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Religion in our Public Schools: Has the Supreme Court's Treatment of Religion Made Government Intervention in Education Unconstitutional?

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I. INTRODUCTION

Supreme Court adjudication in the area of religion in public education has been inconsistent at best and a display of flagrant preference at worst. If the United States Supreme Court's First Amendment analysis of religion in the public schools is pushed to its logical conclusion, the curricula of public schools may well be outside the realm of government control altogether. In support of this thesis, this article examines the various definitions of "religion" and "secular," surveys U.S. Supreme Court cases showing the treatment and definition of religion, and shows that the "state" has violated the Establishment Clause by establishing religion in our public schools. In conclusion, this article contends that Constitutionally-bound government should no longer be actively engaged in educational curriculum decisions, and suggests some possible alternatives to current government control of education that can be implemented to allow an appropriate level of religious influence while upholding the Constitution and keeping education "free" and "public."

II. DEFINITION OF RELIGION

There are various definitions of religion which have been or could be used by the Supreme Court. In order to better understand First Amendment jurisprudence, it is important to lay out the Court's various, explicit and implicit, definitions of religion. Religion, in its narrowest sense, has been defined as an established sect. In a broader application, it is defined as any individually held world view.

The narrowest definition of religion is belief in a transcendent being, a God: "an individual's vertical relationship to a higher order of being, . . . to anything that may serve as an *a priori* source of human knowledge or foundation for the explanation of human experience."[1] Thus stated, religion is a

1. Paul J. Toscano, INVISIBLE RELIGION IN THE PUBLIC SCHOOLS: SECULARISM, NEUTRALITY, AND THE SUPREME COURT 31-40 (Horizon Publishers 1990).

personal belief in a higher source and revelation from that source.

A broader definition of religion is "religion as the immanent."[2] This suggests the possibility of individual and community communion with the Transcendent.

A. Religion as Philosophy

An even broader definition is religion as philosophy.[3] This allows for more than a vertical orientation (man looking to God) and looks to "the horizontal plane [man looking to man or the world] and that [which] touch[es] matters humanitarian and social: the ultimate practical and philosophical concerns about life, death, good, and evil."[4] Philosophy addresses many of the same questions of life, death, good, and evil that religion addresses. Often, people form their world views according to both philosophy and religion.

> [W]hen "religion" is expanded to include our fundamental concerns with our fellow beings and with our natural environment, then the distinction between philosophy and religion becomes too blurred to track. The concerns of each become so intertwined and interconnected that they cannot be disentangled. What is religion to one person is philosophy to another. Thus, no definition of religion can be devised that will not, depending upon one's point of view, potentially embrace some or all philosophical concerns.[5]

Both religion and traditional philosophy ask the quintessential questions: What is the good, what is the true, and what is the beautiful? The answers to such fundamental questions necessarily make value assumptions and judgments about life.

B. Religion as a World View

Religion as a world view broadens the definition beyond that of mere philosophy. A world view is a pattern or paradigm by which an individual creates "a scheme for understanding and explaining certain aspects of reality."[6] The definition of world view as religion can be expanded further to connote "any system of beliefs or assumptions [utilized] to see connections and

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2. *Id.* at 32.
3. *Id.* at 32-34.
4. *Id.* at 32.
5. *Id.* at 32-33.
6. *Id.* at 34.

relationships."[7]

Connections and relationships can be based on mythical, mystical or traditional religious beliefs by looking to the transcendent; based on science, reason, or the scientific method by looking to mankind[8]; or, based on the world or the environment by looking to nature.[9] The basis for connections and relationships indicates one's standard of measuring things and one's world view.

The definition of religion as a world view is that an individual, through personal perception, interprets any value or any aspect of life. That interpretation is religious belief.

III. DEFINITIONS OF RELIGION EMPLOYED BY THE SUPREME COURT

Evidence suggests that the definition of religion employed by the Supreme Court has changed over time. What was intended by the Framers as the meaning of "religion" is markedly different than the Court's modern conception.

Originally, "the Bill of Rights contained unprecedented provisions guaranteeing freedom of religious conscience and prohibiting the establishment of a national church."[10] It seems clear from the historical evidence, that in the First Amendment, "an establishment of religion" meant the public and institutional manifestation of religion, while "free exercise" referred to private religion or the private right of conscience.[11] Despite the Framers intended interpretation, the Court has strayed from those original narrow definitions, to various, looser, and perhaps even conflicting definitions.

In the Supreme Court's decisions interpreting the First Amendment, there is a "conspicuous absence . . . of any consistent, complete, and formal definition of the term 'religion.'"[12] "The United States Supreme Court's Religion Clause opinions are widely perceived to be hostile to religion."[13] In fact, the "judiciary's

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7. *Id.* at 35.

8. For an example of relationships based on looking at mankind, see John Dewey's A COMMON FAITH.

9. Examples of connections and relationships based on the world, the environment, or nature can be seen in EMILE by Rousseau and NATURAL RELIGION by Hume.

10. Frederick M. Gedicks, *The Religions, the Secular, and the Antithetical*, 20 Cap. U. L. Rev. 113, 120 (1991).

11. Toscano, *supra* note 1, at 64.

12. *Id.* at 63.

13. Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 Va. L. Rev. 671 (April 1992). *See also* Richard A. Baer, *Perspectives on Religion and Education in American Law and Politics: The Supreme Court's Discriminatory Use of the Term "Sectarian"*, 6 J.L. & Pol. 449 (Spring 1990).

church-state principles do not resonate with the popular sentiments. They seem counterintuitive to the average citizen and the Court knows it."[14]

IV. SECULARISM AS AN IDEOLOGY FALLS INTO THE DEFINITION OF RELIGION

Secularism has been defined in terms of placement of political power. During the Medieval period, the spheres of

> "religious" and "secular" did not exist as descriptions of fundamentally different aspects of society. . . . There were two forces that encouraged the institutional separation of church and state into fundamentally different social spheres of the religious and the secular; one force was theological, the other political . . . [T]he state was not understood to be nonreligious, but was simply a different aspect of the sovereign authority of God.[15]

The state and church were intertwined during this period, and there was no doubt that the secular and the religious worked together. Secular did not mean non-religious.

To ensure that religious diversity would not be a stumbling block for the members of society in their associations with each other, the American colonists incorporated the Bill of Rights. With the First Amendment, "'Secular' gradually came to be associated with 'religiously neutral.'"[16] Politicians, among others, employed overtly sectarian language in their politicking; although, through

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14. *Id.* at 671 n.3, *citing* Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 Case W. Res. L. Rev. 674, 739 (1987); *See also* several law journal articles that have been written on the subject of the lack of a definition of religion and suggesting possible definitions to the Supreme Court. Anand Agneshwar, Note, *Rediscovering God in the Constitution*, 67 N.Y.U. L. Rev. 593 (1992); Andrew W. Austin, *Faith and the Constitutional Definition of Religion*, 22 Cumb. L. Rev. 1 (1991/1992); Richard O. Frame, Note, *Belief in a Nonmaterial Reality--A Proposed First Amendment Definition of Religion*, 1992 U. Ill. L. Rev. 819. As anecdotal evidence, many articles have been written about the influence of secularism as a religion in public schools, but none have been cited in any way by the Supreme Court in dealing with these issues when they arise. A few examples are: Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. Rev. 603 (July 1987); Peter D. Schmid, Comment, *Religion, Secular Humanism and the First Amendment*, 13 S. Ill. U. L.J. 357 (Winter 1989); Craig A. Mason, Comment, *'Secular Humanism' and the Definition of Religion: Extending a Modified 'Ultimate Concern' Test to Mozert v. Hawkins County Public Schools and Smith v. Board of School Commissioners*, 63 Wash. L. Rev. 445 (April 1988); Michael R. O'Neill, Comment, *Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?*, 21 Pepp. L. Rev. 477 (1994); George W. Dent, Jr., *Religious, Children, Secular Schools*, 61 S. Cal. L. Rev. 863 (May 1988).

15. Gedicks, *supra* note 10, at 116-117.

16. *Id.* at 120.

the 1800's, general religious language became more acceptable and even encouraged. However, the divergence of the religious and secular was furthered and religious language gradually disappeared from the area of public discourse by the 1930s.[17]

"Sectarian discourse became increasingly confined to private life, and ultimately survived in public life only as 'civil religion' - faintly Protestant platitudes which reaffirmed the religious base of American culture despite being largely void of theological significance."[18] In the 20th century, the full separation between the secular and the religious was completed. Some considered "civil religion" a violation of the First Amendment; consequently, the sectarian and secular were severed.

Secularism favors science and the scientific method for gaining knowledge; its way of knowing is empirical. If a thing cannot be proven by the scientific method, it is not knowable. This perspective eliminates the possibility of the Creation or absolute moral values since there is no way to prove what "good" is. In fact, science secularized the personal questions of life. The question: "What is my purpose?" became "How does nature work?" The question: "Why am I here?" became "How can we control it?" The question: "What should I know?" became "How does the mind work?" The question: "Why should I know this?" became "How can we control behavior?" The question: "What should I do?" became "What do people do?" Finally, the question: "Why should we do this?" became "How can we control society?"[19]

Secular questions are variations of traditionally religious questions, merely asked from a different viewpoint, asserting a certain way of knowing and relating to the world.

Secularists, including Secular Humanists, have defined their ideals in three documents. These ideals are summarized in three documents, the "Humanist Manifesto I," the "Humanist Manifesto II," and "A Secular Humanist Declaration."[20] These documents outline a secularist creed which defines their anti-theistic beliefs as religion, ethics as relativistic and based on man,

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17. *Id.* at 120-121.

18. *Id.* at 122.

19. A. LeGrand Richards, The Secularization of the Academic World-View: The History of a Process and its Consequences for the Study of Education 313 (1982)(unpublished Ph.D. dissertation, Brigham Young University) The religious questions of "what is" and "why should" were replaced with the secular questions of "how does" and "how can." Natural science became the secular substitute of metaphysics. Psychology became the secular substitute of epistemology. Sociology, anthropology, and political science became the secular substitute of ethics.

20. B. Douglas Hayes, Note, *Secular Humanism in Public Schools: Thou Shalt Have No Other God (Except Thyself)*, 63 Notre Dame L. Rev. 358, 365 (1988).

the individual as paramount, democratic society with civil liberties as supreme, and a world community based upon transnational government.[21]

V. SUPREME COURT DEFINITION OF RELIGION INCLUDES SECULARISM

An examination of the concepts "secular," "secularism," and "Secular Humanism" in light of the Supreme Court's definition of "religion" reveals that these concepts are religious and define a religion.

Rather than accept the Court's interpretation of its own decisions, it proves enlightening to look at the practical results of Supreme Court decisions in this area. The following analyzes, compares, and examines (1) various Supreme Court interpretations of the term "religion" as found in the public education context, (2) the Supreme Court definition to the general definitions of religion explored above in part II and, (3) the implications of that comparison against the Court's constitutional tests. This analysis defines "religion" as derived from the actual, practical effect that each decision has had.

Real changes in the definition of religion in education cases are exemplified in such cases as *Everson v. Board of Education*[22].[23] Here, the Court says that the "establishment of religion" means at least this:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.

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21. *Id.* at 365-366 (quoting the "Humanist Manifesto II"):
    1. Religion: Religions which place God above humans do a disservice. "We find insufficient evidence for belief in the existence of a supernatural: it is either meaningless or irrelevant to the question of the survival and fulfillment of the human race. As nontheists, we begin with humans not God, nature not deity." Teachings of eternal salvation or damnation are "illusory and harmful" because they "distract humans from present concerns."
22. Everson v. Bd. of Educ. of Ewing TP., 330 U.S. 1 (1947).
23. Toscano, *supra* note 1, at 66.

> Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[24]

However, the terms "participation in the affairs of any religious organization," "support" of religious activities, and "wall of separation" were not defined by the Court.

Everson held Maryland residents were not required to take an oath affirming a belief in God in order to become a public official.

In *Engle v. Vitale*,[25] the Supreme Court declared a mandatory nondenominational prayer for New York public school students unconstitutional and a violation of the First Amendment. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."[26] The Court was correct in ruling that the prayer forced public school students to exercise religion, but stretched in suggesting that such a prayer established religion. The Court's ruling implied that the definition of religion is broader than an "institutionally established church or sect," and is at least as broad as "common belief." The impetus behind the prayer most likely was a group of legislators in New York who shared a significantly common belief to have passed the prayer into a prescriptive, mandatory law. The Court implies that those legislators who voted to have the prayer organized *established* a religion.

In *Abington v. Schemp*,[27] the Court prohibited all Bible reading in public school, even though the reading was done without interpretation or comment. Here, content was judged to be inherently religious. The Court most likely reasoned that many ideas were put forth by the Bible, and innumerable religions based on its contents. However, banning Bible reading for its content, without interpretation, defined religion beyond the institutional church, beyond a profession of deity, and indicates that the Court defines religion as the expression of any idea or world view.

In general, literature embraces ideas and world views, including philosophy, history, social studies, or anthropology. Teaching goes beyond the survey of these areas. By this definition,

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24. Everson, at 15-16.
25. Engle v. Vitale, 370 U.S. 421, 422 (1962).
26. Toscano, *supra* note 1, at 86, *citing* Engle v. Vitale, *Id.*
27. Abington v. Schemp, 374 U.S. 203 (1963).

literature would be considered religion. Yet, interpretations of knowledge in these subjects are taught, tested, and graded, which seems inconsistent with traditional concepts of religion.

Epperson v. Arkansas[28] dealt with an Arkansas law that attempted to ban teaching evolution yet, endorsed teaching Creation. The Court banned teaching the Creation and eliminated the prohibition on teaching evolution. The Court offended the First Amendment by accepting one world view as the only valid one in the marketplace of ideas, that the biblical creation world view was inferior, and that evolution was the preferred world view or interpretation of the origins of man.[29]

Lemon v. Kurtzman[30] arose when Rhode Island and Pennsylvania statutes allocated public monies to non-public schools to help provide materials. The court held that the statutes gave rise to excessive entanglement between church and state. The Court established a three-part test for statutes and school policies, which the opinion claimed was the result of a survey of the Court's decisions of the past. The Court held:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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 government entanglement with religion (citations omitted)."[31]

Criticism of this decision is voluminous; even individual members of the Supreme Court criticized and "snubbed" the *Lemon* test. For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*,[32] Justice Scalia's dissent notes that, "Finally, Justice O'Connor observes [in her dissent] that the Court's opinion does not focus on the so-called Lemon test, [citation omitted], and she urges that that test be abandoned, at least as a "unitary approach" to all Establishment Clause claims." Justice Scalia further stated he has already "documented the Court's convenient relationship with *Lemon*, which it cites only when

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28. 393 U.S. 97 (1968).
29. *Id.*
30. 403 U.S. 602 (1971).
31. *Id.* at 612-613.
32. Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S.Ct. 2481 (1994) (5-3 decision) (Souter, J., delivered the opinion of the Court; Blackmun, J., concurring; Stevens, J., concurring, Blackmun, J. and Ginsburg, J. joining; O'Connor, J., concurring in part and concurring in judgment; Kennedy, J., concurring in judgment; Scalia, J., dissenting, Rehnquist, C.J. and Thomas., J. joining).

useful. . . ." He also declared that the Court snubbed *Lemon* by acknowledging *Lemon* with only two "see also" citations, saying, "The Court's decision today is astounding."[33]

It is important to note precisely what the three parts of this test required. The first prong states there must be "a secular legislative purpose."[34] While this prong is unclear, it indicates a favoritism for the secular world view.

The second prong lays out a neutrality element,[35] which states that a statute "must be one that neither advances nor inhibits religion."[36] The second prong is a direct contradiction to the first prong, for in the first prong the Court emphasized a need for "a secular legislative purpose." The secular world view maintains a privileged position under the guise of "false neutrality."[37]

The third prong prohibits "excessive government entanglement with religion." Here again, the questions of: (1) what is religion and (2) what constitutes excessive government entanglement, must be asked. Prior Supreme Court decisions point to religion as the holding of a world view; the government, therefore, under it's own third prong of the *Lemon* test, is already heavily entangled with public schools, which subscribe to and promote the secular world view. The implications of excessive government entanglement remains unclear, but *Lemon* and later Court decisions try to set those boundaries.

Lemon determined that excessive federal government entanglement was the cause behind state governments enactment of legislation allowing public school funds to subsidize private school teacher's salaries to the extent that they taught secular subjects. Most private schools in these states were parochial and the Court held that "the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state."[38] The Court also made an issue of the fact that this would give rise to people using religion in politics and voting according to their faith,[39] but

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33. *Id.*

34. Lemon, at 612.

35. *See* David G. Leitch, Note, *The Myth of Religious Neutrality by Separation in Education*, 71 Va. L. Rev. 127 (Feb. 1985).

36. Lemon, at 612.

37. Toscano, *supra* note 1, at 15-17, 76-83 (discussing the illusion of neutral education and ideological neutrality and the commitment of the Court to a false neutrality).

38. Lemon at 620-621.

39. *Id.* at 622.

this point is arguably without merit.[40] There is nothing unconstitutional or improper with individuals holding personal world views and acting and influencing society according to those personal world views, such as in voting.

Another problem presented by this third prong is that the Court itself is guilty of "excessive government entanglement with religion."[41]

> Where the national government was originally committed to keeping its hands off institutional and personal religion, it is now committed, by the United States Supreme Court, to a policy of continual interference in the form of case-by-case line drawing, as the courts attempt to determine which activities of government amount to a religious preference and which to religious interference. Thus, the Supreme Court has turned the historical non-interventionist stance into a continuing intervention stance by giving to the religion clauses an interpretation that is repugnant to the intent of those who originally framed the amendment's language to protect all religions from government intrusion.[42]

Other cases deal with line-drawing of what "excessive governmental entanglement" is or is not.[43]

The Court extends the secular-purpose prong in *Stone v. Graham*,[44] ruling that the Ten Commandments could not be posted in a public school, even though the secular purpose was to promote the commonly held civic values that the Ten Commandments contain.[45] The Court imposed a presumption of sectarian intent where none should have been imposed, striking out against the possibility of promoting the Judeo-Christian world view by happenstance.

The Supreme Court vaguely referred to its previous conception of religion. In *Torcaso v. Watkins*,[46] the Court discussed "religions based on a belief in the existence of God as against those

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40. *See* Stephen L. Carter, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (Bantam 1993).

41. Lemon, at 622.

42. *Id.*

43. *See* Toscano, *supra* note 1, at 93-94 for discussion of the following cases. Aguilar v. Fenton, 473 US. 402 (1985) (Court invalidates program using federal funds to pay public employees to give remedial instruction and guidance to non-public students on premises of church owned schools); Bowen v. Kendrick, 487 U.S. 589 (1988) (funding given to religious approaches of solving teenage pregnancy problem).

44. Stone v. Graham, 449 U.S. 39 (1980).

45. Toscano, *supra* note 1, at 91.

46. Torcaso v. Watkins, 367 U.S. 488 (1961).

religions founded on different beliefs."[47] The Court then listed some belief systems in the United States "which do not teach what would generally be considered a belief in the existence of God [such as] Buddhism, Taoism, Ethical Culture, Secular Humanism and others (citations omitted)."[48] This dictum indicates the Court's definition of religion encompasses at least as far as "religion as philosophy" because some of the above "isms," such as Secular Humanism, are considered by many to be philosophies, not religion.

An interesting turn in First Amendment jurisprudence is found in *Lynch v. Donnelly*.[49] Here the court adopted religious "accommodation" by finding constitutional a publicly purchased and displayed creche, and by retreating from the "wall of separation" doctrine.[50]

From these various decisions and their effects, one gleans the meanings given to religion by the U.S. Supreme Court. In *Abington v. Schemp*, we learned that the reading of a text which espoused a world view, in this case the Bible, even without interpretation, was a violation of the First Amendment. *Torcaso* indicated that a religion need not be theistic in order to be a religion. This is important in the analysis, for then the other Supreme Court religion tests can be applied no matter the basis of a given world view. The reasoning in *Engle* is evidence that the Court could consider that a non-denominational, theistic prayer established a religion. It is easy to see how such a fixed, short prayer could be seen as a catechism, which is how the recitation of facts or answers to a test could be seen. *Stone* showed disfavor for a certain way of expressing commonly held values, while the *Epperson* ruling suggested a preference for science law.

VI. PUBLIC EDUCATION HAS ADOPTED SECULARISM AS ITS FOUNDATION

Public education has adopted secularism, specifically Secular Humanism, as its underlying foundation. Professor A. LeGrand Richards[51] points out that an important aspect of proving the secular trend in education resulted from American schools of educational philosophy trading in their ideological/philosophical

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47. *Id.* at 495.

48. *Id.* at 495 n.11.

49. 465 U.S. 668, 687 (1984).

50. Toscano, *supra* note 1, at 92.

51. Professor in the College of Education, Brigham Young University.

roots for roots in science.[52] By the 1930s, the transition from the education/philosophical approach to education to the scientific/instructional science approach to education was complete.[53] No longer did the American educational establishment search the American soul and ask the crucial questions of what should be taught in American schools. Rather, it turned from those questions and focused "philosophy of education" on how to teach whatever is taught more efficiently and with better results. The focus turned to methods instead to basic questions of why. "What" became the methods of "how"; striving for better methodology and scientific advancement became the "why."

> Any coherent approach to education must answer either explicitly, or by implication, at least three fundamental questions: What is man? What should he be? and How should we help him become what he should be?[54]

Richards goes on to suggest that a Christian concept of man is an appropriate world view for the educational environment,[55] and as such need not be excluded from the discussion of educational theory and practice. If this approach is correct, then any answers must be religious, for an answer to the question "Who is man?" must necessarily dictate an ideology or an approach to knowing the world. This example shows that, though the world view promoted would change from secularism to Christianity, there must be some world view foundation for education. If a world view is religion, and schools must promote a world view in order to teach, and schools are sponsored by government, then schools are teaching religion, which is unconstitutional under the tests the Supreme Court has promulgated.

Because of the Supreme Court's interpretation of "establishment" as ideological rather than institutional,[56] the Court has constitutionally pushed government outside the schooling business without explicitly admitting it. By evaluating these cases in this way, the Court has shown that government should leave the schooling business or be guilty of establishing a state

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52. Interview with A. LeGrand Richards, Assistant Professor of Education at Brigham Young University (Jan. 12, 1995).

53. *Id.*

54. Richards, *supra* note 197, at 300; *see also* A. LeGrand Richards, *Technology, Democracy and the American Dream in Education*, Rassegna Di Pedagogia (1992); A. LeGrand Richards, *Padagogik vs. Pedagogy: The Technological Seduction of American Educational Theory*, Proceedings of Far West. Phil. of Educ. Soc'y. (1989).

55. *Id.*

56. Toscano, *supra* note 1, at 64.

ideology/religion.

VII. DUE TO THE INHERENT PROMOTION OF AN IDEOLOGY IN EDUCATION AND VIOLATION OF THE FIRST AMENDMENT, THE SUPREME COURT SHOULD RULE THAT GOVERNMENT WITHDRAW ITSELF FROM CURRICULUM DECISIONS IN PARTICULAR AND ENTANGLING INVOLVEMENT IN GENERAL

Under Supreme Court rulings, the government should exclude itself from dictating the interpretations and values taught in school. If not even a "civil religion" is allowed as permissible religion, then the teaching process itself falls outside the oversight of the government because the teaching process involves values and world views on how, what, and why students should be taught.[57]

Compulsory education requirements are evidence of the

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57. Many questions arise in the ideological context. Toscano asks the following series of questions:

> Should strongly held beliefs, especially with regard to education and curriculum, go unexpressed simply because the majority feels that such beliefs are religious? If so, how can religious ideas be avoided in American education? And, if they are avoided, what kind of public education will result? Should the historical Reformation be taught solely as a political, social, and economic movement without any mention of its religious basis or theological origin? And, if the theological questions are raised at all, how should they be treated? As meaningless? Irrelevant? Or superstitious?
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> Can a religious question ever be treated in the public schools as a serious question upon which reasonable individuals could differ? Can racial equality be taught without invoking a moral value and without explaining its religious source? Can any religion or ideology survive after two generations of school children have effectively been insulated from it? Is there any hope for a society dedicated to peace and to justice if its religious underpinnings are removed from future generations?
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> "How far away from the Judeo-Christian tradition must America move to make sure that it is not establishing as religion or effectuating as public policy a viewpoint that is ultimately traceable to the Judeo-Christian tradition?" [citation omitted]. How many issues must be removed from the democratic arena because they are religiously motivated? Should, for example, our senators and representatives disqualify themselves from voting in the halls of our legislatures simply because their views are born of religious, as opposed to secular, convictions? Is the state prohibited from imparting or from allowing churches or parents to impart to a child in public school anything "that might influence his ultimate concerns and paramount beliefs?" [citation omitted]. How can any subject matter be religiously neutral when it is offensive to a person's religious convictions?

Toscano, *supra* note 1, at 82.

government's interest in an educated populace. In light of this interest, the Supreme Court has three alternatives to dealing with religion in American schools. The first option is to maintain the views previously expressed, becoming more entangled in curriculum content, thereby defining the state ideology.

Another option the Supreme Court may follow is to back off its stance toward religion and allow states broader latitude to enact statutes similar to those previously adjudged unconstitutional by the Court. This option is repugnant to many and would require even more litigation to re-define where the limits of values and ideology cross too far into the establishment of religion in public schools.

The third option is for the Supreme Court to remove itself entirely from involving the Court and government in educational issues that deal with values and ideology. This non-interference stance would perhaps require government to relinquish its *direct* sponsorship of education to a light regulatory, but non-curricular role over schools.

Whatever the case may be, the Court has found itself, as a government entity, entangled with religion by adjudicating too many cases involving religion. These problems indicate that the Court should step back and recognize, as it did in creating the Erie Doctrine, that it has extended itself into an area, inappropriate for Supreme Court venturing. In education, it is inappropriate for the Court and government to dictate an ideology since the Court itself has for practical purposes defined an ideology as religion.

In *Erie R. Co. v. Tompkins*,[58] the Supreme Court overruled the common practice in the federal district courts of disregarding state law to decide state cases and creating and applying a "federal common law." This practice was based on the doctrine of *Swift v. Tyson*.[59] The *Erie* decision held: "There is no federal general common law."[60] The Court quoted Mr. Justice Holmes who described the doctrine of *Swift v. Tyson* as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[61]

Just as the Court acknowledged that the federal courts' application of federal general common law was erroneous, they should now acknowledge that their own "unconstitutional

58. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

59. Swift v. Tyson, 41 U.S. 1 (1842).

60. Erie, at 78.

61. Erie, at 79 (quoting Swift v. Tyson).

assumption of powers" and entanglement of First Amendment jurisprudence is likewise erroneous.

VIII. POSSIBLE SOLUTIONS THAT ARE CONSTITUTIONAL AND STILL ALLOW A "FREE, PUBLIC EDUCATION" ARE VOUCHERS, TAX CREDITS, OR EQUAL TIME STATUTES THAT THE SUPREME COURT WILL LIKELY NOT STRIKE DOWN

Two possible solutions to this dilemma of excessive government entanglement with religion are (1) promote greater privatization of schools through tax credits, vouchers or state charter schools, or (2) avoid striking down equal time statutes contained in many local school board statutes. The problems that must be overcome involve the fact that many state constitutions require a compulsory education that be both "free" and "public."

Both Carter and Toscano suggest that vouchers or tax credits are constitutional approaches that would allow citizens to choose a school that coincides with their "religion."[62] Simply speaking, vouchers and tax credits both allow parents to allocate money collected for educational purposes to *any* school of the parents' choice, whether private or public. By allowing parents to send their children to their school of choice, the Court and the government avoid promoting any "religion." Thus meeting the requirements of a "free" and "public" education, while keeping religious influence to a minimum.

State charter schools are schools where groups of citizens can organize their own school with state monies, make their own decisions as to hiring of teachers and curriculum, and receive funding according to how many children attend the school.

There is a legitimate concern that either system of tax credits/vouchers or charter schools may still entangle the Court far too extensively by allowing tax money collected by the government to go toward private religious schools. One way to deal with this problem is that the government could cut back its involvement in the educational establishment to the extent that it is not considered the supporter of any particular school.

This could be done in the same manner that Congress has chartered federal mortgage companies. The Federal National Mortgage Association (FNMA) is a federally-sponsored private corporation which is not considered to be a direct government entity. In court cases where the FNMA has been challenged for violation of insufficient notice, the courts have held that for

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62. Carter, *supra* note 40, at 192-194, 200; Toscano, *supra* note 1, at 126.

constitutional purposes these federally chartered mortgage companies' actions are not sufficient state action to be bound by the Due Process, notice, and hearing provisions of the Fifth and Fourteenth Amendments.[63]

School districts could be chartered by state governments while still avoiding government regulation held to the strict standards of the First, Fifth, or Fourteenth Amendments. This would require a quasi- or full privatization of public education, sufficient to allow local school districts to follow the wishes of their patrons. This may seem to be a legal fiction, but it is no more a legal fiction than the supposed ideological neutrality in public schools' curriculum today.

Many voice concerns about the effect of privatization on the quality of education. One possible way to address this concern is to insure that general knowledge is being taught to meet the educational requirements of the state, perhaps through standardized tests, such as are already in place, and could be the criteria by which schools are granted certification by the state.

Some might argue the solution is to allow equal time to all views of the world.[64] This would be an unacceptable and impossible task because there would be no realistic way to incorporate all world views - at least one would be objectionable to some school patron. This option also assumes that all world views are known and thus could be taught. Not insignificantly, this approach would also lead to more court intervention and entanglement.

IX. CONCLUSION

The definitions of religion used by the Court today are easily broad enough to include all notions of values and world views. The definition of secular today means that world view which accepts only "objective" and "empirical" ways of knowing the world and eschews religion. Applying these definitions to the

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63. Grant S. Nelson and Dale A. Whitman, REAL ESTATE FINANCE LAW, § 7.27, n.2 (1993)(Footnote 2 gives a large list of cases supporting this result under the Fourteenth Amendment); § 7.28 (Explains no sufficient state action for Fifth Amendment purposes where the government acts contractually)(*See* Warren v. Gov't Nat'l Mortgage Ass'n, 611 F.2d 1229 (8th Cir.), *cert. den.* 449 U.S. 847 (1980)(GNMA not considered the federal government for Fifth Amendment purposes because, according to Nelson and Whitman, "the court was suggesting that even the United States can act in a proprietary or commercial, as opposed to governmental, fashion . . ." The suggestion here is that government involvement in public education be considered proprietary and not governmental action).

64. *See* Toscano, *supra* note 1, at 124.

practical effects of Supreme Court decisions shows that no ideology, not even secularism, may be promoted by government, and not even in the public schools. Since no true education can occur without a view of the world by which to transmit or teach values or interpretations of knowledge, all teaching must inherently be religious. Secularism as a world view has been adopted by the educational establishment and the Supreme Court. Thus, the Court by its definition of religion has put educational curriculum outside the Court's and government's constitutional control by declaring that any delivery of religious teaching with public monies is unconstitutional.[65]

Paul Waldron

65. *See* Everson, at 15. ("No tax in any amount . . . can be levied to support any religious activities . . . whatever form they may adopt to teach or practice religion.")