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SMITH V. BOARD OF SCHOOL COMMISSIONERS: 
THE RELIGION OF SECULAR HUMANISM IN 
PUBLIC EDUCATION 

STEVEN M. LEE*

[A] religious evacuation of the public square cannot be sus-
tained, either in concept or in practice. . . . When recog-
nizable religion is excluded, the vacuum will be filled by er-
satz religion, by religion bootlegged into public space under 
other names. . . .¹

INTRODUCTION

In a society which has experienced both a dissipation of 
moral consensus and a revival of religious fundamentalism, 
moral education in public schools is a sensitive and poten-
tially volatile issue. Some would attempt to avert controversy 
by placing morality beyond the purview of public school cur-
ricula. This solution, however, is highly specious. Both courts 
and educators generally agree that some form of public 
moral education is desirable, with the Supreme Court going 
so far as to conclude that moral education is necessary to the 
maintenance of a democratic society.² Further, even if de-
sired, the elimination of moral education from public schools

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1. R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY 
2. In Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), the 
Court stated that public education's objective is "the 'inculcation of' funda-
damental values necessary to the maintenance of a democratic political sys-
tem." Id. at 681 (quoting Ambach v. Norwick, 441 U.S. 68, 76-77 (1979)). 
See also Purpel & Ryan, infra note 3, at 3 ("There is an increasing demand 
for the schools to be a more forceful agent of moral development . . . ."); 
Note, Humanistic Values in the Public School Curriculum: Problems in Defining 
is not possible. Indeed, "[i]t is inconceivable for the schools to take [a] child for six or seven hours a day, for 180 days a year, from the time he is six to the time he is eighteen, and not affect the way he thinks about moral issues . . . ."\(^3\)

The issue, then, is not whether public schools should engage in moral education, but rather how public schools should engage in moral education. Traditional theistic religion once provided the framework.\(^4\) However, theistic religion's presence in public schools has declined, abetted by Supreme Court decisions calling for a strict separation of church and state.\(^5\) Public schools have replaced the theistic framework with moral relativism,\(^6\) an approach that encour-

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The secularization of public education was not completely a matter of constitutional exclusion. The teaching of traditional Christian morality declined as society's concepts of morality became more diverse. Industrialization depleted the role of the family as a morally unifying force, and mass immigration introduced concepts of morality that conflicted with the formerly predominant Protestant view. Purpel & Ryan, supra note 3, at 4. In order to accommodate an increasingly diverse constituency, public education began to emphasize open inquiry as opposed to teaching set religious values. Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 Ohio St. L. J. 663, 668 n. 21 (1987). See also N. Wolterstorff, Religion and the Schools 6-7 (1965) (discussing the "erosion" of religious values from public education).

6. See Note, supra note 2, at 804 ("The major purpose behind the emphasis upon moral and spiritual values in schools is to attempt to fill the void created by the removal of religion from the schools."); Purpel & Ryan, supra note 3, at 4 ("Cultural relativism and a supposed scientific objectivity replaced Protestant moral theology" in public education.).

ages children to rely solely on internal referents in defining their morality. Moral relativism has developed into an integral part of public education, apparent both as a general principle and in designed curricula.⁷

While moral relativism may be an appealing approach to moral education in a pluralistic society, it has been argued that moral relativism is tantamount to a secular religion. If tantamount to religion, its presence in public classrooms creates an obvious disharmony with the Supreme Court's adherence to the separation of religion and government. Smith v. Board of School Commissioners⁸ examines this disharmony by addressing the religious nature of moral relativism. In Smith, a group of parents and teachers in Alabama's Mobile County argued that certain elements of the curriculum advanced a "secular religion," violating the establishment clause of the first amendment.⁹ The Smith plaintiffs convinced a federal district court to ban a number of textbooks found to inculcate moral relativism through a humanistic approach to values education.¹⁰ Subsequently reversed,¹¹ the district court's decision illustrates the problems inherent in the Supreme

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9. Smith, 655 F. Supp. at 946. The first amendment provides in full: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. The first clause is referred to as the establishment clause. The second clause is referred to as the free exercise clause. Taken together, the clauses are known as the religion clauses.
10. Smith, 655 F. Supp. at 973. The plaintiffs also argued that the promotion of secular humanism inhibits theistic religion by denying the existence of absolute morality. The district court stated that "some religious beliefs are so fundamental that the act of denying them will completely undermine that religion." Id. at 987.
11. Smith v. Board of School Comm'rs, 827 F.2d 684 (11th Cir. 1987).
Court's current establishment clause analysis, especially in the sensitive area of public education.12

This note makes two main contentions: (1) that secular humanism is a religion within the meaning of the first amendment and (2) that humanistic approaches to values education in public schools impermissibly promote the religion of secular humanism through the inculcation of moral relativism. To begin, Part I of this note briefly discusses the development of the Supreme Court's existing establishment clause jurisprudence. Part II summarizes Smith within that jurisprudential context. Part III considers the religious nature of secular humanism, concluding that it is a religion for establishment clause purposes. Part IV examines the religious effect of humanistic values education and offers a possible solution to the secular humanism/humanistic values education quandary.

I. DEVELOPMENT OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The first amendment of the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion . . . ."13 The Supreme Court has found this language "at best opaque,"14 making the development of establishment clause jurisprudence a difficult task. Since the establishment clause was first applied to the states in 1947,15 the Court has based its jurisprudence on separation doctrine, a doctrine that promotes neutrality16 to-

12. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Supreme Court stated that the pervasive influence of public education over the children who are compelled to attend them creates a context of analysis requiring scrupulous compliance with the establishment clause. Id. at 104-05. See also Edwards v. Aguillard, 107 S. Ct. 2573, 2578 (1987) ("[I]n employing the three-pronged Lemon test, we must do so mindful of the particular concerns that arise in the context of public elementary and secondary schools.") (the Lemon test is discussed infra text accompanying notes 50-64).
13. U.S. Const. amend. I. For the full text of the amendment, see supra note 9.
15. See infra note 23.
ward religion through the separation of religion from government.\textsuperscript{17}

Separation doctrine has proven to be a problematic basis of analysis because it is underpinned by two tenuous assumptions:\textsuperscript{18} (1) that church and state are separable entities and (2) that a readily apparent distinction between the religious and the secular exists.\textsuperscript{19} Over time these assumptions have been challenged by the growth of government and a prolific diversification of religion,\textsuperscript{20} creating tension between the Court’s adherence to strict separation and social reality.\textsuperscript{21} Consequently, the Court’s opinions have been marred by confusion and inconsistency.\textsuperscript{22}

Separation jurisprudence has evolved from strict separation, a rigid approach which attempts to completely divide religion and government, to the \textit{Lemon} test, a more flexible approach that recognizes some overlap between the two.

\textsuperscript{17} “That doctrine [strict separation] prohibits any interaction whatsoever between institutions of government and those of religion.” Tushnet, \textit{infra} note 22, at 705 (footnote omitted). \textit{See generally} L. \textit{Pfeffer, Church, State and Freedom} (1953).

\textsuperscript{18} Strict separation is also based on the assumption that separation is mandated by the Constitution. \textit{See infra} notes 213-20 and accompanying text.

\textsuperscript{19} Implicit in separation doctrine is the assumption that the religious and the secular are each confined to distinct spheres of reality. This note contends that ostensibly secular beliefs have overlapped into the sphere of religion through religious diversification. Concerns relating to mankind, culture, science, philosophy, etc. often fall within the sphere of religion in today’s society. \textit{See Religious Commitment and Secularization: Readings in Secular and Theistic Religion} viii (C. Card & R. Ammerman eds. 1974) (“The idea of ‘secular religion’ no longer strikes one as a contradiction in terms.”).

\textsuperscript{20} \textit{See infra} note 128 and accompanying text. \textit{See also supra} note 19.

\textsuperscript{21} Moreover, strict separation conflicts with the free exercise clause, which requires the government to affirmatively accommodate religion in some instances. \textit{See infra} note 52 and accompanying text.

A. Strict Separation

The Court first articulated its commitment to strict separation in *Everson v. Board of Education.* In *Everson,* the Court considered the constitutionality of a public school system reimbursing parents for costs incurred in transporting their children to sectarian schools. Although the Court affirmed the validity of the practice because of a perceived secular purpose and effect, namely, the safe, expedient transportation of children to and from school, it announced that the establishment clause requires the strict separation of religion and government. Writing for the Court, Justice Black declared, "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."

Though the *Everson* Court was unanimous in its pronouncement that the establishment clause requires strict separation, it divided 5-4 on the issue of whether the reimbursement practice was permissible. The majority's reluctance to apply strict separation in a manner consistent with its rhetoric implied an early recognition of strict separation's functional shortcomings. Nevertheless, the rhetorical commitment to strict separation was emphasized less than two years later in *McCollum v. Board of Education.* The *McCollum* Court found unconstitutional the practice of an Illinois public school district allowing religious-instruction classes during

23. 330 U.S. 1 (1947) (for the first time applying the establishment clause to the states).
24. Id. at 18.
25. Id. at 16.
26. Id. at 18. The "wall of separation" metaphor was written by Thomas Jefferson in a letter to the Danbury Baptist Association in 1802. Jefferson wrote, "[I] contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." T. JEFFERSON, WRITINGS 510 (M. Peterson ed. 1984).
28. "[T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters." Id. at 19 (Jackson, J., dissenting).
school hours on school premises. The "release-time" arrangement permitted outside teachers, employed by private religious groups, to give religious instruction to willing students who had secured parental permission. Finding that the arrangement was an impermissible use of the tax-supported school system to aid religious groups, the Court invoked the "wall-of-separation" metaphor.

As America moved into the 1950s the tension inherent in strict separation began to surface. This tension was reflected in Zorach v. Clauson, where the Court upheld the validity of a "release-time" program similar to the program invalidated in McCollum. In Zorach, the Court refined its establishment clause rhetoric stating, "The First Amendment . . . does not say that in every and all respects there shall be a separation . . . . Rather . . . there shall be no concert or union or dependency one on the other." The Court also explicitly recognized that government may, in some instances, affirmatively accommodate an individual's religious needs without violating the establishment clause.

Ten years after Zorach, the Court heard the controversial "school prayer" cases, Engel v. Vitale and School District of Abington Township v. Schempp. In Engel, a New York school board directed the daily recitation of a nondenominational prayer at the commencement of each school day. The state

30. Id. at 207.
31. Id. at 205-06.
32. Id. at 206.
33. Id. at 211.
34. See infra note 51.
36. In Zorach, the practice of the New York City school system in releasing students during school hours to attend religious courses was found constitutional. The Court distinguished the case from McCollum on the ground that off-campus religious instruction presented a problem different from the on-campus religious instruction. Id. at 308-09.
37. Id. at 312.
38. Id. at 313-14 ("When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.").
40. 374 U.S. 203 (1963). For a good analysis of the Court's religion clause jurisprudence in light of its school prayer decisions, see generally C. Rice, The Supreme Court and Public Prayer: The Need for Restraint (1964) (with particular attention to pp. 3-22 (criticizing the Court for paying deference to a small anti-God minority while ignoring the pro-God majority)).
41. Engel, 370 U.S. at 422.
argued that the prayer practices were constitutionally permissible because the school did not compel student participation. The Court rejected this argument, holding that the establishment clause does not depend upon a showing of overt compulsion. Encouragement, the Court found, is indirect coercion and is violative of the clause.

Following on the heels of Engel, Schempp represented the Court's first attempt to promulgate a formal test for constitutionality under the establishment clause. In that case, the Court found unconstitutional a Pennsylvania statute requiring the reading of Bible verses in public school classrooms, even though the school district proposed a number of valid secular purposes. The Court held that the avowed secular purposes failed to overcome the religious character of the exercise. Thus, the finding of a secular purpose does not end establishment clause analysis. The court proposed:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

A second major development in Schempp was a further refinement of the Court's rhetoric. In delivering the Schempp opinion, Justice Clark wrote not of separation, but rather of "wholesome neutrality." In referring to Everson, Clark did not invoke the "wall-of-separation" metaphor. He instead wrote, "[T]he Court held that the [first] Amendment 'requires the state to be neutral in its relations with groups of religious believers and non-believers . . . ." 

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42. Id. at 430.
43. Id. at 431.
44. The Court disallowed the practice even though the statute excused children from the readings at their parents' request. Schempp, 374 U.S. at 205.
45. The lower court identified the promotion of moral values, the contradiction of materialistic trends, the perpetuation of social institutions, and the teaching of literature as secular purposes of in-class Bible reading. Id. at 223.
46. Id. at 224.
47. Id. at 222.
48. Id.
49. Id. at 218 (quoting Everson v. Board of Educ., 330 U.S. 1, 18 (1947)).
B. The Lemon Test

The shift of focus from separation to neutrality reflected what Zorach had foreshadowed: the Court's realization that absolute separation is not possible. Government had become too pervasive to remain completely uninvolved in religion, and religion had diversified to the extent that distinctions between the secular and the religious were not always clear. Further, it had become apparent that strict adherence to separation necessarily conflicted with the free exercise clause, which often mandates an accommodation of religion. In light of these developments, the Court sought an increased flexibility that would reconcile the necessary overlaps between government activity and religion.

Establishment clause jurisprudence found a certain stasis in Lemon v. Kurtzman, where the Court examined the "cumulative criteria developed . . . over [the] years" and distilled a comprehensive, if somewhat formalistic, test. The so-

50. See Roemer v. Board of Pub. Works, 426 U.S. 736, 745-46 (1976) ("A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church. . . . [A] hermetic separation of the two is an impossibility . . . ."). See also L. Tribe, supra note 16, § 14-6, at 1185 ("[T]he reach of the state has . . . grown. . . . [and a]s a consequence, church concerns often overlap substantially with state concerns.").

51. See supra note 19 and accompanying text. See also infra note 128 and accompanying text.

52. In Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court held that the state must accommodate certain religious beliefs, finding that Amish children were exempt from mandatory school attendance requirements because attending public schools would undermine their religious faith. Id. at 210-12. See also Sherbert v. Verner, 374 U.S. 388 (1963) (holding that the state may not deny unemployment benefits to a Seventh-Day Adventist who, for religious reasons, would not work on Saturdays).

53. In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the Court stated that government could accommodate religion as long as it maintained "benevolent neutrality": "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. at 669.

54. 403 U.S. 602 (1971). In Lemon, the Court invalidated a Rhode Island statute authorizing a 15% salary supplement for teachers in nonpublic schools and a Pennsylvania statute authorizing the state to reimburse nonpublic schools for certain teacher services and school materials. The statutes were found to excessively entangle government with religion. Id. at 625.

55. Id. at 612.
called *Lemon* test, a product of the more flexible attitude the Court had adopted, is comprised of three parts.\(^{56}\) Part one requires a clearly secular purpose behind a governmental activity. Part two prohibits the activity from having a primary effect of either advancing or inhibiting religion. Part three prohibits “excessive entanglement” between government and religion.\(^{57}\) That this test represented a shift from rigid adherence to strict separation is reflected in Chief Justice Burger’s observation that “the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier . . . .”\(^{58}\)

While the more flexible approach has recognized the possibility of some governmental aid to religious schools\(^{59}\) and limited accommodation of religion in public schools,\(^{60}\) the majority of recent establishment clause cases has reiterated the settled proposition that public schools are secular institutions.\(^{61}\) The express goal of “wholesome or benevolent neutrality”\(^{62}\) is neutrality between religion and irreligion, not merely among religions.\(^{63}\) Therefore, the government may

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56. *Id.* at 612-13.


59. *Id.* at 616-17 (acknowledging that the establishment clause permits government to provide sectarian schools with certain services). *See supra* note 53 and accompanying text.

60. *See supra* note 52.


63. “[The first] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers . . . .” *Everso*n v. *Board of Educ.*, 330 U.S. 1, 18 (1947). “Neither a state nor the Federal Government can . . . . aid one religion, *aid all religions*, or prefer one religion over another. . . . .” *Id.* at 15 (emphasis added). For an objection to the Court’s position, see *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).
not favor or promote religion even as a general subject matter in a nondiscriminatory manner. Thus, the judicial view put forth in *Lemon* represents a refinement of separation doctrine, not its abandonment; that is, the Court now seeks separation between church and state to the greatest practical extent.64

In *Lynch v. Donnelly,*65 the Supreme Court expressed an unwillingness to be confined to the *Lemon* test.66 Nevertheless, *Lemon* clearly remains a staple in matters of public education. The Court recently noted that it has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children."67 The *Lemon* test was used by both the federal district court and the appellate court in adjudicating *Smith v. Board of School Commissioners.*

II. SMITH V. BOARD OF SCHOOL COMMISSIONERS

The plaintiffs in *Smith* asserted that secular humanism is a religion and that the public school curriculum advanced that religion in violation of the establishment clause. Specifically, the plaintiffs argued that certain textbooks actively promoted secular humanism by inculcating a relativistic moral system and that, therefore, the school district could be enjoined from using the books.68

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64. "The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other." *Lemon* v. *Kurtzman,* 403 U.S. 602, 614 (1971). Some commentators urge a return to strict separation. See Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause,* 81 COLUM. L. REV. 1463 (1981). See also Committee for Pub. Educ. v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) ("I would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment." (citation omitted)).


66. *Id.* at 679. In *Marsh v. Chambers,* 463 U.S. 783 (1983), the Court did not apply the *Lemon* test in upholding the constitutionality of chaplaincy and prayer in the Nebraska legislature. The Court held that the legislative practice of opening sessions with a chaplain's prayer has become a "part of the fabric of our society... [and] is simply a tolerable acknowledgment of beliefs widely held among people of this country." *Id.* at 792.


68. *Smith v. Board of School Comm'rs,* 655 F. Supp. 939 (S.D. Ala. 1987). The plaintiffs also argued that the texts inhibited traditional religions by ignoring their historical and social significance. That issue is separate from the issue of this note—whether secular humanism is promoted in the classroom in violation of the establishment clause as an advancement of religion. See infra note 86.
A. Background

Smith began as an intervention in Jaffree v. Wallace. In 1982, Ishmael Jaffree brought an action against Mobile County's school board and the state of Alabama. The complaint challenged the constitutionality of certain prayer activities and three statutes authorizing the activities. The statutes authorized, respectively, a minute of silence for meditation, a minute of silence for prayer or meditation, and a prescribed teacher-led prayer. Specifically, Jaffree objected to organ-

69. 705 F.2d 1526 (11th Cir.), reh'g and reh'g en banc denied, (11th Cir. 1983), aff'd, 472 U.S. 38 (1985). At the district court level the case was bifurcated into Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala.), and Jaffree v. James, 554 F. Supp. 1130 (S.D. Ala. 1983), separating the action against the school board from that against the state. The appellate court subsequently reconsolidated the case and nominated it Jaffree v. Wallace, as the original defendant Governor Fob James had been replaced in office by George Wallace. Smith, 655 F. Supp. at 942. For the complete procedural history, see supra note 8.

70. The action was brought pursuant to 42 U.S.C. § 1983 (1982), which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

71. ALA. CODE § 16-1-20 (1975 & Supp. 1987) provided:

At the commencement of the first class each day in the first through the sixth grades in all public schools, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, shall be observed for meditation, and during any such period silence shall be maintained and no activities engaged in.

ALA. CODE § 16-1-20.1 (1975 & Supp. 1987) provided:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.2 (1975 & Supp. 1987) provided:

From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

(prayer omitted).
ized prayer in Mobile County school rooms when his children were in attendance.\textsuperscript{72} He sought an injunction against in-class prayer and a declaratory judgment that the statutes violated the establishment clause.\textsuperscript{75}

Douglas T. Smith, a public school instructor, and over 600 other teachers and parents filed a motion to intervene in the action alleging that the injunction would violate their right to free exercise of religion.\textsuperscript{74} Alternatively, the intervenors pled that if the injunction was granted, it also should be enforced against "the religions of secularism, humanism, evolution, materialism, agnosticism, atheism and others."\textsuperscript{76} The United States District Court for the Southern District of Alabama, in an opinion by Judge W. Brevard Hand, denied Jaffree any relief and dismissed the action for failing to state a claim.\textsuperscript{76} Because the court found that the establishment clause did not apply against the states, the \textit{Lemon} test was not even considered.\textsuperscript{77}

\textsuperscript{72} Pixie Alexander led her class in a daily recitation of the Lord's Prayer at Craighead Elementary School. Jaffree v. Board of Commissioners, 554 F. Supp. 1104, 1107 (S.D. Ala. 1983). Julia Green, an instructor at Morningside Elementary School, frequently led her class in a recitation of "For health and strength and daily food,/we praise Thy name, Oh Lord." \textit{Id.} And Charlene Boyd, an instructor at E.R. Dickson Elementary School, led her class each day in the following recitation: "God is great, God is good,/let us thank him for our food,/bow our heads we all are fed,/give us Lord our daily bread./Amen!" \textit{Id.} All three teachers continued their practices after being apprised of Jaffree's objections. \textit{Id.} at 1107-08.

\textsuperscript{73} Smith v. Board of School Comm'rs, 655 F. Supp. 939, 942 (S.D. Ala. 1987).

\textsuperscript{74} \textit{Id.} The free exercise clause argument was never considered in \textit{Jaffree} or \textit{Smith}. For a good illustration of free exercise clause analysis in a similar context, see Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), rev'd, 827 F.2d 1058 (6th Cir.), \textit{reh'g and reh'g en banc denied}, (6th Cir. 1987), cert. denied, 108 S. Ct. 1029 (1988). See also, Michael, \textit{The Free Exercise Clause: Can Mandatory Use of Certain Textbooks Be Protected Conduct?} 3 NOTRE DAME J.L. ETHICS & PUB. POL'Y 469 (1988).

\textsuperscript{75} Smith, 655 F. Supp. at 942.

\textsuperscript{76} Jaffree v. James, 554 F. Supp. 1130, 1132 (S.D. Ala. 1983). The case was dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

\textsuperscript{77} Jaffree v. Board of School Comm'rs, 544 F. Supp. 1104, 1118 (S.D. Ala. 1983). Judge Hand reasoned by way of historical analysis that the framers intended the establishment clause only to apply against the federal government and that the fourteenth amendment did not incorporate the clause against the states. \textit{Id.} at 1113-29.

The United States Court of Appeals for the Eleventh Circuit reversed, finding that the first amendment protection against establishment of religion applies to the states by incorporation through the fourteenth amendment. The court went on to hold that the questioned prayer activities and the statutes authorizing a moment of silence for prayer or meditation and a teacher-led prayer violated the establishment clause under the criteria set forth in Lemon. In the appellate court's judgment, the statutes were not motivated by a clearly secular purpose; and, they had a primary effect of advancing religion. The United States Supreme Court affirmed the appellate court in a 6-3 decision, with Chief Justice Burger, Justice White, and Justice Rehnquist dissenting.

Judge Hand quoted Justice William O. Douglas in support of his position:

"A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it."

Jaffree, 554 F. Supp. at 1127 (quoting Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949)).

78. Jaffree v. Wallace, 705 F.2d 1526, 1532 (11th Cir. 1983) ("[T]he Supreme Court has considered and decided the historical implications surrounding the establishment clause. The Supreme Court has concluded that its present interpretation of the first and fourteenth amendments is consistent with historical evidence." (emphasis in original)).

79. Id. at 1536. The court made no ruling on Ala. Code § 16-1-20 (authorizing a minute of silence for meditation). For the full text of the provision, see supra note 71.

80. Jaffree, 705 F.2d at 1535.


82. In dissent, Justice Rehnquist argued that the Court has misconceived the true purpose of the establishment clause, positing that the clause was designed not to maintain a neutrality between religion and irreligion, rather only to prevent the federal government from establishing a national religion. Therefore, under his analysis, the Alabama statutes and related prayer activities were permissible. Jaffree, 472 U.S. at 91-114 (Rehnquist, J., dissenting).
On remand, the district court issued an order enjoining the unconstitutional statutes and activities. Jaffree withdrew from the controversy, and the alternative petition of the intervenors—that no establishment of any religion, including secular humanism, should be allowed—was considered. The court realigned the parties making the original intervenors (Smith et al.) the plaintiffs, with the case recaptioned *Smith v. Board of School Commissioners*.

**B. The District Court Opinion in Smith**

Judge Hand granted an injunction in favor of the plaintiffs, banning five textbooks. The texts, all approved by the state, fell under the subject heading of home economics. The parties agreed that a valid secular purpose for using the books existed and that use of the books did not constitute an excessive entanglement of government and religion, thereby satisfying the *Lemon* test's first and third prongs. The court considered only the second prong—whether the activity had a primary effect of either advancing or inhibiting religion. Relying on the testimony of numerous experts, the court found secular humanism to be a belief system that


84. The district court extended to the original plaintiffs the right to withdraw. Jaffree et al. made, and were granted, a motion to this effect. *Id.* at 943-44.

85. In the original *Jaffree* opinion, the district court reserved the right to "look again at the record . . . and reach conclusions which it [was not then] forced to reach." *Jaffree v. Board of School Comm’rs*, 554 F. Supp. 1104, 1129 (S.D. Ala. 1983). The court identified issues not reached as including the establishment clause challenge to the teaching of secular humanism. *Id.* at 1129 n. 41.

86. Forty-four textbooks were actually banned. Thirty-nine were found unconstitutional because they failed to adequately discuss religion. This note does not consider the issue of whether a failure to adequately discuss religion violates the establishment clause. This note will focus on the five home economics texts found to affirmatively promote secular humanism. See supra note 68.


89. *Id.*

90. The experts included: Dr. Russell Kirk (B.A., Michigan State University; M.A., Duke University; D.Litt., St. Andrews University (Scot-
"makes a statement about supernatural existence a central pillar of its logic; defines the nature of man; sets forth a goal or purpose for individual and collective human existence; and defines the nature of the universe, and thereby delimits its purpose."91 Under an expansive definition of religion gleaned from Supreme Court precedent,92 the court found secular humanism to be a religion for establishment clause purposes.93

The court then ruled that the banned texts inculcated moral relativism, which the court found to be a manifestation of secular humanism, through a humanistic approach to values education.94 In the court's view, the texts promoted that moral choice is merely a matter of preference and that preference should be determined through a consideration of temporal consequences.95 Describing the curriculum as a "relativistic and individualistic approach [which] constitutes the promotion of a fundamental faith claim,"96 the court found the texts unconstitutional as an advancement of religion.97

C. The Appellate Court Opinion

The Court of Appeals for the Eleventh Circuit reversed the decision of the district court without reaching the issue of whether secular humanism is a religion.98 The appellate court held that even if secular humanism is a religion, the banned texts were not unconstitutional.99 In concluding that the banned texts did not violate the establishment clause, the
circuit court found that the value system promoted by the books was neutral toward religion.\textsuperscript{100}

The circuit court stated that any benefit to the religion of secular humanism was only indirect, remote, and incidental, not constituting a violation of the \textit{Lemon} test.\textsuperscript{101} Moreover, the court relied on language in Justice O'Connor's concurrence to \textit{Lynch}, stating that "'[t]he effect prong [of the \textit{Lemon} test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'"\textsuperscript{102} The circuit court held that the home economics texts did not endorse secular humanism, finding that the message conveyed reflects only "a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making."\textsuperscript{103} The court then concluded, "This is an entirely appropriate secular effect."\textsuperscript{104}

III. SECULAR HUMANISM AS RELIGION

To violate the second prong of the \textit{Lemon} test an activity must either advance or inhibit religion.\textsuperscript{105} Although conventional definitions of religion\textsuperscript{106} might exclude secular humanism, the following discussion will reveal that secular humanism is a religion within the meaning of the first amendment.

A. What is Secular Humanism?

Depending upon the historical context, the term humanism has different meanings.\textsuperscript{107} Although derived from Greek

\begin{itemize}
  \item \textsuperscript{100} \textit{Id.} at 690.
  \item \textsuperscript{101} \textit{Id.} at 691.
  \item \textsuperscript{102} \textit{Id.} at 690 (citation omitted).
  \item \textsuperscript{103} \textit{Id.} at 692.
  \item \textsuperscript{104} \textit{Id.}
  \item \textsuperscript{105} \textit{See supra} notes 56-57 and accompanying text.
  \item \textsuperscript{106} 
\[\text{[T]he personal commitment to and serving of God or a god with worshipful devotion, conduct in accord with divine commands esp. as found in accepted sacred writings or declared by authoritative teachers . . .].} \] \textit{WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY} 1918 (1986).
  \item \textsuperscript{107} Melnick, \textit{Secularism in the Law: The Religion of Secular Humanism}, 8 Ohio N. U. L. Rev. 329, 335 (1981). Early humanism can be traced back to ancient Greece, where "supremacy of reason was the order of the day. . . . [and] civil law and emperor rose to the level of a god. . . ." \textit{Id.} at 335 n. 36. In more modern times, humanism resurfaced during the Renaissance and grew during the Enlightenment's Age of Reason. \textit{Id.} at 335. \textit{See also} J. \textit{van Praag}, \textit{FOUNDATIONS OF HUMANISM} 21-26 (J. Herget trans. 2d ed. 1982) (chronicling humanism of "antiquity").
\end{itemize}
and Renaissance humanism, modern secular humanism bears only a superficial resemblance to those philosophies. Modern secular humanism is a comprehensive man-centered belief system describing no single organized movement, but rather the unifying principles that relate a number of organized movements and countless individuals. One commentator has examined various characterizations of secular humanism and has formulated a two-part definition:

1) The placement of human and worldly concerns above concerns about God or the supernatural. This prong has two elements: (a) the denial of, or skepticism about, the existence of the supernatural or the denial of its relevance in the natural world, and (b) corresponding emphasis on the importance of humans and the concerns of the temporal world; and

2) Confidence in reason, which also includes two elements: (a) belief in the importance of science and technology as a method of improving the world, and (b) a system of ethics based on reason rather than on an external source dictating ethical behavior.

Modern secular humanism appeared in the United States as a social phenomenon in the late nineteenth century. Charles Darwin's theories pertaining to the origin of life helped launch secular humanism into mainstream American


109. "Humanist Manifesto II" proclaims that secular humanism "affirm[s] a set of common principles that can serve as a basis for united action . . . ." Humanist Manifesto II, supra note 19, at 5.


John Whitehead and John Conlan have identified six specific tenets of secular humanism:

1) Denial of supernatural agencies.
2) Belief in the supremacy of human reason.
3) Belief in the inevitability of progress.
4) Belief in science as the guide to human progress and the ultimate provider of an alternative to both religion and morals.
5) Belief in the self-sufficiency and centrality of man.
6) Belief in the absolutism of evolution.


111. Whitehead & Conlan, supra note 110, at 27-29.
culture by offering a viable alternative to divine creation.\(^{112}\) The emergence of Darwinism is also said to have fostered a mentality hostile to objective morality in favor of the belief that morality is temporal and subjective.\(^{113}\)

Relativistic morality was a founding principle of the organized secular humanism movements that emerged in the early part of this century.\(^{114}\) These movements were characterized by coherent organizational structures and formal methods of proselytization.\(^{115}\) After World War II, the growth of secular humanist movements accelerated, both in their numbers and in the scope of their activities.\(^{116}\) Today, secular humanism is a widely-accepted philosophy. Although secular humanism has been called "the dominant religion of our time,"\(^{117}\) categorizing it as a religion for establishment clause purposes requires adoption of a fairly broad, and non-traditional, definition of religion.

B. Defining Religion

Religion does not lend itself to a single compendious definition.\(^{118}\) Some scholars would restrict religion's definition to

112. Darwin's theories provided the basis for a complex theory concerning the origin of man. Called "biological evolution" or "biological Darwinism," the theory traces man's development from single celled-life forms to fish, from fish to amphibian, from amphibian to reptile, and from reptile to mammal. The theory further posits that as a mammal, man developed from the lower-primate ape to humanoid. See generally L. GAMLIN & G. VINES, THE EVOLUTION OF LIFE (1987).
113. Whitehead & Conlan, supra note 110, at 28-29 (discussing how "survival of the fittest" had become a code of behavior especially in business practices).
114. J. VAN PRAAG, supra note 107, at 45.
115. Id. at 48-52.
116. Id.
118. The ENCYCLOPEDIA OF PHILOSOPHY lists a survey that reveals many different definitions. That survey includes the following: "Religion is the belief in an ever living God, that is, in a Divine Mind and Will ruling the Universe and holding moral relations with mankind." — James Martineau; "Religion is the recognition that all things are manifestations of a Power which transcends our knowledge." — Herbert Spencer; "Religion is rather the attempt to express the complete reality of goodness through every aspect of our being." — F.H. Bradley; "Religion is ethics heightened, enkindled, lit up by feeling." — Matthew Arnold; "[I]t [religion] may best be described as an emotion resting on a conviction of a harmony between ourselves and the universe at large." — J.M.E. McTaggart; "A man's religion is the expression of his ultimate attitude to the universe, the summed-up meaning and purport of his whole consciousness of things." — Edward Caird; "To be religious is to effect in some way and in some mea-
those belief systems that contemplate a deity or other supernatural force.\textsuperscript{119} Others would expand the definition to encompass belief systems that range beyond theism.\textsuperscript{120} Many modern theologians define religion without reference to substantive criteria. Notably, Paul Tillich, Hans Kung, and others have defined religion by the psychological function it serves in the lives of adherents, creating a tautology under which belief systems that fill a role usually filled by traditional religions are religions.\textsuperscript{121}

Because no consensus as to the precise meaning of the word religion exists,\textsuperscript{122} its nature is better left undefined and treated simply as "a problem in the philosophy of religion."\textsuperscript{123} Unfortunately, implementation of the Lemon test requires some functional definition. In order to determine whether an activity advances or inhibits religion, courts must know what is encompassed by that term. In most cases the courts have not been forced to test the boundaries of the "semantic penumbra of the word 'religion,'"\textsuperscript{124} simply taking for granted that traditional theistic religions fall within the definition.\textsuperscript{125} Claims involving nontraditional religious beliefs, however, are more perplexing.

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\textsuperscript{120} Stark & Bainbridge, supra note 119, at 3 (citations omitted). See also R. Bellah, Beyond Belief (1970); P. Tillich, What is Religion? (1973); J. Yinger, Religion, Society and the Individual (1957).

\textsuperscript{121} Both Tillich and Kung define religion by its psychological function and assert that everyone has a religion; that is, everyone has some belief that fills the role in life usually filled by religion. Tillich frames the analysis in terms of a person's "ultimate concern," a term adopted by the Court in United States v. Seeger, 380 U.S. 163, 187 (1965). See Ultimate Concern; Tillich in Dialogue (D. Brown ed. 1965); H. Kung, Does God Exist? An Answer For Today (E. Quinn trans. 1980). See also D. Carmody & J. Carmody, Religion: The Great Questions 2 (1983) ("In our view, religion is the dimension of human life that deals with ultimate questions. The great issues of where we came from, where we are going, and what we ought to live for comprise religion's living heart."); cf. A. Reines, Polydoxy (1987) (every individual's religion is his response to finitude, the realization of limited existence).

\textsuperscript{122} See supra note 118.

\textsuperscript{123} 7 The Encyclopedia of Philosophy 140 (1972).


\textsuperscript{125} See Malnak v. Yogi, 592 F.2d 197, 201 (3d Cir. 1979) (Adams,
1. The Expansive First Amendment Definition

Guidelines for determining what constitutes a religion for first amendment purposes can be gleaned from Supreme Court decisions. Early decisions conformed with conventional Western concepts, limiting religion to theistic belief. Although this approach may have been appropriate to nineteenth-century America when religious pluralism meant a plurality of theistic religions, a broader concept of religion was necessary to respect the prolific religious diversification that occurred in the twentieth century.

Judicial acceptance of a broad concept of religion is logical given the underlying purpose of the religion clauses, namely, religious liberty. Although more explicitly stated in the free exercise clause, voluntarism is the essence of religious freedom in both the free exercise clause and the estab-

J., concurring) (pointing out that through the nineteenth century, definitions of religion were tied to a belief in God). See infra note 127 and accompanying text.

126. See United States v. Macintosh, 283 U.S. 605 (1931) (see infra note 141); Davis v. Beason, 133 U.S. 333, 342 (1890) (The Court defined religion as “one's views of his relations to his Creator . . . .”).

127. L. Tribe, supra note 16, § 14-6, at 1179.

128. In the 1960s and early 1970s hundreds of new religions, both theistic and nontheistic, appeared in society. Wuthnow, Religious Movements and Counter-movements in North America, in New Religious Movements and Rapid Social Change 4-8 (J. Beckford ed. 1986). See generally Melton's Encyclopedia of American Religions (1983) (recognizing hundreds of religions—theistic and nontheistic, traditional and nontraditional—with a presence in America including, e.g., Zen Buddhism, the Unification Church, the Process Church, the Christian World Liberation Front, Hare Krishna, etc.).

Traditional religions have also diversified by shifting focus from a “theocentric, transcendental perspective to forms of religious consciousness that stress the immanence of meaning in the natural order.” L. Tribe, supra note 16, § 14-6, at 1180 (footnote omitted).

129.

When the Constitution’s Framers wrote the religion clauses they hoped to end the history of religious persecution and civil war that had plagued humankind for so long. Their effort has largely, but not perfectly, succeeded. That success is partly a direct result of the rules established by the religion clauses. . . . The constitutional guarantee of religious liberty provides a legal mechanism by which any individual who thinks his religious liberty is violated may call the government to account judicially . . . .

lishment clause.\textsuperscript{130} Realistically, belief systems compete for the minds and souls of individuals in the marketplace of ideas.\textsuperscript{131} To protect the voluntary nature of religious affiliation, all systems that compete with conventional religions should be treated as religions.\textsuperscript{132} Under a narrower view, adherents to nontheistic religions might lose the freedom of voluntary affiliation or gain the power of establishment. Any definition appropriate for the concerns of the religion clauses must encompass all belief systems that compete for the religious mind. The Supreme Court has chosen to give religion such a definition.

In the 1940s, courts began to depart from a definition limited to "one's views of his relations to his Creator."\textsuperscript{133} In United States v. Kauten,\textsuperscript{134} the Court of Appeals for the Second Circuit asserted that "[r]eligious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men and to his universe . . . ."\textsuperscript{135} The Supreme Court followed in United States v. Ballard, stating that sincerity, not creed, is the most important factor in categorizing beliefs as religious or nonreligious.\textsuperscript{136}

In the 1960s two Supreme Court cases, Welsh v. United States\textsuperscript{137} and United States v. Seeger,\textsuperscript{138} clarified the meaning of religion by adopting a position similar to that proposed in Kauten. In Seeger, the Court construed the meaning of religious belief as used in a federal statute exempting conscientious objectors from military service. The statute provided an exemption for persons who are conscientiously opposed to

\textsuperscript{130} L. Tribe, supra note 16, § 14-3, at 1160-61 (voluntarism is the most fundamental goal of the religion clauses). See also Note, Toward a Constitutional Definition of Religion, 91 Harv. L. Rev. 1056, 1058 (1978) (voluntarism is the implicit goal of the establishment clause).


\textsuperscript{132} See Walz v. Tax Comm'n, 397 U.S. 664, 696 (1970) (Harlan, J., concurring) (arguing that neutrality should be viewed in an equal protection mode of analysis). See also Note, supra note 131, at 164-69 (proposing that establishment clause analysis should be governed by principles analogous to "broad rights of free expression and access to a variety of ideas" already protected in public education).

\textsuperscript{133} Davis v. Beason, 133 U.S. 333, 342 (1890).

\textsuperscript{134} 133 F.2d 703 (2d Cir. 1943).

\textsuperscript{135} Id. at 708.

\textsuperscript{136} 322 U.S. 78, 86-88 (1944) (stating that courts may question the sincerity of claimed religious beliefs, but may not attempt to assess the correctness of those beliefs).


\textsuperscript{138} 380 U.S. 163 (1965).
participation in war because of religious training and belief.\textsuperscript{139} The term \textit{religious belief} was defined by the statute as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation . . . ."\textsuperscript{140} The Court concluded that in using the term \textit{Supreme Being} rather than the term \textit{God}, Congress was merely clarifying the meaning of \textit{religious belief} to embrace all religions.\textsuperscript{141} Within that context the Court granted exemptions to petitioners who based their claims on beliefs that fell outside of conventional definitions of religion. Seeger, for example, admitted a skepticism concerning the existence of God and asserted

a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." . . . He cited such personages as Plato, Aristotle and Spinoza for support of his ethical belief in intellectual and moral integrity "without belief in God, except in the remotest sense."\textsuperscript{142}

In concluding that Seeger's beliefs were religious beliefs that qualified for a conscientious objector's exemption, the Court adopted a functional definition of religion.\textsuperscript{143} Relying on the works of theologians including Paul Tillich, the Court ruled that religion should be defined by its psychological function,\textsuperscript{144} stating that the question of religion turns on

\begin{itemize}
  \item \textsuperscript{139} Universal Military Training and Service Act § 6(j), 50 U.S.C. App. § 456(j) (1958).
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Seeger}, 380 U.S. at 165-66. The language of the statute's explanatory phrase was apparently taken from United States v. Macintosh, 283 U.S. 605 (1931), where Chief Justice Hughes wrote, "The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation." \textit{Id.} at 633-34. The \textit{Seeger} Court reasoned that Congress had substituted the word \textit{Supreme Being} for the word \textit{God} in order to broaden the definition of religion to include nontraditional beliefs. \textit{Seeger}, 380 U.S. at 175-76.
  \item \textsuperscript{142} \textit{Seeger}, 380 U.S. at 166 (citations omitted).
  \item \textsuperscript{143} \textit{Id.} at 187.
  \item \textsuperscript{144} \textit{Id.} The Court quoted Dr. Tillich as some length:

  "I have written of the God above the God of theism . . . . In such a state [of self-affirmation] the God of both religious and theological language disappears. But something remains, namely, the seriousness of that doubt in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God,' the power of being, which works through those who have no name for it, not even the name God.'"

\textit{Id.} at 180 (quoting 2 \textit{TILLICH, SYSTEMATIC THEOLOGY} 12 (1957)).
\end{itemize}
whether a given belief is an "ultimate concern" which occupies the same place in the life of its possessor as the belief in a supernatural deity occupies in traditionally religious persons.

Five years after Seeger, the Court again construed the meaning of religious belief in the context of the military exemption statute. In Welsh, a case factually similar to Seeger, the Court found that Welsh's general moral and ethical opposition to war, "formed 'by reading in the fields of history and sociology,'" constituted a religious belief. In reaching this conclusion, the Court noted:

Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by ... God" in traditionally religious persons.

Thus, psychological function, not supernatural content, determine the religious nature of the belief. Within this paradigm theistic belief is but one type of religious belief. Nontheistic belief, including secular humanism, may be another type.

The Court also consulted Dr. David Saville Muzzey of the Ethical Culture Movement who wrote that everyone believes in God, the only question being "what kind of God," id. at 182-83 (quoting D. MUZZEY, ETHICS AS A RELIGION 86-87 (1951) (emphasis in original)), and Anglican Bishop John A.T. Robinson who commented on society's growing disbelief in a God who is "up there" or "out there." Id. at 181 (quoting J. ROBINSON, HONEST TO GOD 13-16 (1963)).

146. Id. at 176.
148. Id. at 340.
2. The Bifurcated First Amendment Definition

The cases dealing with the expansive definition of religion have been decided under the free exercise clause. Consequently, some commentators have promoted limiting the expansive definition to that clause and using a narrower definition for the establishment clause. Professor Laurence H. Tribe promulgated a popular definition under which religion includes any belief that is "arguably religious" for free exercise clause purposes and excludes every belief "arguably non-religious" for establishment clause purposes. The argument for this bifurcated definition recognizes the need for an expansive definition in light of religious diversity. The argument also presupposes a danger if the expansive definition is extended to the establishment clause. Theoretically, under the "ultimate concern/parallel position" concept of religion, the state could be found entangled with or advancing religion through social legislation. Tribe wrote that the expansive definition might transform the establishment clause into an "engine of destruction."

The bifurcated definition, however, cannot be supported either in theory or in practice. First, there is no constitutional justification for a bifurcated definition. As Justice Rutledge pointed out in his dissent to Everson:

"Religion" appears only once in the [first] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty . . . .

149. L. Tribe, American Constitutional Law § 14-6, at 828-29 (1978). Approaches similar to the "Tribe" approach have been utilized in a few cases. See United States v. Allen, 760 F.2d 447, 450-52 (2d Cir. 1985) (holding that state prosecution of persons who damaged a military aircraft does not violate the establishment clause, even if the national worship of nuclear weapons is a religion); Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir.) (Canby, J., concurring), cert. denied, 106 S. Ct. 85 (1985).


151. L. Tribe, supra note 149, § 14-6, at 831.

152. Everson v. Board of Educ., 330 U.S. 1, 32 (Rutledge, J., dissenting). For the full text of the first amendment, see supra note 9.
Setting aside the plain meaning of the religion clauses, the bifurcated definition cannot be justified because it would result in a class of religions that enjoy first amendment protections, yet are immune to first amendment restrictions. This clearly advantageous position granted to "preferred religions" is wholly incompatible with the concept of neutrality. In other words, if the Court wishes to maintain more than one definition of religion, it can do so only by sacrificing the neutrality it purports to protect. Further, the specious nature of the argument for the bifurcated definition is evidenced by Professor Tribe's recent renouncement of his former position.\textsuperscript{153} Acknowledging that a unitary expansive definition of religion poses no real danger to social legislation, Tribe correctly sees room for the government to function without establishing religion under the expansive definition.\textsuperscript{154}

3. Secular humanism distinguished from "purely philosophical" beliefs

Secular humanism fits squarely within the ambit of the expansive definition of religion because secular humanism is a comprehensive belief system that addresses ultimate concerns, namely, the nature of man and his relationship with the universe. The Supreme Court has expressly recognized secular humanism's religious nature in \textit{Torcaso v. Watkins},\textsuperscript{155} where the Court noted the existence of "religions in this country which do not teach what would generally be considered a belief in the existence of God [including] Buddhism, Taoism, Ethical Culture, Secular Humanism and others."\textsuperscript{156} The Court, however, clouded the picture in \textit{Wisconsin v. Yoder},\textsuperscript{157} stating that purely philosophical beliefs are not religious. The Court illustrated a "religion-philosophy" spectrum, by contrasting the philosophical beliefs of Henry Thoreau against the religious beliefs of the Amish with little further clarification.\textsuperscript{158}

153. \textit{Compare} L. Tribe, \textit{supra} note 149, § 14-6, at 828 \textit{with} L. Tribe, \textit{supra} note 16, § 14-6, at 1186-88 ("The dual definition approach thus constitutes a dubious solution to a problem that, on closer inspection, may not exist at all.").


155. 367 U.S. 488 (1961). In \textit{Torcaso}, the Court considered the constitutionality of a Maryland statute requiring public officials to swear an oath declaring a belief in God. The requirement was found unconstitutional as an infringement on the free exercise of religion. \textit{Id.} at 495.

156. \textit{Id.} at 495 n. 11.


158. \textit{Id.} at 216.
Though some argue that secular humanism is not a religion on the religion-philosophy spectrum, it seems clear that secular humanism is more religious than purely philosophical. As previously stated, secular humanism addresses fundamental questions usually dealt with in religion. Secular humanism also manifests external signs of being a religion through formal declarations including "Humanist Manifesto I," "Humanist Manifesto II," and A Secular Humanist Declaration, organizations like the American Humanist Association, the American Ethical Union, the Fellowship of Religious Humanists, the Fellowship of Humanity, and established fora for proselytization including The Humanist and Religious Humanism.

Like more traditional religions, secular humanism bases its beliefs upon primary faith assumptions; that is, secular humanism embraces and espouses that which it cannot prove. Secular humanism denies the existence of the supernatural,

159. Several years after Yoder, Judge Adams of the Court of Appeals for the Third Circuit proposed a widely-cited set of indicia for discerning religion in Malnak v. Yogi, 592 F.2d 197, 207-10 (3d Cir. 1979) (Adams, J., concurring). Adams' approach asks whether a comprehensive belief system addresses the fundamental questions concerning the meaning of life and death, man's role in the universe, and the proper code of morality. Adams' approach also examines whether the belief system shows external signs of being a religion. Notes 160-75 and accompanying text examine secular humanism in light of Judge Adams' approach.

160. New Humanist, May-June 1933, at 1 (setting forth the principles of humanism).

161. The Humanist, Sept.-Oct. 1973, at 4-9 (reaffirming and updating the principles of humanism which are to "serve as a basis for united action . . . ").

162. P. Kurtz, A Secular Humanist Declaration (1980) (making ten specific statements that outline the general beliefs and goals of secular humanists).

163. J. van Praag, supra note 107, at 50-51.

164. Id.

165. See infra note 168.

166. See Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (1957) (denying tax-exempt status for a humanist group, the Fellowship of Humanity, because the tax exemption was limited to houses of "worship").


accepts the absolutism of evolution, and asserts the
supremacy of reason. None of these propositions can be
substantiated by reason or science alone; all require "a leap
of faith" that transcends rationalism.

Further, humanists themselves seem to accept secular hu-
manism as a religion. "Humanist Manifesto I" pronounced:

Today man's larger understanding of the universe, his
scientific achievements, and his deeper appreciation of
brotherhood, have created a situation which requires a new
statement of the means and purposes of religion . . . . It is
obvious that any religion that can hope to be a synthesizing
and dynamic force today must be shaped for the needs of
this age. To establish such a religion is a major necessity of
the present. We therefore affirm the following . . . .

Finally, and perhaps most importantly to this note, secu-
lar humanism identifies an ultimate source of morality. Addressing the source of morality is a fundamental aspect of
most traditional religions. While theistic religions generally
view morality as absolute, established by God and revealed to
man, secular humanism views morality as unfixed and de-
derived from internal referents. As A Secular Humanist Declara-
tion states, "We are opposed to Absolutist morality . . . ." Likewise, "Humanist Manifesto II" pronounces, "We affirm
that moral values derive their source from human experi-
ence. Ethics is autonomous and situational, needing no theolog-
ical or ideological sanction."

The only definitions under which secular humanism is
not a religion are definitions restricted to theistic concepts. Such archaic definitions cannot be supported in this era. Un-
less the sincerity of secular humanism's adherents is ques-
tioned, there is no valid reason to exclude it from any defini-
tion of religion, least of all the expansive definition adopted
by the Supreme Court.

169. See supra note 110 and accompanying text.
172. See supra note 110 and accompanying text.
also N. Haan, E. Aerts, & B. Cooper, On Moral Grounds: The Search for
Practical Morality 20 (1985) (for theistic religions morality is embodied
in God's commands) [hereinafter On Moral Grounds].
174. P. Kurtz, supra note 162, at 15.
175. Humanist Manifesto II, supra note 19, at 6 (emphasis in original).
IV. An Impermissible Advancement of Religion: Secular Humanism in Public Education

The "effect" prong of the *Lemon* test requires that government conduct either advance or inhibit religion before that conduct is unconstitutional. With the acceptance of secular humanism as a religion, at least for the purposes of the first amendment, the only question that remains is whether secular humanism is impermissibly advanced in the public schools.

In *Smith*, the district court found the inculcation of relativistic morality through humanistic values education to be an impermissible advancement of religion. The circuit court reversed on the grounds that the curriculum had an "entirely appropriate secular effect." The existence of a valid secular effect, however, is not dispositive. In *Committee for Public Education v. Nyquist*, the Supreme Court declared, "Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end ... is immune from further examination to ascertain whether it also has a direct and immediate effect of advancing religion." Hence, the existence of a primary secular effect does not exclude the possibility that a substantial secondary effect nevertheless would violate the establishment clause. When governmental conduct has both secular and religious effects the inquiry is not limited to which is "more primary." To avoid an establishment clause violation the religious effect must be remote, indirect and incidental. The following discussion suggests that the religious effect of the Mobile County texts was not remote, indirect, and incidental, but rather was direct and immediate.

A. Secular Humanism in Public Education

Many commentators have written of a conspiracy on the part of humanists to dominate public education. While

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176. See supra notes 56-57 and accompanying text.
177. See supra text accompanying notes 96-97.
178. See supra notes 103-04 and accompanying text.
180. Id. at 783-84 n. 39.
181. Id. at 771. See L. Tribe, supra note 16, § 14-7, at 1215.
182. See, e.g., T. LaHaye, THE BATTLE FOR THE PUBLIC SCHOOLS (1983) (discussing secular humanism's "plot" to proselytize through the public schools). See also H. Cox, THE SECULAR CITY 21 (1965) (noting that secular humanism "seeks to impose its ideology through the organs of the state").
conspiracy may be too strong a word, it is clear that secular humanism's presence in public education is not without design. To a great extent secular humanism is built into America's prevailing educational philosophy.\textsuperscript{183}

John Dewey was the primary architect of modern public education. Dewey was also a self-acknowledged humanist who endorsed the first "Humanist Manifesto" and affiliated himself with the American Humanist Association.\textsuperscript{184} His commitment to the principles of secular humanism formed the basis of his educational philosophy, the central themes of which are experimentalism and pragmatism.\textsuperscript{185} Dewey promoted science as the basis of all learning and controlled social change as the goal of education. He believed that morality should be in accord with the scientific method: moral judgments should be treated as hypotheses, tested only by their temporal consequences.\textsuperscript{186}

Today Dewey's philosophy forms the essence of public education\textsuperscript{187} and is most evident in a phenomenon known as humanistic education.\textsuperscript{188} Humanistic education, which fo-
cuses on students' psychological, moral, and social development, has been identified as a "comprehensive social and moral philosophy with specific implications for the design of curriculum." A number of humanistic approaches have gained prominence. The Mobile County texts closely tracked "Value Clarification," the most widely-accepted humanistic approach. In Value Clarification, children are not taught values per se, rather they are taught a three-part valuing process: 1) choose values freely, 2) choose values from among alternatives, and 3) choose after thoughtful consideration of consequences. Reflecting the Value Clarification approach, the banned texts promoted a process of value development that relies solely on internal referents. The texts were replete with statements such as "Values are personal and subjective. They vary from person to person" and "only you can judge your own values."

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190. See C. Beck, Educational Philosophy: An Introduction 2 (1971) (promoting a humanist moral education approach that assesses all educational objectives in terms of fundamental life goals such as happiness, freedom, and survival); L. Kohlberg, The Psychology of Moral Development: The Nature and Validity of Moral Stages (1984) (promoting Cognitive Moral Education); Raths, Harmin, & Simon, infra note 191 (promoting the approach known as Value Clarification); Wehlage & Lockwood, Moral Relativism and Values Education, in MORAL EDUCATION... IT COMES WITH THE TERRITORY, supra note 3, at 330-31 (discussing the humanistic value education approach known as Cognitive Moral Development).

191. See L. Raths, M. Harmin, & S. Simon, Values and Teaching (1966) (promoting a value processing system in which right and wrong are entirely relative depending upon the situation and upon the child's point of view) [hereinafter Values and Teaching]. See also S. Simon & H. Kirschenbaum, Readings in Values Clarification (1973).

192. Values Clarification is "ten times the most popular" among values education methods. K. Gow, Yes, Virginia, There is Right and Wrong 18 (1985).

193. VALUES AND TEACHING, supra note 191, at 28-29. See also Simon & Massey, Value Clarification, in HUMANISTIC EDUCATION SOURCEBOOK, supra note 189, at 388-90 (analogizing the discovery of personal values to an archeological expedition).

194. VALUES AND TEACHING, supra note 191, at 28-29.


196. Id. at 1002 (quoting J. Kelly, supra note 87, at 26).
Like other humanistic educational approaches, Value Clarification is designed to suffuse relativistic morality into all subjects. Typically, the teacher presents students with a moral dilemma upon which each student gives an opinion. The teacher then leads a discussion designed to cause the student to consider the consequences of his position and to scrutinize his opinion in light of those consequences. Humanistic values education is predicated on the assumptions that absolute values do not exist and that children will develop positive values from within through self-reflection. As the creators of Value Clarification have indicated, the basis of humanistic values education is a conception of humanity that says human beings hold the possibility of being thoughtful and wise and that the most appropriate values will come when persons use their intelligence freely and reflectively to define their relationships with each other and with an ever-changing world. Furthermore, it is based on the idea that values are personal things if they exist at all.

B. Relativistic Morality: The Direct and Immediate Effect

The problem with humanistic approaches such as that employed by the banned texts is a failure to differentiate between moral and nonmoral values. As one of the texts stated, "[T]he steps in decision-making can be applied to something as simple as buying a new pair of shoes' and 'can also be applied to more complex decisions such as those which involve religious preferences; education and career choices; use of alcohol, tobacco and drugs; and sexual habits.' While the relativistic approach may be innocuous as

197. Note, supra note 7, at 1205 n. 43.
198. Id. at 1206-07. For a brief survey of other Values Clarification activities, see Harmin & Simon, How to Help Students Learn to Think . . . About Themselves, in HUMANISTIC EDUCATION SOURCEBOOK, supra note 189, at 400-08. See also S. Simon, L. Howe, & H. Kirschenbaum, Values Clarification: A HANDBOOK OF PRACTICAL STRATEGIES FOR TEACHERS AND STUDENTS (1972).
199. Note, supra note 7, at 1205.
200. VALUES AND TEACHING, supra note 191, at 39.
201. K. Gow, supra note 192, at 52.
a method of choosing shoes, it takes on significant religious import as a method of deciding moral questions.

Moreover, relativistic morality is more than merely a principle of secular humanism; it is the very essence of that religion. Given the definition of secular humanism offered in the previous section, relativistic morality clearly embodies each tenet described. The acceptance of relativistic morality denies the existence of absolute morality, thereby implicitly denying God or, at least, denying his relevance. Relativistic morality emphasizes the importance of humans and the temporal world, and relativistic morality reflects a confidence in reason by declaring it as the true source of moral judgment.

Finding that the concept of morality "strikes at the heart" of theistic religions, the district court in Smith asserted that the denial of such a fundamental belief completely undermines those religions. "In addition, denial of that belief will result in the affirmandence of a contrary belief and result in the establishment of an opposing religion." It is true that differing beliefs, and even differing belief systems, are often compatible; however, at certain levels, a particular perspective can preclude all other beliefs. Relativistic morality is such a perspective. Indeed, theistic morality has no place in a belief system that is completely derived from internal referents.

In the sensitive area of public education, where children are captive and impressionable, the inculcation of a religious perspective on morality cannot be permitted. Although the circuit court found the banned texts neutral toward values, it is clear that humanistic values education promotes a very subjective and limited point of view. Thus, while the religious effect is arguably secondary, it is nevertheless direct and immediate, constituting a violation of the establishment clause.

In Smith v. Board of School Commissioners, Judge Hand was faced with the task of applying establishment clause jurisprudence to a belief system which has perhaps become indistinguishable from the state's educational enterprise as a

203. See supra note 110 and accompanying text.
205. Id. (emphasis in original).
207. See K. Gow, supra note 192, at 168.
whole. To that end, he rendered a technically correct, but inherently problematic, decision. Faithful analysis under existing establishment clause jurisprudence requires the exclusion of secular humanism from public schools, as it has required the exclusion of traditional religions.

C. Proposal: The Balanced Approach

Excluding secular humanism from public education presents a quandary because removal of humanistic values education seems both impossible and, in some ways, undesirable. The impossibility stems from the pervasive nature of secular thought. The undesirability relates to the inevitable reappearance of a void in moral education. The quandary can be avoided by requiring public schools to present diverse ideological viewpoints, including religious ones, in values education. This approach, called "balanced treatment" or "aggressive pluralism," would allow the reintroduction into the classroom of some traditional religious views that would "compete" with humanistic and other views in the market place of ideas.

Although neutral toward religion, the balanced approach easily could be construed as conflicting with existing establishment clause jurisprudence. The main obstacle to allowing a balanced approach to values education is the mistaken, but well-ingrained, belief that the Constitution

209. It has been proposed that morality can be inculcated without religious effect by avoiding the reasons or sources behind moral standards. See Note, supra note 7, at 1223 (proposing that moral education need not explore moral issues or delve into the source of morality). But see K. Gow, supra note 192, at 16-17 ("To reduce values education to mere rule-giving and to define morality as obedient conformity, rather than compassionate and reasoned commitment, is to retard students' growth and development in moral sensitivity and to prevent them from thinking intelligently.").

210. See Note, supra note 131, at 164-69.

211. "Because religion in the classroom is inevitable, anything short of aggressive pluralism will necessarily result in the pall of orthodoxy and establishment of ideology that the first amendment was designed to avoid." Id. at 167.

mandates separation of religion and government. The plain language of the establishment clause, that "Congress shall make no law respecting an establishment of religion . . .," contains no mention of separation. The text suggests nothing more than a prohibition against a national religion, a proposition consistent with the disposition of the framers, who were, by and large, theists holding beliefs that religion played an important role in society. Their motivation in drafting the establishment clause was not a desire to completely separate religion and government, but a desire to protect against an established national religion and to prohibit preferential aid to specific sects. In the words of historian Wilbur Katz:

Except for occasional flights of rhetoric, no one contends either that absolute separation of church and state is required by the First Amendment or that such a rule would be desirable. Nor does the concept of separation provide its own principle of limitation. In determining the limits of constitutional separation, it is the concept of religious free-

213. The idea that the Constitution mandates separation arises from Everson and its progeny. The Everson Court primarily based its reading of the establishment clause on its interpretation of constitutional history, focusing specifically on the lives and works of Thomas Jefferson and James Madison. Everson v. Board of Educ., 330 U.S. 1, 8-13 (1946). But see Smith, infra note 216, at 594 (Madison "never advocated by word or action . . . strict separation.").

214. For the full text of the amendment, see supra note 9. See also Kauper, Church and State: Cooperative Separatism, 60 Mich. L. Rev. 1, 4-7 (1961) (discussing the lack of constitutional support for the proposition of strict separation).


216. See generally R. Cord, Separation of Church and State: Historical Fact and Current Fiction 15 (1982) ("First, [the establishment clause] was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit."). See also M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978) (arguing that the framers did not intend strict separation, but intended to allow nonpreferential aid to religion); Smith, Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions, 20 Wake Forest L. Rev. 569 (1984) (also arguing that the framers intended to allow nonpreferential aid to religion).
dom which provides the criterion. The principle of church-state separation is an instrumental principle.\textsuperscript{217}

Nevertheless, the present Court has not willingly conformed to the intent of the framers.\textsuperscript{218} Justice Stevens wrote in \textit{Jaffree} that the Court has examined the underlying principle of the establishment clause "in the crucible of litigation" and has set forth precedent by which it is now bound.\textsuperscript{219} The Court should not continue, however, to promote a historical mistake. As Justice Rehnquist retorted in dissent to \textit{Jaffree}, "The 'crucible of litigation,' . . . is well adapted to adjudicat-


\textsuperscript{218} In \textit{Jaffree}, the Court impliedly accepted the historical view that the framers did not intend strict separation. Delivering the opinion of the Court, Justice Stevens stated, "[T]he individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another . . . ." Wallace v. \textit{Jaffree}, 472 U.S. 38, 52 (1985). Stevens specifically relied upon Justice Joseph Story's account of history:

"Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [First Amendment], the general, if not universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation . . .

The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; \textit{but to exclude all rivalry among Christian sects}, and \textit{to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government}. It thus cut off the means of religious persecution, (the vice and pest of former ages,) and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age . . . ."

472 U.S. 38, 52 n.36 (quoting 2 J. Story, \textit{Commentaries on the Constitution of the United States} \S\ 1874, at 593, and \S\ 1877, at 594 (1851) (footnote omitted by Court) (emphasis added by Court)). \textit{But see} L. Pfeffer, \textit{God, Caesar, and the Constitution} (1975) (arguing that the framers did intend a strict separation of religion and government); Laycock, "\textit{Nonpreferential} Aid to Religion: A False Claim About Original Intent," 27 \textit{Wm. \\& Mary L. Rev.} 875 (1986) (arguing that the Framers did not intend to allow non-preferential aid to religion).

For a good historical overview, see T. Curry, \textit{The First Freedoms: Church and State in America to the Passage of the First Amendment} (1986).

ing factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true."

CONCLUSION

A return to the Framers' ideals does not necessarily require complete abandonment of separation. While the Constitution does not mandate separation, the doctrine can be utilized, indeed is useful, as a mechanism for achieving establishment clause goals in certain contexts. Separation should not be utilized, however, in contexts where it is not useful, such as public education.

The Court refined its jurisprudence when the growth of government and diversification of religion made strict separation an untenable proposition. This note reveals that separation continues as an untenable proposition in the area of values education in public schools. Consequently, the Court should not hesitate to refine establishment clause jurisprudence as long as that refinement promotes neutrality and protects voluntarism.

As this note has shown, secular humanism is a religion, a religion advanced by the public schools through the inculcation of relativistic morality. Under the Supreme Court's present establishment clause jurisprudence, public schools cannot continue to present a single perspective on morality without violating the establishment clause. Rather than prohibit the schools from teaching humanistic values, however, this note suggests that the Court simply modify its jurisprudence in the sensitive area of moral education. While it is clearly beyond the scope of this note to work out with precision the Court's exact path in formulating that remedy, this note suggests that the Court abrogate its "neutrality through separation" approach in favor of a "neutrality through pluralism" approach. Such an approach would protect the overriding purpose of the establishment clause without inhibiting public education's express goal to instill in children values necessary to the maintenance of a democratic society.

220. Id. at 107 (Rehnquist, J., dissenting) (citation omitted).
221. See supra notes 50-60 and accompanying text.
222. Supra note 2.