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NOTES

EPISTEMOLOGICAL NONSENSE? THE SECULAR/RELIGIOUS DISTINCTION

CHRISTINE L. NILES*

One of the most contentious debates today involves the role of religious reasoning in the public square of law and politics. Some worry over the thought of allowing religious reasoning in public debate, and advocate a “privatized religion” theory in which religion is confined to the private realm. According to this line of thought, secular reasons should prevail in public discussion as such reasons are universally accessible by way of being more rational, neutral and inclusive of many truths. Others desire a middle way, in which religion should at least play a muted part in public discourse. For example, Kent Greenawalt argues that religious reasoning is only appropriate in the public sphere when secular reasoning fails to resolve an issue.¹ Finally, others such as Michael Perry advocate the full and robust participation of the religious in politics and law.² This line of reasoning holds that religion as a worldview encompasses all aspects of life, and artificially separating religion between the public and private spheres not only makes little sense, it is impossible.

The first task of philosophy involves questioning assumptions. Each person holds beliefs never analyzed, but simply taken for granted. In law, it is especially important to examine presuppositions in order to understand and apply legal concepts properly. When it comes to Establishment Clause jurisprudence, all roads lead to the secular/religious distinction. Although arguments over the role of religion in the public square support different conclusions, they each start from one unquestioned

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1. Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 411 (2001).

2. See, e.g., MICHAEL PERRY, *LOVE AND POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS* (1991).

premise: namely, that the distinction between religion and secularism is a valid and coherent one. This Note argues that the secular/religious distinction, from which so much Establishment Clause jurisprudence springs, is epistemologically incoherent. Secularism, which prides itself on being rational, neutral, and non-exclusionary, no more attains these virtues than the most ardent sectarianism.

By analyzing the epistemological underpinnings of secularism, this Note will show that no coherent line separates the "secular" from the "religious." This Note concludes that a more accurate Establishment Clause jurisprudence will understand the nature of this distinction, and, in an effort to provide a principled method of application, courts should define the terms precisely and apply them consistently. Courts have yet to clearly define secularism or religion, failing to set clear parameters that can be followed by later courts. As a result, we are left with a confusing body of case law that fails to clarify the very terms on which all else depends.

I. BACKGROUND

A brief sketch of the progress of philosophical thought might prove a useful backdrop to this discussion. It is difficult to sum up the last three centuries without gross oversimplification, but the following outline should prove relatively accurate. Some of the strongest influences on early American thought came from the Protestant religion, and Enlightenment Rationalism. This was the age of the British Empiricists³ and the Continental Rationalists,⁴ as well as the intellectuals of France.⁵ Though many of the prominent philosophers believed in God,⁶ and some considered the Christian Scriptures authoritative, all of them put an emphasis on the role of reason. Using reason as a tool to cut away at the less "essential" dogmas of the Church, rationalism was proposed as an alternative to the mysticism and superstition often associated with religion. Some used rationalism as a way to refute arguments previously asserted to prove the existence of God,⁷ while others formulated rationalist arguments to prove

3. The British Empiricists are generally recognized as John Locke, Bishop George Berkeley, and David Hume.

4. The Continental Rationalists include Renee Descartes, Gottfried Leibniz, and Baruch Spinoza.

5. Some influential French thinkers of this era are Voltaire, Denis Diderot, Paul von Holbach, and Jean-Jacques Rousseau.

6. *E.g.*, Locke, Descartes, Kant, and Leibniz.

7. *See, e.g.*, DAVID HUME, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING (1748).

God's existence.⁸ Whatever the result, the method was based on a radical distinction between faith and reason.

The rise of modernism in the nineteenth and twentieth centuries flowed directly from Enlightenment Rationalism. Auguste Comte and Ernst Mach introduced scientific positivism, an attempt to categorize all sciences, including the study of human behavior, into one all-embracing empirical law.⁹ Utilitarians, including Jeremy Bentham and John Stuart Mill, proposed a sort of "thinking man's hedonism," where, through the use of reason, they concluded that human behavior is motivated by sensations of pleasure or pain.¹⁰ Their moral philosophy was based on an ethics grounded in ascertainable facts, rather than hazy intuitions.¹¹ The Pragmatism of Charles Sanders Pierce, William James, and John Dewey, though composed of different strands of thought, advocated empirical investigation as the path to objective truth. Bertrand Russell, later joined by the Logical Positivists of the Vienna Circle, attempted to purify philosophy—and the essential terms of the language of philosophy—through the application of logic, desiring the same certainty and precision inherent in mathematics.¹²

The nihilism that followed proclaimed the death of God and the death of Truth by endorsing man's ability to forge his own fate through the use of his will.¹³ Nihilism replaces the idea that absolute Truth exists with the view that many truths coexist, man is the center of the universe, the world is at bottom irrational and absurd, and man must debunk the myths of religion in order to create his own fate.¹⁴

The nihilism of Nietzsche went hand-in-hand with the existentialism of Albert Camus¹⁵ and Jean-Paul Sartre.¹⁶ Their phi-

8. *See, e.g.*, IMMANUEL KANT, *CRITIQUE OF PURE REASON* (1748).

9. ERNST MACH, *THE ANALYSIS OF SENSATIONS* (C.M. Williams trans., Sydney Waterlow ed., Dover Publ'ns 1959) (1886); AUGUST COMTE, *COURSE IN POSITIVE PHILOSOPHY* (1781).

10. JOHN STUART MILL, *UTILITARIANISM* (David Lyons ed., 1997) (1861); JEREMY BENTHAM, *INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

11. *See generally* MILL, *supra* note 10, and BENTHAM, *supra* note 10.

12. BERTRAND RUSSELL, *OUR KNOWLEDGE OF THE EXTERNAL WORLD* (1926).

13. *See, e.g.*, FRIEDRICH NIETZSCHE, *THUS SPOKE ZARATHUSTRA: A BOOK FOR ALL AND NONE* 9–12 (Walter Kaufmann trans., ed., 1954) (1883–1885).

14. WALLACE I. MATSON, *II A NEW HISTORY OF PHILOSOPHY* 465 (1987).

15. *See, e.g.*, ALBERT CAMUS, *THE MYTH OF SISYPHUS AND OTHER ESSAYS* (Justin O'Brien trans., 1955).

16. *See, e.g.*, JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY* (Hazel E. Barnes trans., 1956).

losophies consisted of a view of the world consisting fundamentally of chaos and purposelessness. The absurdity of existence means that man is free to choose what he is to become, without the trappings of traditional morality. The death of God proclaimed by Nietzsche necessarily implied the collapse of the whole traditional ethical system, a system in his time dominated by the Judeo-Christian tradition. This traditional morality, informed by religious values, should be rejected in favor of a man-made, man-centered morality.¹⁷ We are left in a universe indifferent to our fate, and thus must create our own meaning and destiny.¹⁸

Despite the seeming extremism of these worldviews, their influence on academia is pervasive. Indeed, what we know as "postmodernism" is largely informed by such views. Although postmodernism is comprised of diverse worldviews, one could accurately characterize it as a hermeneutics of suspicion. Those practicing the deconstruction of language, history, literature, science, and law believe their work reveals innate power structures that perpetuate oppression. In other words, language, history, science, and law do not reveal truth—they are social constructs created to manipulate and oppress. In the deconstructionist's mind, it is necessary to subvert the *status quo* of power latent in all fields of inquiry in order to bring about equality.¹⁹

As noted, some oversimplification is inevitable when summarizing several centuries of thought in a few paragraphs. However, the general trends documented are accurate. It is against this backdrop that we can understand the modern distinction between the "secular" and the "religious," a distinction that this Note will argue is deceptive and ultimately incoherent. In order to understand its folly, the lawyer must become the epistemologist. This is not the average jurist's field of expertise, but an understanding of it is essential to a more accurate Establishment Clause jurisprudence.

Although some may quibble over the definition of secularism, for the purposes of this Note, secularism is generally marked by three assumptions. First, human reason is the ultimate authority for the secularist, whereas faith has the final word for the sectarian. Second, secularism approaches the question of metaphysics neutrally, unlike "religion," in which bias and

17. See, e.g., FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS (Walter Kaufmann trans., ed., 1967) (1887); FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (Walter Kaufmann trans., ed., 1966) (1886).

18. See, e.g., NIETZSCHE, *supra* note 13.

19. Critical Legal Theory is one area of such thought, its starting point being the belief that all law is reducible to power and politics.

dogma prevail. Finally, secularism leaves room for many truths to co-exist, whereas religious worldviews require adherence to absolute and exclusive truth.

This Note will demonstrate that these assumptions are patently false. First, secularists rely on faith as much as, if not more than, religious adherents. Secularists are no more capable of neutrality in their thinking than anyone else. Finally, secularists adhere to their own dogmatic and exclusive view of the world as much as religious adherents do. The following sections will examine each of these assumptions in turn.

A. *Faith and Reason*

The religious have at times been caricatured for being superstitious and irrational, blindly following divine authority despite evidence to the contrary. Some Christians believe in notions generally thought outrageous to the rationalist, who abides by argument, reason, and evidence. A seven-day creation, a Garden of Eden, talking serpents, staffs that turn into snakes, and the resurrection of the dead cannot be demonstrated by science or the use of reason, the rationalist argues, and thus he rejects such notions. The religious man, however, although he has not seen, believes because of his faith in Scripture and in God's authority. According to this picture, the man of faith and the man of reason seem entirely at odds.

It is important here to define exactly what faith is. Faith is, no more and no less, the reliance on trusted authority. Faith need not be limited to reliance on divine authority; rather, it can include reliance on any authority. The child has faith in his parents that they will take care of him. The lover has faith in his beloved that she will be loyal. The student has faith in his teacher that what is being taught is accurate. The teacher has faith that the textbook he teaches from contains correct facts. The driver has faith that the car he drives has been assembled correctly. Faith is exercised in almost every aspect of our lives. It undergirds everything that people take for granted on a daily basis. Faith is the most common, and most essential, aspect of practical existence.

This notion is well reflected in the following passage:

[T]here are in the life of a human being many more truths which are simply believed than truths which are acquired by way of personal verification. Who, for instance, could assess critically the countless scientific findings upon which modern life is based? Who could personally examine the flow of information which comes day after day from all

parts of the world and which is generally accepted as true? . . . This means that the human being—the one who seeks the truth—is also the one who lives by belief.²⁰

Once one understands this, then the yawning gulf between faith and reason turns out to be a mere crack—if that. The secularist believes to have rejected faith in favor of reason, but on closer scrutiny turns out to be, at bottom, as dependent upon faith as any religious person. Sir Karl Popper, the great philosopher of science, has demonstrated the ultimate irrationality of the worldview that takes human rationalism as its starting point.²¹

The rationalist attitude is characterized by the importance it attaches to argument and experience. But neither logical argument nor experience can establish the rationalist attitude; for only those who are ready to consider argument or experience, and who have therefore adopted this attitude already, will be impressed by them. That is to say, a rationalist attitude must be first adopted if any argument or experience is to be effective, and it cannot therefore be based upon argument or experience.²²

In other words, the rationalist must presuppose rationalism in order to prove rationalism. It turns the entire argument into a question-begging enterprise. This is true in the case of all inductive and deductive reasoning. The conclusion in deductive reasoning assumes the premise, and the rule derived from inductive reasoning assumes the general rule in the first instance. For example, if the empiricist challenges the rationalist to prove how he knows his ultimate authority—rationalism—to be true, the rationalist might reply, "By the use of Reason." But this begs the very question he is trying to answer, for he has already presupposed rationalism in order to prove rationalism. If he responds by claiming that experience proves so, he has relied upon empiricism to prove the superiority of rationalism, contradicting himself. In the end, the rationalist can only say that Reason's ultimate authoritativeness is self-evident—which is, at bottom, no different from simply declaring that his position is so because it is so.

The purpose of this exercise is to show that the rationalist must, in faith, adopt rationalism as his starting point, without being able to account for rationalism itself. Popper concludes that, in the end, the rationalist has an "irrational faith in rea-

20. JOHN PAUL II, *FIDES ET RATIO: ON THE RELATIONSHIP BETWEEN FAITH AND REASON*, 43–44 (1998).

21. KARL POPPER, *POPPEL SELECTIONS* 35 (David Miller ed., 1985).

22. *Id.*

son."²³ In fact, he has gone so far as to say that "[i]rrationalism is logically superior to uncritical rationalism."²⁴ In other words, those who accept rationalism as their ultimate starting point without realizing that the starting point cannot be proved are in a worse position intellectually than those who openly embrace faith as their first principle.

Ludwig Wittgenstein argued along a similar vein in regard to language and the doubting game.²⁵ In order for language to work, certain basic axioms must be assumed without question, what he termed "indubitables."²⁶ These indubitables are those beliefs most firmly entrenched in our system of language and thought. They are not learned one by one, but simply accepted as a system of interlocking and interconnected axioms by which our language system is made coherent. They comprise the "rules of a game" which we call language.²⁷ Reasoning cannot be made without the use of language, and therefore all reasoning turns upon definitions and concepts we have accepted *on authority* by those we trust.

One imagines the way a child learns. He must first accept what his teachers or parents tell him is the case regarding the world. He does not start by doubting, but accepting facts on authority. Only later does he begin to question and demand reasons for those facts he has accepted on authority; yet this questioning can only involve elements *within* the linguistic framework. For him to demand rational justification for the entire framework itself would be moot, for this is precisely where rational justification ends. Michael Polanyi, the philosopher and theologian, has noted that an art "can be transmitted only by examples of the practice which embodies it. He who would learn from a master by watching him must trust his example. He must recognize as authoritative the art which he wishes to learn and those of whom he would learn it."²⁸

In other words, a linguistic system frames the entire rational enterprise, and to demand justification for the enterprise itself requires presupposing those elements that are beyond doubt—elements that have no rational justification *per se*, but are needed because all else hangs upon them. These are the foundational elements that provide coherence to the whole scheme. For

23. *Id.*

24. *Id.*

25. See LUDWIG WITTGENSTEIN, ON CERTAINTY (D. Paul & G.E.M. Anscombe trans., G.E.M. Anscombe & G.H. von Wright eds., 1969).

26. See generally *id.*

27. *Id.* § 95.

28. MICHAEL POLANYI, SCIENCE, FAITH AND SOCIETY 15 (1973).

example, a linguist who decides to doubt the entire foundation of language must use the very language he presently doubts. It is as if the linguist sets out to doubt the whole structure of language, but in doing so, forms his analysis according to the words he has learned from that language. So, obviously, there are elements of that language that *must* be presupposed and employed, elements that *cannot* be doubted, for they form the bedrock on which he can doubt at all. Certainly, he may revise parts of the language, modify or alter certain grammatical rules here and there—but he cannot revise the entire linguistic framework without employing the very terms used in that linguistic framework. To put it simply, doubting the whole enterprise is impossible without presupposing terms learned from the very enterprise in doubt. “The *questions* that we raise and our *doubts* depend on the fact that some propositions are exempt from doubt, are as it were like hinges on which those turn.”²⁹ “Doubt itself rests only on what is beyond doubt.”³⁰

For example, take the scientist, the eminent empiricist. The scientist’s credo is to observe, experiment, prove. However, even the scientist cannot escape the clutches of authority. All facts cannot be tested *ad infinitum*. At some point, the scientist must accept some facts as simply given.

Take as an illustration the investigator who has read in the paper that the President has flown to the Himalayas. If he were to investigate the truth of this claim, he might telephone the newspaper’s headquarters and have a reporter corroborate the statement. If the investigator were to prod the reporter to ascertain this fact, the reporter might reply that he had called the White House. The investigator might question how the reporter knows the White House staff member was not lying. If the reporter answers that all the other newspapers have reported that the President has flown to the Himalayas, the investigator might ask how the other papers know the staff member was not lying. If not satisfied, the investigator might fly to the Himalayas himself to find the President in person. Once he sees the President, he might question further whether it is not the President but a body double.

The purpose of this tedious exercise is to demonstrate that the quest for rational justifications for every fact leads to an infinite regress. The average man would respond to the investigator’s questions in the illustration above with an exasperated, “It’s just common sense!” This exclamation, however, is no different

29. WITTGENSTEIN, *supra* note 25, § 341.

30. *Id.* § 519.

from admitting that at some point further questioning is pointless. For the sake of practicality, certain claims should be believed without further empirical justification, and simply accepted on faith as true. We begin to understand Wittgenstein's claim that "[g]iving grounds [and] justifying evidence, comes to an end."³¹

In response to this demonstration, the naturalist might concede that he does, to some small degree, exhibit faith by his acceptance of unsubstantiated facts, simply because, as explained above, facts cannot be substantiated *ad infinitum*. Yet he will counter that there are degrees of faith, and the religious person exhibits far more faith than the naturalist himself. At least the naturalist, he will assert, has good grounds for accepting unsubstantiated facts—because those same facts have been reliable in the past. Those facts are something he can depend on, because they have consistently produced accurate results, whereas the religious person blindly throws himself upon some occult being without empirical warrant.

The Christian would claim, however, that his faith in God rests on perfectly rational justifications, and that his faith is supported by just as many sound empirical facts as the naturalist's. The Christian may experience prayer answered again and again in his life, prayer he believes to have been answered by a faithful God. He may have experienced God's work in his life manifested in objective and tangible ways. The seasoned religious person could eventually come to have faith in God to sustain him through future trials, as God has already demonstrated his real presence consistently in the past. Thus, to rely on God in faith is not an irrational act to the Christian, but a perfectly reasonable and justified act, based on empirical evidence.

B. *Neutrality*

The secularist believes that his ability to be neutral in matters of belief allows him to occupy the high ground above the sectarian.³² The ground is leveled, however, once the assumption of neutrality is dismantled. As David Novak has so aptly written, "The question, then, is not a god or no-god. The question is *whose god*."³³

It should be understood that each person approaches the world with his own framework of interpretation. We each wear

31. *Id.* § 204.

32. Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 SAN DIEGO L. REV. 763, 764 (1993).

33. David Novak, *Law: Religious or Secular?*, 86 VA. L. REV. 569, 594 (2000).

uniquely tinted glasses, as it were, through which we filter objective facts. Apart from this filter, i.e., this framework of interpretation, facts remain unintelligible data. "Brute facts," as Hume termed them, have no logical interconnection and therefore no intelligibility. Brute facts are facts as yet uninterpreted. The traditional understanding is that the human observer gathers brute facts neutrally, simply compiling more and more brute facts one on top of the other, like unconnected data about the world. However, the truer picture is that the human observer must interpret brute facts to fit within his framework of belief.

Polanyi has observed that reasoning and learning do not occur fact by individual fact, but take place within an overarching system of interpretation. Facts are seen "*subsidiarily* in terms of their *participation* in a whole."³⁴ The philosopher of logic W.V.O. Quine has rejected the notion that beliefs can be acquired piecemeal, as if individual statements can have their own unique empirical content apart from other statements.³⁵ Rather, each statement is logically bound up with all other statements within one conceptual scheme apart from which no statement is coherent.³⁶

As illustration, think of facts as bricks. The traditional view of fact-gathering is that of stacking one brick upon an existing body of bricks. One fact builds upon another fact, and another, and so on. Each fact is discrete and separate from the others, and is added on neutrally to a never-ending stack of bricks.

However, modern epistemology has revealed that this is not the way knowledge is gathered. Rather, consider knowledge now to be represented by a bubble of plasma. Each new fact is like a drop added to the bubble, rippling through the plasma until finally incorporated into the bubble. A new fact must be made to fit smoothly within the preexisting framework. In other words, a new fact must be made to make sense according to one's present understanding of the world, and this necessarily affects other facts within the bubble. If it does not make sense, the fact—rather than being molded to fit within the existing bubble—will be rejected as error or hallucination, and will never become part of the bubble.

Take as another illustration knowledge represented by a puzzle, and facts being pieces of the puzzle. The pieces so far seem to depict a scene of a forest. However, new pieces added

34. MICHAEL POLANYI, KNOWING AND BEING 128 (1969).

35. WILLARD VAN ORMAN QUINE, FROM A LOGICAL POINT OF VIEW 20-46 (2d ed. rev. 1961).

36. *Id.*

and fitted to the puzzle change the picture from that of a forest to that of the interior of a house. The new pieces completely transform one's understanding of the old pieces, so that an entirely different picture is formed. So it is with facts and knowledge. New facts necessarily have an effect on "old" facts, either confirming them, or transforming them entirely. They are not like single bricks stacked on top of each other, static, unchanging, with no transformative effect on one another. Each fact is part of a whole web of facts, logically interconnected and interdependent.

An interesting phenomenon that follows from this concept of epistemology is that the old picture of the puzzle, which one has for years believed to be a forest, does not die easily. One's most firmly entrenched beliefs are not discarded simply by a few contradictory facts—and this applies to the rationalist as well as to the irrationalist. That is, when a new piece does not corroborate the picture of the forest, the new piece will be rejected as error, rather than found a place within the puzzle. Not until a large number of new pieces consistently contradict the picture of the forest will the observer reconsider the accuracy of his former view of the picture. This can only be done through a radical upheaval, whereby all the old pieces (facts) must be reinterpreted in light of the new pieces (facts) to form a different picture (theory of the world).

Thomas Kuhn, the brilliant philosopher of science, has applied this notion to science.³⁷ Contrary to traditional understanding, science does not progress in linear fashion, by the piecemeal accretion of facts. Rather, the history of science is marked by revolutions.³⁸ One conceptual scheme, or paradigm, is slowly destroyed in favor of another wholly incompatible paradigm.³⁹ When new data in conflict with the present paradigm are introduced, the scientist does not immediately do away with the old paradigm to accommodate the new, conflicting data, as we might expect the "neutral" observer to behave. Rather, the scientist will do his best to explain away the conflicting data as

37. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

38. *Id.* at 128.

39. *Id.* For instance, our present theory of optics was preceded by numerous contradictory paradigms, each an attempt to explain the nature of light. Similarly, concepts of electricity differed among scientists in the eighteenth century, all practicing the same methods of experimentation and observation. One of the most notable paradigm shifts occurred between classical Newtonian physics and the introduction of Quantum physics, a theory of the physical universe that transforms classical understandings of gravity, time, and speed. *See id.* at 2-17.

error, or aberration.⁴⁰ He will cling to the old paradigm in spite of contradictory facts, believing *in faith* that a naturalistic explanation will someday present itself to corroborate the old paradigm. When enough conflicting facts present themselves, and enough members of the scientific community are convinced, the new paradigm begins to replace the old paradigm. This, in essence, is the structure of scientific revolutions.

Thus, an innate psychologism exists in the scientific enterprise such that one cannot deem it purely rational. The scientist might finally abolish the old paradigm in favor of a new scientific theory—but it is not done without great resistance. As the puzzle illustration above demonstrated, our firmly entrenched beliefs about the world die hard deaths. Quine has termed this phenomenon the *maxim of minimum mutilation*.⁴¹

Any statement can be held true come what may, if we make drastic enough adjustments elsewhere in the system. Even a statement very close to the periphery can be held true in the face of recalcitrant experience by pleading hallucination or by amending certain statements of the kind called logical laws.⁴²

Another thinker has made the radical but cogent argument that natural science as one's ultimate authority is not established through the application of scientific method, but taken for granted, just as the *biblicist* takes the Bible's authority for granted.⁴³ To take an example, science proceeds by inductive reasoning. One of the rules acquired through inductive reasoning is the uniformity of nature—that nature will continue to operate in the same way as it has in the past. This rule was acquired through the repeated observation of physical objects behaving in exactly the same way as they had yesterday, and the day before, and the day before that, hundreds upon thousands of times over. Although the scientist cannot see into the future, he *assumes*, based on past evidence, that objects will continue to behave in the same way. There is no logical necessity linking past and future phenomena.

The great British philosopher David Hume demonstrated this fact.⁴⁴ That physical objects have behaved consistently

40. POPPER, *supra* note 21, at 145.

41. QUINE, *supra* note 35, at 42.

42. *Id.* at 43.

43. See GREG L. BAHNSEN, *The Problem of Religious Language*, in ALWAYS READY: DIRECTIONS FOR DEFENDING THE FAITH (Robert R. Booth ed., 1992).

44. DAVID HUME, A TREATISE OF HUMAN NATURE 177–82 (Alasdair MacIntyre ed., 1965) (1739).

thousands of times in the past does not foreclose the *logical* possibility of a deviation in behavior in the future. In other words, the logical possibility always exists for phenomena to change; the sun might not rise tomorrow, or objects could begin to levitate. This is implicit in the concept of probability, which is the keystone of all scientific investigation.

Science has never relied on certainty, but rather on probability. Probability presupposes what the scientist needs but can never prove, which is the uniformity of nature. At bottom, the natural scientist has faith in the hypothesis that the course of nature will remain uniform, and as proof can only point to examples of its past uniformity. Of course, this is not proof but mere question-begging. As previously noted, inductive reasoning assumes its general rule.

The Christian has faith that God has an overarching and coherent plan for human existence, that history is the outworking of that divine plan, and that faith in this divine plan lends intelligibility to the universe. Empirical evidence buttressing these beliefs include, for example, the love shown in other human beings, the order and beauty of creation, and the beneficial changes in the believer's own heart and life through adherence to faith. Such empirical evidence demonstrates to the believer that his faith, as a system of belief, lends intelligibility to the universe. Apart from such a framework of interpretation, the universe is unintelligible. Thus, the Christian's faith is no more blind than, on a lesser level, the naturalist's faith in the uniformity of nature. Both starting points are assumed, and then buttressed by empirical facts.

In the political realm, Frederick Gedicks has indicated that secularists "fail to see how thin the distinction is between knowledge and belief. It never occurs to them that religious claims might be rational or that secular claims would be irrational."⁴⁵ As an example, Gedicks examines the nature of election campaigns to demonstrate the irrationalism that pervades politics.⁴⁶ Campaigns, dominated by political posturing and pithy sound bites, are structured to draw not on the rational element of voters' consciousness but rather on the emotive and the psychological.⁴⁷ The very members elected to represent the people in a rational manner are chosen largely through irrational, emotive means. "If politics as actually practiced falls well short of the

45. Frederick Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 694 (1992).

46. *Id.* at 695.

47. *Id.*

ideal of critical rationality, and if religious belief is partially based on reason, on what basis is religion disfavored in political life?"⁴⁸ This is a question well worth asking the secularist.

At this point one might object that religion has not been properly defined. We should examine some attempts at defining religion to see whether a cogent definition is possible. Some believe religion, for political and legal purposes, should be defined as including those belief systems that teach the existence of a supreme Author of the universe, to which one owes obedience.⁴⁹ That definition works well for Christianity, Judaism, and Islam, among others, but it fails to include, for example, Buddhism—unless one claims the unity of all existence to mean God. But that is quite a stretch, and no one would deny that Buddhism is a "religion." One might switch tracks and define religion as including belief systems with fundamentally spiritual teachings. But the word "spiritual" would have to be defined, and it is difficult to understand the content of what is "spiritual" apart from what is "religious," resulting in circular reasoning. One might then make the defining factor faith. Finally, Buddhism is included—but so is every other conceivable worldview. As previously demonstrated, every belief system, whether it be atheism, materialism, utilitarianism, idealism, etc., involves assuming its starting point, and thus reasoning in a circle. Ultimate justification for each worldview cannot rest on purely rational grounds, but, as explained above, on faith.

Agnosticism seems to present a special case, because the agnostic claims to abstain from dogma. Under the magnifying glass, however, it is not unique after all, for agnosticism is simply another word for secularism. Agnostics may claim that they do not know whether certain religious truth claims are true, but they live as if they *know* they are not true. For instance, the agnostic may say that he abstains from deciding whether Christ's lordship is the only way to eternal salvation, yet he lives in the present as if Christ is *not* the only way to salvation. The man who says "I do not know" with his mouth declares with his life the opposite. Thus, the agnostic is not neutral, as he proclaims to be. This aspect of secularism will be explored more fully in the next section.

48. *Id.*

49. *See* United States v. Macintosh, 283 U.S. 605, 633–34 (1931). In his dissent, with which Justices Stone, Holmes, and Brandeis agreed, Justice Hughes wrote, "[T]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." *Id.*

C. *Exclusivity of Truth*

To accommodate a pluralistic society, the secularist believes to have adopted an epistemological pluralism. The secularist does not desire to be dogmatic, therefore he emphasizes the non-exclusivity of truth. In *A Theory of Justice*, legal theorist John Rawls argued that a democracy should reason according to, as it were, the least common denominator. That is, democracy should act on “reasoning acceptable to all. . . . [D]eparture from generally recognized ways of reasoning would involve a privileged place for the views of some over others. . . .”⁵⁰

Michael McConnell has accurately noted, however, that secular liberalism, though purporting not to take sides, does indeed take sides.⁵¹ The very fact that it offers particular reasons and draws on cultural resources aligns it with a particular moral tradition, making it “appear to be parochial or sectarian from other points of view.”⁵² It is simply not possible for secularism to inculcate public virtue without compromising its commitment to neutrality.⁵³ “Somehow, ‘neutral’ came to mean ‘secular’—as if agnosticism about the theistic foundations of the universe were common ground among believers and nonbelievers alike.”⁵⁴

Regretfully for the secularist, truth dies hard. Truth is necessarily exclusive. The one who claims that secularism is *true* has already rejected out of hand all non-secular worldviews. The secularist may claim all religions are equally true in the hope of reducing conflict and furthering tolerance, but not only is this claim self-contradictory, it implicitly rejects the truth of all non-secular worldviews. Christianity, Islam, Buddhism, Hinduism, Santeria, Satanism, Pantheism, and any number of religions posit one exclusive view of the world. Even the Buddhist teaching that “all is one” is a claim for the truth of Buddhism and the rejection of any religion that does *not* claim “all is one.”

One might say one’s eyes are green, and might even wish very much they were. But saying one’s eyes are green will not change the fact that they are brown. The secularist might claim that secularism can accommodate all worldviews, and he might even wish this were the case. But religions present competing truth claims that secularism implicitly rejects. Thus, contrary to

50. JOHN RAWLS, *A THEORY OF JUSTICE* 213 (1971).

51. Michael McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000).

52. *Id.* at 455.

53. *Id.*

54. Michael W. McConnell, “*God Is Dead and We Have Killed Him!*”: *Freedom of Religion in the Postmodern Age*, 1993 BYU L. REV. 163, 174.

common opinion, secularism does not and cannot accommodate all worldviews.

Louis Seidman correctly observed that the distinction between the public and the private sphere (and thus the secular and the religious) is not a self-evident, natural ordering, but rather "a human construct that must be fought for and quarreled over."⁵⁵ Bruce Ackerman has argued that citizens should discuss public policy based on shared moral premises that both sides find reasonable.⁵⁶ However, the shortcoming of this argument is obvious: it assumes that all worldviews share basic moral premises.⁵⁷ It may be true that many worldviews share basic moral premises, but in a diverse political and moral body, some worldviews may not meet on any level at all.⁵⁸

Even if some moral precepts are shared, worldviews with different underlying presuppositions approach such moral issues from fundamentally different angles. Therefore, common moral premises are usually shared in only a superficial sense. "When [secularism] tries to square the circle, the result is a thin, least-common-denominator version of public virtue. . . ."⁵⁹ Bruce Ackerman's approach is correct for prudential reasons, since discussing public policy in a language accessible to most will win more people. His argument, however, is rooted not in prudence, but in the inherently biased premise that non-religious reasoning is the only way to conduct public debate. Perry has correctly noted that "Ackerman is obviously privileging particular premises or beliefs."⁶⁰

At bottom, the secularist applies his own value preferences by choosing and excluding types of political language according to *his* view of the world. The secularist, like the non-secularist, cannot escape the fact that he believes his own worldview is the most accurate description of the world. He believes his worldview, to the exclusion of others, is *true*. "Ultimately, then, the only reason to exclude religious views from the realm of coercive public policy . . . is because those views are wrong."⁶¹ Secularism is, in the end, a value-laden view of the world no less than is Christianity, Judaism, or any other traditionally recognized religion.

55. Louis M. Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006 (1987).

56. Bruce Ackerman, *Why Dialogue?*, 86 J. PHILOSOPHY 5, 17-18 (1989).

57. PERRY, *supra* note 2, at 9.

58. *Id.*

59. McConnell, *supra* note 51, at 455.

60. PERRY, *supra* note 2, at 10.

61. Alexander, *supra* note 32, at 797.

Kathleen Sullivan concedes this point.⁶² She argues that even though secularism has its own substantive content and conflicts with religious worldviews, this conflict is inevitable. Under our Constitution, she argues, secularism is the only viable option in a liberal democracy. She fears that allowing religious thought to invade the public square would result in strife, therefore it is safer for religion to remain a private affair.⁶³

Fear of strife, however, is not enough to bar an issue from the public square. "If avoidance of strife were an independent constitutional value, no legislation could be adopted on any subject which aroused strong and divided feelings."⁶⁴ Race relations continue to engender a great deal of strife, but the nation believes the issue is important enough to maintain in political discourse.⁶⁵ In fact, strife erupts over tax increases, antitrust jurisprudence, oil drilling, and censorship. Sullivan's argument that secularism should prevail because of fear of division is simply not compelling.

Indeed, Sullivan seems to have it backwards. Our Constitution never intended secularism to prevail over all other worldviews, come what may. Rather, our Constitution guarantees nearly any idea, inane or radical, honorable or blasphemous, an equal place in public discourse. In *Lemon v. Kurtzman*,⁶⁶ the Supreme Court grappled with this idea in holding two state statutes to be unconstitutional. Both statutes provided state aid to religious schools, and the Court set up a three-part test to determine whether or not religion had been established. First, the law had to serve a secular purpose; second, the law could neither advance nor inhibit religion; and finally, the law could not result in excessive government entanglement with religion.⁶⁷ One of the factors weighed in considering the entanglement prong was

62. See Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992).

63. *Id.* at 197.

64. Alan Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 711 (1968).

65. *Id.* See also Justice Scalia's concurrence in *Good News Club v. Milford School*, 533 U.S. 98, 126 (2000), in which he argues that a Christian Bible group should have the freedom to access a public school "even if . . . its actions may prove (shudder!) divisive." See also Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984), in which she states that "political divisiveness along religious lines should not be an independent test of constitutionality. . . . [W]e have never relied on divisiveness as an independent ground for holding a government practice unconstitutional."

66. 403 U.S. 602 (1971).

67. *Id.* at 612.

the potential for political divisiveness.⁶⁸ Chief Justice Burger, in a surprising statement, wrote that “many people confronted with [public religious] issues . . . will find their votes aligned with their faith.”⁶⁹ As if this were a bad or unusual thing! As if faith were the one aspect of voters’ lives that must be suppressed at the ballot box! Chief Justice Burger even went so far as to say that the First Amendment was intended to protect from political division along religious lines.⁷⁰

This view has been roundly criticized.⁷¹ It entirely misses the point, expressed by James Madison, that contending factions in politics—including religious factions—safeguard against the possibility of one faction gaining a tyrannical stronghold.⁷² This is done through the many disparate voices of the democratic process, as voices vie with one another and eventually balance each other out. This is precisely the point of democracy as set up under our Constitution—not to force a secular straitjacket on the political process, as Sullivan or Chief Justice Burger seem to contend, but rather to allow every voice, religious and irreligious, into public debate.

Kent Greenawalt, however, would rather legislate and public policy not be motivated by religious convictions. “[A] liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition.”⁷³ However, that is no more than to say that citizens must suppress their religious convictions at the ballot box. One wonders whether this is the way democracy should work—by marginalizing religiously-based motivations in favor of an illusory secular neutrality. This version of “neutrality” seems no more than a thinly veiled hostility towards religion.

Perry proposes that, “Because of the role that religious arguments about the morality of human conduct inevitably play in the political process, it is important that such arguments, no less than secular moral arguments, be presented in—so that they can

68. *Id.* at 622.

69. *Id.*

70. *Id.*

71. See, e.g., Edward M. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U. L.J. 205 (1980).

72. THE FEDERALIST NOS. 10, 51 (James Madison).

73. KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 91 (1988).

be tested in—public political debate.”⁷⁴ This seems right. As mentioned above, all ideas, religious and secular alike, should be tested in the waters of public opinion. The purpose of the political process is to allow all voices to be heard, and to allow citizens to vote according to their own idiosyncratic motives. Legislators, though required to faithfully represent their constituents (for reasons of prudence), should have the same freedom to act from idiosyncratic motives.

As illustration, suppose a legislator were to include in his re-election campaign the proposal to add an amendment to the Constitution requiring all highway signs to be changed from green to pink, and he declared that an alien told him to do so. His ability to publicly use such reasoning is altogether distinct from his ability to get votes. Let’s suppose a contingent of alien worshippers whose favorite color is pink re-elects him. His proposal would still have to meet the approval of the House, the Senate, and the President. If the House, the Senate, or the President thinks the proposal absurd (as one assumes they might), the measure would never see daylight. The same applies to any “religious” argument in public discourse. If the reasoning is found to be distasteful to the people, it will not stand.

One might then ask, what if this absurd proposal were to appeal to a majority in the House, a majority in the Senate, and signed into law by the President? Then it still must pass the test of the courts, which will strike down the law if it is seen as an establishment of religion. The hurdles that any bill—much less a religiously motivated one—must jump are steep. As this nation has moved away from its generally theistic roots⁷⁵ towards a more pluralistic society, religiously motivated laws are even more inherently suspect than they may have been at the founding. The fact is “religious” tyranny is simply not a realistic possibility under our Constitution.

Justice Brennan’s concurrence in *McDaniel v. Paty*,⁷⁶ a case upholding the right of clergy to participate as legislators, presents an apt perspective on religious participation in the public square:

The mere fact that a purpose of the Establishment Clause is to reduce or eliminate religious divisiveness or strife, does not place religious discussion, association, or political

74. MICHAEL J. PERRY, *RELIGION IN POLITICS: CONSTITUTIONAL AND MORAL PERSPECTIVES* 61 (1997).

75. John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 *EMORY L.J.* 489 (1991).

76. 435 U.S. 618 (1978).

participation in a status less preferred than rights of discussion, association, and political participation generally. . . . In short, government may not as a goal promote "safe thinking" with respect to religion and fence out from political participation those, such as ministers, whom it regards as overinvolved in religion. Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally.⁷⁷

Justice Scalia elsewhere writes:

Our cases in no way imply that the Establishment Clause forbids legislators merely to act upon their religious convictions. We surely would not strike down a law providing money to feed the hungry or shelter the homeless if it could be demonstrated that, but for the religious beliefs of the legislators, the funds would not have been approved. Also, political activism by the religiously motivated is part of our heritage. . . . [We may not] deprive religious men and women of their right to participate in the political process. Today's religious activism may give us the Balanced Treatment Act, but yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims.⁷⁸

Strife may indeed arise from introducing the "religious" into public debate—but as indicated earlier, strife erupts over tax increases, antitrust jurisprudence, oil drilling, racial integration, and censorship. Religious reasoning has played a broad role in our national history and politics, and religious motives have undergirded great social movements. Religion should not only be allowed in public debate—it is vital to public debate.

D. Summary

The purpose of this study has been to demonstrate that an element of irrationality exists in every conceptual scheme, such that neutrality and complete rationality are impossible ideals. We have by now established the irrefutable fact that *faith* in some authority lies beneath *all* thinking and acting. No epistemological system is exempt. At bottom, the skeptic, the agnostic, and the naturalist depend on improvable, unquestionable axioms no less than the most ardent theist. Neutrality is an impossible ideal for the secularist, who approaches the world with his own non-

77. *Id.* at 640–41.

78. *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987).

neutral framework of interpretation. The secularist may not claim lack of dogmatism, for he posits his own firmly entrenched beliefs about the nature of the universe, to the exclusion of other non-secularist claims to the contrary.

II. THE SUPREME COURT

There has been a recent trend in the Supreme Court consistent with this Note's argument. Rather than placing "religion" in a special and distinct realm, out of bounds to a secular government, the Court has cut away at separationism in favor of a more "neutral" approach towards all viewpoints. Note that this recent approach is not premised on *neutrality*, though couched in such terms, but rather on the understanding that secularism and religion are not so different after all. Both categories espouse their own values, and the Court should treat each value system equally, rather than giving "secularism" a stronghold in the government while marginalizing religion.

Although Establishment Clause jurisprudence by no means provides a straight and clear path, there are some discernible trends. In the area of public school education, earlier cases found Establishment Clause violations where state aid directly went to support parochial schools, or where religious instruction involved the direct use of government property.⁷⁹ More recent cases, however, have shifted the focus away from direct government aid to state aid offered neutrally to public and parochial schools alike.⁸⁰

79. See, e.g., *Aguilar v. Felton*, 473 U.S. 402 (1985) (holding that use of public school teachers in parochial schools involves excessive entanglement between church and state); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (striking down shared time program as violation of Establishment Clause); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that reimbursement for salaries and teaching materials in religious schools is unconstitutional); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding released time program only insofar as religious instruction took place off of public school grounds); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (striking down released time program where religious instruction took place on public school property).

80. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000) (upholding as constitutional therapeutic services on public school grounds and state provision of instructional materials); *Agostini v. Felton*, 521 U.S. 203 (1997) (upholding remedial services on public school grounds as constitutional); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing sign-language interpreter for deaf student on premises of religious school); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (upholding state grant to blind man to use towards religious education); for the argument that "strict separationism" no longer exists, see Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230 (1994).

In the significant case *Lemon v. Kurtzman*,⁸¹ Rhode Island and Pennsylvania statutes allocating direct funding to private schools were challenged as violating the Establishment Clause. The Rhode Island statute authorized the state to supplement the salaries of private school teachers who taught secular courses, in an amount not in excess of 15% of their annual salaries. The Pennsylvania statute authorized reimbursement of private schools for their actual expenditures involving secular subjects.

The Court proposed a three-part test to determine whether the statutes in question violated the Establishment Clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.'" Focusing primarily on the third prong of the test, the Court struck down the statutes as violating the Establishment Clause.⁸² The Court seemed worried about the possibility of the state using parochial school teachers to teach secular subjects, as the teachers might inadvertently inculcate religious beliefs while teaching. Additionally, Pennsylvania's program of reimbursement involved government monitoring and surveillance in the allocation of state aid for only secular teaching materials.⁸³

*Lynch v. Donnelly*⁸⁴ held that displaying a Nativity scene on public grounds was constitutional. "The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."⁸⁵ In her concurrence, Justice O'Connor first formulated her endorsement test, reasoning that the issue should revolve around whether or not the government, by its actions, had given the impression of endorsing religion.⁸⁶ Since the government had merely intended to celebrate a cultural holiday rather than preach about the birth of Christ, it had not endorsed Christianity.⁸⁷

Although government aid directly helping religious schools was once ruled as a violation of the nonestablishment doctrine,⁸⁸

81. 403 U.S. at 602.

82. *Id.* at 614, 623.

83. *Id.* at 613.

84. 465 U.S. 668 (1984). *But see* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

85. *Lynch*, 465 U.S. at 668.

86. *Id.* at 690.

87. *Id.* at 691.

88. *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

the Court rejected this reasoning in *Agostini v. Felton*.⁸⁹ The key to constitutionality rested on the neutral application of the law in question.⁹⁰ It no longer mattered whether state aid directly helped religion, as long as private choice was posited between the state grant and the payment of private education.⁹¹

This same reasoning was taken much farther in *Mitchell v. Helms*,⁹² which involved government aid issued directly to private schools on the basis of neutral criteria. Funds were disbursed on a per capita basis to public and private schools alike. About thirty percent of the funds were allocated to private schools, and of these private schools, the overwhelming majority were religious in nature. Thus, unlike previous cases, in which private actors directed aid to the school of their choice, this program involved direct government aid to parochial schools. Justice Thomas, writing for the Court, held that the program's neutral criteria saved the program from violating the Constitution.⁹³ "If a program offers permissible aid to the religious . . . , the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be."⁹⁴ In fact, Justice Thomas criticized the dissent for its "special hostility" towards religion.⁹⁵

The principle of neutrality also manifests itself in a line of cases implicating the Free Speech Clause. In *Widmar v. Vincent*,⁹⁶ the Court invalidated on free speech grounds a state university regulation prohibiting student use of school facilities for religious purposes. An "equal access" policy was adopted that the Court found consistent with *Lemon*.⁹⁷ This reasoning holds that, as long as a forum has been created for students to discuss ideas, then all ideas must have equal access to that forum—including religious ideas.⁹⁸ To bar religious groups from using the limited public forum was to discriminate against their viewpoint, which is a violation of the constitutional right to free speech.⁹⁹

The doctrine of *Widmar* was later extended to secondary schools in *Board of Education of the Westside Community Schools v.*

89. 521 U.S. 203 (1997).

90. *Id.* at 230–32.

91. *Id.* at 226.

92. 530 U.S. 793 (2000).

93. *Id.* at 809.

94. *Id.* at 827.

95. *Id.*

96. 454 U.S. 263 (1981).

97. *Id.* at 271.

98. *Id.* at 277.

99. *Id.*

Mergens,¹⁰⁰ despite the fact that it involved younger, more impressionable schoolchildren. Justice O'Connor wrote that equal access gave the message of neutrality, as all groups regardless of viewpoint should be allowed to participate in a limited public forum.¹⁰¹

This doctrine received further support in *Lamb's Chapel v. Center Moriches Union Free School District*.¹⁰² In this case, the content of a film discussing childrearing from a Christian perspective was at issue. The Court held that the Establishment Clause would not be violated by showing the film on public school grounds after hours, but rather the school violated the church's right to free speech by discriminating against its Christian viewpoint.¹⁰³ The Court reasoned that it would be manifestly unfair for the school to permit the screening of any film discussing childrearing from any perspective, while barring a religious perspective.¹⁰⁴ *Rosenberger v. Rector & Visitors of the University of Virginia*¹⁰⁵ followed on the heels of *Lamb's Chapel* by holding that a state university engaged in viewpoint discrimination by denying funds to a Christian student magazine.¹⁰⁶ Once it provided a limited public forum, the university should have distributed its funds evenly to all student magazines, rather than singling out the Christian magazine because of its religious content. 'By doing so, the university violated the students' right to free speech.¹⁰⁷

This "equal access" approach appeared again in *Good News Club v. Milford Central School*.¹⁰⁸ A public school denied access to a Christian group, which had requested permission to use a classroom after hours to conduct a bible study. The Supreme Court held that Milford was a limited public forum self-professedly open to activities "pertaining to the welfare of the community,"¹⁰⁹ and the Good News Club involved teachings pertaining to the welfare of the community.¹¹⁰ "[N]o one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way."¹¹¹ Therefore,

100. 496 U.S. 226 (1990).

101. *Id.* at 248.

102. 508 U.S. 384 (1993).

103. *Id.* at 393-95.

104. *Id.*

105. 515 U.S. 819 (1995).

106. *Id.* at 831.

107. *Id.* at 839.

108. 533 U.S. 98 (2001).

109. *Id.* at 108.

110. *Id.*

111. *Id.*

the Court held Milford School had engaged in viewpoint discrimination against the Good News Club.¹¹²

Returning to Establishment Clause jurisprudence, the neutrality framework was reinforced most recently in *Zelman v. Simmons-Harris*.¹¹³ Ohio taxpayers challenged a school vouchers program as a violation of the Establishment Clause. The Court ruled that, because the aid was distributed neutrally, and any government aid received by religious schools was the result of parents' private choice, the vouchers program did not violate the First Amendment.¹¹⁴ The Court found it irrelevant that ninety-six percent of aid recipients attended religiously affiliated schools.¹¹⁵ "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."¹¹⁶

This string of Free Speech and Establishment Clause cases reveals a gradual tendency of the Court toward requiring government neutrality towards religion. In the free speech context, the government may not discriminate according to viewpoint by allowing secular organizations access to public facilities while denying access to limited public fora. In the Establishment Clause context, the government may allow parents the option of spending government aid on religious schools,¹¹⁷ or even grant aid directly to parochial schools on a neutral, per capita basis.¹¹⁸ In the one setting, the government is required to provide equal access to religious and secular viewpoints alike. In the other, the government is allowed to provide funding for both religious and secular schools.¹¹⁹ But in both settings, the Court has demonstrated the gradual recognition that secularism, once believed to hold the high ground in the public square, can no longer have such priority. This arises from one significant fact: secularism espouses its own particular viewpoint, its own unique morality, and its own non-neutral value judgments. The Court (or at least

112. *Id.* at 109.

113. 122 S. Ct. 2460 (2002).

114. *Id.* at 2467-68.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Mitchell v. Helms*, 530 U.S. 793 (2000).

119. It is yet to be seen whether the First Amendment requires the government to provide aid to religious believers, although at least one case has held that it does as to state educational scholarships. See *Davey v. Locke*, 299 F.3d 748 (9th Cir. 2002).

some members of it) has thus come to realize that secularism is no less neutral than religion.

In his concurrence in *Good News Club*, Justice Scalia sets forth this reasoning lucidly:¹²⁰

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep “morally straight” and live “clean” lives by giving [secular] reasons why that is a good idea—because parents want and expect it, because it will make the scouts “better” and “more successful” people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered—because God wants and expects it, because it will make the Club members “saintly” people, and because it emulates Jesus Christ. . . . This is blatant viewpoint discrimination. Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God’s will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise—and in respondent’s facilities every premise but a religious one may be defended.¹²¹

Justice Scalia’s reasoning reveals a position entirely consistent with the analysis of this Note. That is, that secularism involves its own non-neutral value judgments, as does religion, and to exclude the latter is to prefer the former. This is an unjustified preference.

III. “RELIGION”

After his demonstration of the ultimate irrationality of different worldviews, Wittgenstein cynically concluded that each person’s bedrock assumptions are at best arbitrary, at worst, thoroughly biased. In the end, we can only opine, and “[w]here two principles really do meet which cannot be reconciled with one another, then each man declares the other a fool and heretic.”¹²²

120. 533 U.S. 98, 120–27 (2001).

121. *Id.* at 124–25 (citations omitted).

122. WITTGENSTEIN, *supra* note 25, § 611.

“At the end of reasons comes *persuasion*.”¹²³ At bottom, no single true philosophy exists, only different therapies.¹²⁴

This conclusion is not terribly helpful in determining a more accurate First Amendment jurisprudence. This Note, however, does not agree with such a conclusion. It is an unjustified leap to infer from the presence of a multitude of worldviews that no Truth therefore exists. The former need not imply the latter. In fact, such a stance is logically inconsistent and self-contradictory. To say, “No viewpoint is ultimately true,” is to assert a viewpoint the speaker believes is ultimately true. Apart from its logical contradiction, the theory is unworkable in real life. Every person lives as though he believes in *something*, even if he says he believes in nothing.

Truth necessarily exists. But one may admit that without admitting that we, as finite, limited human beings, are capable of grasping Truth. Nietzsche’s perspectivalism is grounded in the notion that our spatial and temporal restrictions only allow us very limited perspectives of the world. Even if Truth exists, mortal man is unable to grasp it, for to grasp Truth is to transcend space and time to discern the eternal, the immutable, the absolute—and this mortals cannot do.

Of course, Nietzsche never considered the possibility (which would no doubt seem absurd to him) that Truth itself might come and reveal itself to mankind. In other words, despite man’s limited and finite nature, man might still be able to grasp absolute Truth through its being affirmatively revealed to him. This is a perfectly logical possibility, and to reject it outright is to have presupposed the nonexistence of absolute Truth in the first place—or at least to presuppose that absolute Truth cannot affirmatively reveal itself to mankind. However, it is just this possibility that religious traditions allow, particularly those that believe in the personal interaction of God (i.e., Absolute Truth) with mankind.

Conceding that Truth necessarily exists, the hard question is determining what, exactly, Truth is. And it is this question that public discourse should be allowed to determine, through its myriad political and legal channels, known to us as the democratic process. And yet, votes may only go so far, for at some point, the will of the majority must confront that colossal, ever-watchful guardian of rights—the Constitution. This is why the role of the legislator differs markedly from the role of the judge.

123. *Id.* § 612.

124. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 133 (G.E.M. Anscombe trans., 3d ed. 1953).

It is not the judge's task, as prescribed in our Constitution, to determine popular opinion, but rather to apply the law. The judge, however, is not exempt from value judgments any more than the legislator, and so determining how to apply the establishment and free exercise clauses without violating them seems to pose a not insignificant problem. For the Court to decide between what is "religious" and what is not is for the Court inevitably to prefer certain worldviews, with their inherent value systems, to others. This is a fundamentally moral process of decision-making.

And it is this that the Court does, although masking it behind terms like "neutrality," "endorsement," "secularism," and "religion." If value preferences are inevitable, even in the application of law in Establishment Clause jurisprudence, and if the secular/religious distinction is epistemologically incoherent, then are we at a crossroads? What is the judge's proper role here? For it is all fine and good to theoretically dismantle the secular/religious distinction, but one is still left with what courts are to do about it. Should one cast aside the distinction as irrelevant, in favor of postmodern disillusionment over establishing a coherent and principled approach to Establishment Clause jurisprudence? Or should one retain the distinction and work with it as best one can, defining as clearly as possible the terms employed? In answering this question, an illustration from another field of law can provide some insight.

For purposes of appellate review of lower court decisions, academics have long criticized the fact/law distinction as one that breaks down easily upon examination. Neat categorization fails when certain issues can be classified as either fact or law. However, Gary Lawson makes the insightful remark that this fact/law distinction, "which every sophisticated academic will tell you is a naive misconception, happens to be embodied in the United States Constitution. . . ."¹²⁵ And if one takes the Constitution seriously, as this Note certainly does, then one must work with the terms it has given us. Thus, the answer to the question posed above is given by the latter position: though the secular/religious distinction seems epistemologically incoherent, the terms are employed in our Constitution, statutes, and all of our Supreme Court jurisprudence. Therefore we have no choice but

125. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 504 (2d ed. 2001) (citing U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no *fact* tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.") (emphasis added)).

to make the distinction as coherent as possible. The way to do this, this Note proposes, is to define the terms clearly, and then apply them consistently.

It is precisely this that the Court has not done. Our Establishment Clause jurisprudence is yet to define exactly what religion and secularism are, and this is its greatest weakness. It is not enough to formulate a three-part test to determine whether a law establishes religion. If the terms employed *within* that test are undefined, then the Court will not know what is being advanced or inhibited, or what the purpose of the law in question really is. Some artificial line-drawing may be inevitable, and where the lines fall may even seem arbitrary—but the point is to lay down clear parameters that can be applied in a principled way. The inherent difficulties in line-drawing are nowhere near as problematic as the application of terms undefined and easily manipulable.

Although an artificial rigidity may result from the definitions set, and such artifice may appear unfair to the common litigant, the alternative results in far more injustice. Failing to define the terms leaves them unacceptably vague, and dangerously malleable. Each justice no doubt has his or her own notions as to what counts as religion, and what counts as secularism. But those notions remain confused and unexpressed. Judges always have the duty to explain the rationale behind their holdings. Although the Court has tried to do so in its Establishment Clause cases, it has failed to take it one step farther, not defining the very terms on which all else hangs.

With this goal in mind, we will be saved—it is hoped—from future footnotes like that of Justice Black's in *Torcaso v. Watkins*,¹²⁶ practically equating secularism with religion—neither helpful nor clarifying. Other cases in which the terms are notoriously stretched include those dealing with conscientious objectors. The Selective Service Act of 1940 required that a conscientious objector be exempted from armed service if his religious convictions informed him so.¹²⁷ In *United States v. Seeger*,¹²⁸ several conscientious objectors were denied exemption

126. 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country . . . are Buddhism, Taoism, Ethical Culture, *Secular Humanism*, and others." (emphasis added)).

127. Pub. L. No. 76-783, 54 Stat. 885, 889 (1940). The statute provides in relevant part, "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

128. 380 U.S. 163 (1965).

due to their lack of belief in traditional religion. On appeal, the Supreme Court reversed, allowing exemptions for each appellant. Religion, the Court found, is comprised of diverse strands of thought, and need not require belief in a personal God.¹²⁹ Quoting the theologian Paul Tillich,¹³⁰ religion could include any belief "you take seriously without any reservation."¹³¹ On such a definition, it would be difficult to exclude any worldviews. Another source cited in the opinion defined religion as "the supreme expression of human nature; it is man thinking his highest, feeling his deepest, and living his best."¹³² "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."¹³³ "Religion" thus becomes a morass of any conceivable belief, as long as it is firmly held.

Five years later in *Welsh v. United States*, the Supreme Court followed *Seeger* by reaffirming the breadth "religion" implies.¹³⁴ In a patronizing gesture, the Court offered that the registrant who listed himself as nonreligious on his Selective Service System form might *really* be religious, but just not know it.¹³⁵ The Court distinguished between beliefs resting on religious grounds as within the scope of the statute, versus beliefs that rest on "philosophical" grounds.¹³⁶ The Court failed to explain the difference between what counts as "religious" and what counts as "philosophical." Any person minimally schooled in basic philosophy understands, however, that philosophy is simply another word for worldview—and "worldview" includes religion.

The truths of philosophy, it should be said, are not restricted only to the sometimes ephemeral teachings of professional philosophers. All men and women . . . are in some sense philosophers and have their own philosophical conceptions with which they direct their lives. In one way or other, they shape a comprehensive vision and an answer to the question of life's meaning, and in the light of this

129. *Id.* at 176.

130. Generally regarded as more liberal than conservative among theologians.

131. PAUL TILlich, THE SHAKING OF THE FOUNDATIONS 57 (1948), *cited in Seeger*, 380 U.S. at 180.

132. *Seeger*, 380 U.S. at 169.

133. *Id.* at 176.

134. 398 U.S. 333 (1970).

135. *Id.* at 341.

136. *Id.* at 343.

they interpret their own life's course and regulate their behavior.¹³⁷

In his concurrence, Justice Harlan sharply criticized this aspect of the opinion. "The prevailing opinion today . . . has performed a lobotomy and completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely personal moral code.'"¹³⁸ And later:

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure [and] . . . loose and informal associations of individuals who share common ethical, moral, or intellectual views.¹³⁹

These cases set the precedent for defining religion extremely broadly, such that there is essentially little conceptual difference between secularism and religion. In order for any meaningful distinction to exist between the two, the Court must undertake the task of defining secularism and religion. It may be that "religion" must be limited in ways that seem artificial—for instance, religion may be restricted to include only those traditions that worship a Supreme Being. This automatically excludes Buddhism or Humanism, and this is problematic. However, the alternative seems worse, which is to do precisely what was done in *Welsh* and *Seeger*, and what is being done today—to allow "religion" to mean a hotchpotch of traditions espousing any deeply held beliefs. Defining the parameters is the only way to ensure a clearer, more principled Establishment Clause jurisprudence

On a different note, the Court's jurisprudence in this area, consistent with the analysis in this Note, is at least somewhat promising. *Lamb's Chapel*, *Good News Club*, and *Zelman* reveal a trend towards placing religion on an equal footing with secularism. Implicit in this move is the knowledge (conscious or not) that all worldviews—not simply "religious" ones—involve value preferences. Therefore, to exclude religiously-based reasoning from public discourse while allowing secularly-based justifications to stand is to discriminate unreasonably. Whether or not the

137. JOHN PAUL II, *supra* note 20, at 43.

138. *Welsh*, 398 U.S. at 351.

139. *Id.* at 354.

Court will attempt a redefinition of secularism and religion is unclear. But at least the recent trend away from “strict separationism” towards equal access is more consistent with proper epistemological analysis.