pupils or students should be provided with meaningful and equal opportunities to gain knowledge and become familiar with each other’s traditions, thoughts, and religious beliefs without any pressure.¹²⁰ In this regard, the Canadian Supreme Court has eloquently described the school as a public arena “for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate.”¹²¹

Equal care and respect similarly treats parental interests with objective importance, as weighed against the strictly interpreted civil goals of education. Equal opportunities for reasonable religious claims are complemented when meaningful exemptions and fair alternatives are equally provided. For

118. The United Nations Human Rights Committee, for example, has expressed its concerns about making non-Catholic children, who were exempt from taking religious courses in schools in Monaco, “to feel like the ‘black sheep’ of the class.” Human Rights Committee, Summary Rec. of the 1936th meeting: Monaco, ¶30, U.N. Doc. CCPR/C/SR.1936 (2001); see also *C.J. v. Poland*, App. No. 23380/94, 84-B Eur. Comm’n H.R. Dec. & Rep., 46 (1996).

119. For similar accounts of ‘equal respect,’ see RONALD DWORIN, *A MATTER OF PRINCIPLE* 190–91 (1985), and Forst, *supra* note 88, at 307.

120. See, e.g., Kenneth A. Strike, *Democracy, Civic Education, and the Problem of Neutrality*, 27 *THEORY INTO PRACTICE* 256, 261 (1988); see also Nord, *supra* note 27, at 16, 18.

121. *Ross v. New Brunswick Sch. Dist.* [1996] 1 S.C.R. 825, ¶ 42 (Can.); see also *Widmar v. Vincent*, 454 U.S. 263, 267–68, 273–74 (1981); *Bd. of Ed. v. Mergens*, 496 U.S. 226, 234–47 (1990); *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 836–37 (1995).

example, equal care and respect may provide reasonable access for religious parents to organize discussions or initiate clubs outside class hours in public school premises with young children.¹²² However, in some challenging cases, such as providing religious education in public schools, it might be difficult to protect all parental interests with equal care and respect, as the teaching of all religions from all perspectives would simply be an impossible task to achieve.¹²³

It is also important to note that equal care and respect may not always enable equally neutral effects,¹²⁴ primarily because of limited resources and the means at the disposal of the state.¹²⁵ For example, if a public university is providing equal financial support and other equal opportunities to all religious and non-religious student-initiated clubs, then perhaps we may claim that they are treated equally with objective importance. However, if the equal support policy is aimed at making all student clubs, for example, enjoy equal popularity in the university, then we are naively expecting neutrality in the effects.¹²⁶ Equal care and respect may not always provide equal success, although organizational norms, provisions, policies, procedures, or practical approaches should not create substantially disproportionate effects, placing a person or a group in a disadvantaged position in public education.¹²⁷ Furthermore, equal care and respect may also satisfy small inexpensive or functional preferences of minority religions with the purposes of rectifying historical injustices.¹²⁸

CONCLUSION

In response to the recent influx of migrants, modern liberal societies must reorganize social integration and cooperation to allow for peace, harmony, and equality among people with deep conscious, cultural, and religious differences. Realizing these dreams requires dealing with challenges in public education, the most complex and controversial arena of multicultural public space, in which the much disputed “neutral” face of the liberal state must be fairly adjusted with respect to reasonable religious and secular interests or claims of the participants of public schooling. This Essay has

122. See James L. Underwood, *The Proper Role of Religion in the Public Schools: Equal Access instead of Official Indoctrination*, 46 VILL. L. REV. 487, 542–44 (2001).

123. See BADER, *supra* note 4, at 156–57; see also GREENAWALT, *supra* note 116, at 180–83.

124. See Patten, *supra* note 8, at 257–58.

125. *Id.* at 272; see also BADER, *supra* note 4, at 156–57.

126. Rawls, for example, argues that the neutrality of effects is not possible, as the state, with time, will have certain effects and influences on those religious or philosophical views, which manage to endure and gain adherents. See RAWLS, PRIORITY OF RIGHT, *supra* note 9, at 262–63.

127. See Elisabeth Griffiths, *The Reasonable Accommodation of Religion: Is This a Better Way of Advancing Equality in Cases of Religious Discrimination*, 16 INT'L J. DISCRIMINATION & L. 161, 164 (2016); see also Adam Anczyk & Joanna Grzymała-Moszczyńska, *Religious Discrimination Discourse in the Mono-Cultural School: The Case of Poland*, 40 BRIT. J. RELIGIOUS EDUC. 182, 183 (2018).

128. See Griffiths, *supra* note 127, at 165.

offered a conception of accommodative neutrality, which is developed on three dreams—autonomy, civic citizenship, and substantive religious equality—in order to respond to religiously or consciously motivated claims in multicultural public education.

