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Deborah L. McHenry
Bucci & Ranson

A DISCUSSION OF THE MOVEMENT TO DESECULARIZE PUBLIC EDUCATION

DEBORAH L. MCHENRY*

I. INTRODUCTION

Since the Supreme Court invalidated Bible-reading and organized prayer[1] in the public schools twenty-six years ago, some parents, children and religious leaders have persistently opposed the secularization of the schools.[2] These individuals have increasingly used the term "secular humanism"[3] as a convenient label for a perceived omission from school curricula of the importance of religion in American history and culture and inclusion in the curricula of topics or ideas that are said to be inconsistent with certain religious beliefs, such as evolution, feminism, sex education, and values clarification.[4]

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* B.A. 1980, University of Charleston; J.D. 1984, West Virginia University College of Law. Associate in the firm Bucci & Ranson, Charleston, West Virginia. I am indebted to Virginia Eskridge for her library research assistance and to Richard Boone of LEXIS for his assistance in obtaining recent decisions prior to their publication. I also acknowledge the work of Lilly Moody with respect to word-processing and the guidance and assistance of editors and staff of the West Virginia Law Review. In addition, I wish to thank Elaine Moore for her support.

[1] Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[2] Noteworthy are the efforts of Mel and Norma Gabler, textbook critics in Texas. The Gablers have built textbook monitoring into a $120,000 per year non-profit corporation called Educational Research Analysts. Their research is used by prominent new conservative organizations such as Jerry Falwell's, Phyllis Schlafly's Eagle Forum, and the Heritage Foundation. *Texas Textbooks Selection Under Fire*, 31 NEWSLETTER ON INTELLECTUAL FREEDOM 199 (1982). The Gablers publish a newsletter containing evaluations of specific texts, ways that objectionable views are most likely to be prevented, and methods to protest objectionable material. Weissman, *Building the Tower of Babel*, TEXAS OUTLOOK, Winter 1981-82 at 13. The Gablers' goal is elimination of secular humanism from public schools. *Id.* at 112-21. The Gablers have been highly successful. Many publishers have responded with precensorship by reading the treatment of controversial topics, and either eliminating them or affording them equivocal treatment. *See generally* Jenkinson, *How the Mel Gablers Have Put Textbooks on Trial*, in DEALING WITH CENSORSHIP 108 (J. Davis ed. 1979); Needham, *Textbooks Under Fire*, NEA TODAY, Dec. 1982; Cohon, *What's Taboo in Textbooks*, HIGHWIRE 30-32 (Spring 1982); Massie, *Of Mice and Men, a Huckleberry and Harrassment*, in TODAY'S EDUCATION, 1982-83 Annual 109, 110.

[3] The term secular humanism is described with respect to the views of those who oppose its inclusion in public school curricula. *See* text accompanying *infra* notes 78-87.

[4] A number of schools include instruction in "Values Clarification," an approach to moral and ethical issues that does not refer to traditional religious mandates. *See, e.g.*, Meskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPPERDINE L. REV. 105, 114-17 (1978); Kohlberg, *Moral Education Reappraised*, 38:6 HUMANIST 15 (Nov.-Dec. 1978).

These individuals argue that advancing secular humanism and inhibiting theistic religions[5] violates the establishment clause and the free exercise clause of the first amendment.[6] Recently, the struggle to purge secular humanism from the public schools reached the Eleventh[7] and Sixth Circuit[8] United States Courts of Appeal. The circuit decisions, however, resolve little; and the struggle is expected to continue.

Parents in some thirty states have lodged complaints with the courts or local school boards asserting that secular humanism is promoted in the public schools to the detriment of theistic Christian beliefs.[9] These complaints date back to 1974 in West Virginia[10] and have led to book banning, death threats, and arson.

The purpose of this article is to examine the current dispute regarding the alleged anti-religious secularization of the public schools and to acquaint the reader with the issues. First, the article will briefly review the role of the religion clauses. Second, the article will describe the mission of public education. Third, an effort is made to delineate the definition of secular humanism. Fourth, two recent circuit court opinions addressing both free exercise and establishment clause challenges to curricula are explained. Finally, comments are offered regarding future challenges.

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[5] By the term theism I mean belief in the existence of one God who is viewed as the creative source of man, the world, and value. Examples of theistic religion include Judaism, Christianity, and Islam.

[6] The first amendment guarantees freedom from "law[s] respecting an establishment of religion or prohibiting the free exercise thereof;. . . ." U.S. CONST. amend. I.

[7] *See infra* discussion accompanying notes 88-144.

[8] *See infra* discussion accompanying notes 145-176.

[9] Michael Farris, counsel for the plaintiffs in Mozert v. Hawkins Co. Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), has commented that in the next year some 2,000 challenges will be brought.

[10] Williams v. Kanawha Co. Bd. of Educ., 388 F. Supp. 93 (S.D. W. Va. 1975), *aff'd mem. on hearing*, 530 F.2d 972 (4th Cir. 1975) (without opinion). *Williams* involved a challenge to textbooks and supplementary materials based on the complaint that the materials contained "anti-religious materials, matter offensive to Christian morals, matter which invades personal and familial morals, matter which defames the Nation and which attacks civic virtue. . . ." Plaintiff's Complaint *quoted at* 388 F. Supp. at 95. It appears that another controversy may be brewing in Kanawha County, West Virginia. Recently, a board member challenged a policy restricting the use of school facilities before 1:00 p.m. on Sundays. CHARLESTON DAILY MAIL Aug. 22, 1987, at 1A, col. 1. Disputes have also recently arisen with respect to a policy adopted in 1973 requiring science teachers to give equal time to evolution and creationism as theories of human origins. The policy was adopted during the nationally publicized textbook controversy. CHARLESTON DAILY MAIL Sept. 10, 1987, at 1B, col. 1.

II. THE RELIGION CLAUSES

A. *The Founding Fathers*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[11] Together these two clauses are known as the religion clauses. The first, commonly known as the establishment clause, was held applicable to the states in *Everson v. Board of Education*.[12] The second, referred to as the free exercise clause, was held applicable to the states in *Cantwell v. Connecticut*.[13]

The religion clauses have long troubled the courts and commentators. The body of doctrine derived from the clauses seems at times confusing and contradictory.[14] Recently, much has been writ-

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[11] U.S. CONST. amend. I.

[12] Everson v. Board of Educ., 330 U.S. 1, 8, 15 n.22 (1947). *Everson* held that the establishment clause is not violated by state payment of transportation costs for parochial school children.

[13] Cantwell v. Connecticut, 310 U.S. 296, 303, 305 (1940). In *Cantwell* the Court held that the free exercise clause was not violated by prior state certification for religious solicitation.

[14] The decision in Widmar v. Vincent, 454 U.S. 263 (1981), illustrates the analytical chaos. A Christian student group at the University of Missouri had been using a room on campus for worship meetings. The school officials stopped the practice on the grounds of strict separation of church and state. The students claimed their rights were being violated under the free exercise clause since they were not permitted to use the facilities on the same basis as secular student organizations. The students also contended that their rights to equal protection of the law and freedom of speech were being violated because they were singled out for adverse treatment and distinguished on the basis of the content of their speech.

The federal district court found that providing a room was an impermissible establishment of religion. Chess v. Widmar, 480 F. Supp. 907 (W.D. Mo. 1979), *remanded*, 635 F.2d 1310 (8th Cir. 1980), *aff'd sub nom.* Widmar v. Vincent, 454 U.S. 263 (1981). The Court of Appeals held for the students, finding that the "University's policy singles out and stigmatizes certain. . . religious groups." *Chess*, 635 F.2d at 1317 (footnote omitted). Both decisions are rational. Religious activity is certainly aided by the providing of facilities. Yet, it can hardly be said that a policy that provides meeting rooms to Republicans, communists, and musicians but denies similar facilities to religious groups is neutral.

The Supreme Court decided the issue on free speech grounds and ruled that worship is a form of communication and observed that a state may not favor one speaker over another based on the content of the speech. The dissent was troubled by the majority's categorization of worship as speech for constitutional purposes, an action that called into question an entire body of doctrine. *Widmar*, 454 U.S. at 284-86 (White, J., dissenting). *Compare* Engel v. Vitale, 370 U.S. 421 (1962) (public school teacher may not lead her class in reciting the Lord's Prayer) and West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (public school teacher may lead class in recitation of Pledge of Allegiance although class participation may not be compulsory). The Court is making distinctions based on the religious content of the speeches.

ten about the constitutional definition of religion.[15] The simple truth, however, is that no analytically precise definition of religion for constitutional purposes exists; and it is not likely that one will be developed. Dean Choper has rightly commented that "the scope of religious pluralism in the United States alone has resulted in such a multiplicity and diversity of ideas about what is a 'religion' or a 'religious belief' that no simple formula seems able to accommodate them all."[16]

Despite the usual reference to James Madison and Thomas Jefferson, the views of the Founding Fathers on the meaning of religion are not clear.[17] For instance, the practices of the early presidents are cited variously by those who assert that the first amendment erected a wall of separation between church and state, by those who support the benevolent neutrality theory, and by those who more radically argue that the religion clauses cannot be incorporated wholesale against the states through the fourteenth amendment.[18]

Whatever might be concluded from the conflicting practices and actions of the founders, it was not until 1947 that the Supreme Court interpreted the establishment clause to require strict separation of government and religion. In *Everson v. Board of Education* the Court stated: "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of sep-

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[15] *See, e.g.*, Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U.L. REV. 163 (1977); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579; Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Fernandez, *The Free Exercise of Religion*, 36 S. CAL. L. REV. 546 (1963); Freeman, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L.J. 1519 (1983); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984); Johnson, *Concepts and Compromises in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817 (1984); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978); Note, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965).

[16] Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579.

[17] For a recent scholarly treatment of the historical background of the religion clauses, *see* R. CORD, SEPARATION OF CHURCH AND STATE (1982). *Compare* CORD *with* L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION (1975). *See* 1 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 290-517 (1950).

[18] *See* 1 J. RICHARDSON, MESSAGES AND PAPER OF THE PRESIDENTS, 1789-1987, 64, 268, 560 (1897); R. CORD, *supra* note 17, at 17-47.

aration between church and state.'"[19] The language quoted Thomas Jefferson's letter to the Danbury Baptist Association that "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."[20] Justice Rehnquist has concluded that "[t]he 'wall of separation between church and State' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging."[21]

B. *Supreme Court Efforts at Defining Religion*

The Supreme Court has had very little to say about the meaning of religion under the Constitution. In 1890 the Court acknowledged theism when it commented that "[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[22] In *United States v. Macintosh*[23] the Court noted that "[t]he essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."[24] In 1944 the Court hinted that its earlier attempts to equate religion with theism were probably unconstitutional.[25] The Court explicitly commented that religious freedom includes "the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faith."[26] Similarly, in *Fowler v. Rhode Island*,[27] the Court noted that "it is no business of courts to say

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[19] *Everson*, 330 U.S. at 16 *citing* Reynolds v. United States, 98 U.S. 145, 164 (1878).

[20] The "Danbury Letter" is reprinted in Jefferson, *Replies to Public Addresses*, in 16 THE WRITINGS OF THOMAS JEFFERSON 281 (1903).

[21] Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

[22] Davis v. Beason, 133 U.S. 333, 342 (1890) (no constitutional bar to prosecuting bigamists or preventing bigamists from voting or holding public office).

[23] United States v. MacIntosh, 283 U.S. 605 (1931) (alien who refused to promise to bear arms unless he believed war was morally justified had no naturalization privilege. *MacIntosh* was overruled in Girouard v. United States, 328 U.S. 61, 69 (1946)).

[24] *MacIntosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting).

[25] United States v. Ballard, 322 U.S. 78 (1944).

[26] *Id.* at 86.

[27] Fowler v. Rhode Island, 345 U.S. 67 (1953) (ban on religious addresses in public park that applied only to Jehovah's Witnesses unconstitutional).

that what is a religious practice or activity for one group is not religion under the protection of the First Amendment."[28]

With the landmark decision of *Torcaso v. Watkins*[29] the Court held that a state's preference for theistic religions over nontheistic ones violated the establishment clause. A Maryland statute required all public officials to profess a belief in God before assuming office.[30] This requirement, according to the Court, placed an unconstitutional burden on nonbelievers as well as believers whose religion did not rest on a belief in God.[31] In an often-cited footnote, the Court stated: "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[32] The *Torcaso* opinion, however, offered no guidelines for defining religion.

In *United States v. Seeger*[33] the Court engaged in a discussion of the nature of the beliefs and practices that constitute religion. The opinion involved statutory interpretation rather than constitutional adjudication. The Court made an effort to construe section 6(j) of the Universal Military Training and Service Act of 1948[34] which controlled exemptions from military service. The exemption reached anyone

> who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation but does not include essentially political, sociological, or philosophical views or a merely personal moral code.[35]

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[28] *Id.* at 70.

[29] Torcaso v. Watkins, 367 U.S. 488 (1961).

[30] *Id.* at 489-90.

[31] *See id.* at 490, 495.

[32] *Id.* at 495 n.11. This reference to secular humanism must not be taken out of context to suggest that secular humanism as used by those currently challenging public school curricula is a religion for first amendment purposes. The reference was to a group seeking exemption which, although non-theist, functioned organizationally as a church. Malnak v. Yogi, 592 F.2d 197, 206, 212 (3d Cir. 1979).

[33] United States v. Seeger, 380 U.S. 163 (1965).

[34] 50 U.S.C. app. § 456(j) (1964).

[35] *Id.*

Thus, the statutory language endorsed a theistic conception of religion and was adopted by Congress after a dispute in the courts of appeal over how broadly religion should be defined.

Andrew Seeger's opposition to war was not based on a belief in a Supreme Being.[36] Rather, Seeger's opposition to war was based on a " 'religious faith in a purely ethical creed.' "[37] Nevertheless, the Court construed the exemption language to reach people like Seeger who had a " 'belief in and devition to goodness and virtue for their own sakes.' "[38] The Court drew heavily on the writings of eminent theologians, including Paul Tillich.[39] A belief is religious when it "is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[40]

The Court stated an even more expansive view of the meaning of religion in *Welsh v. United States*.[41] *Welsh* was also a draft-exemption case. Welsh, unlike Seeger, claimed beliefs that he stated were not in any way religious but rather were formed from his reading of history and sociology.[42] Welsh's objection to military sevice was premised upon his perception of world politics and the wastefulness of devoting human resources to military endeavors.[43] In a plurality opinion, Welsh was found to be religious inasmuch as his beliefs "play the role of a religion and function as a religion in [his]

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[36] *Seeger*, 380 U.S. at 166.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 180. A Harvard Law Review note which discusses the meaning of religion and which has been influential in lower court opinions relies heavily upon the writings of Paul Tillich. The note proposes to define religion, with respect to the free exercise clause, as ultimate concern.

> The meaning of the term "ultimate" is to be found in a particular human's experience rather than in some objective reality. Tillich's thesis. . .is that the concerns of any individual can be ranked, and that if we probe deeply enough, we will discover the underlying concern which gives meaning and orientation to a person's whole life. It is of this kind of experience, Tillich tells us, that religions are made; consequently, every person has a religion.

Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1067 (1978) (citations omitted). Accordingly, ultimate concern is "an act of the total personality" and is the "single most important interest in the adherent's life." *Id.* at 1076 n.110, 1077 n.113. Any interest can serve as an ultimate concern whether it be economic, political or cultural. *See id.* at 1071.

[40] *Seeger*, 380 U.S. at 165-66.

[41] Welch v. United States, 398 U.S. 333 (1970).

[42] *Id.* at 341.

[43] *Id.*

life."[44] The Court specifically declared that Welsh could be denied an exemption only if his beliefs did not "rest at all upon moral, ethical, or religious principle but instead rest[ed] solely upon considerations of policy, pragmatism, or expediency."[45]

Although both *Seeger* and *Welsh* involve the definition of religion in a statutory context, commentators and lower courts have suggested that the interpretation of the statutory language defining religious training and belief must have been guided by a definition of religion in the constitutional sense.[46] This is so because the court in *Seeger* had to overcome a contrary legislative intent and the *Welsh* court had to disregard the specific exclusion of philosophical views.

Although the Court has not repudiated *Torcaso*, *Seeger*, and *Welch*, dicta on the meaning of religion has created confusion. In *Wisconsin v. Yoder*,[47] decided only two years after *Welch*, the Court indicated doubts about defining religion according to how a belief functioned in the believer's life. In *Yoder* the right of the Amish to withdraw their children from school after completion of the eighth grade was upheld.[48] The court commented:

> [T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief. . . . Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious and such belief does not rise to the demands of the Religion Clauses.[49]

Thus, Thoreau is offered as an example of the classic secular believer. The Court, however, set forth no guidelines for distinguishing

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[44] *Id.* at 339.

[45] *Id.* at 342-43.

[46] *See, e.g.*, Mansfield, *Conscientious Objection - 1964 Term*, in RELIGION AND THE PUBLIC ORDER 3 (D. Giannella ed. 1965); Harvard Note, *supra* note 39 at 1064; International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 439-40 (2d Cir. 1981); Malnak v. Yogi, 592 F.2d at 201-10 (Adams, J., concurring).

[47] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[48] *Id.* at 234.

[49] *Id.* at 215-16.

a secular believer such as Thoreau from a "religious believer" such as Welsh.[50]

C. *Establishment Clause Analysis*

In construing the breadth of the establishment clause the Supreme Court has developed a three-part test based on a synthesis of the teaching of earlier precedent.[51] In *Lemon v. Kurtzman*[52] the Court held direct salary supplements to teachers of nonsecular subjects in private schools unconstitutional. The Court outlined the test in *Lemon* as follows:

> 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, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster 'an excessive government entanglement with religion.' *Walz [v. Tax Comm'n*, 397 U.S. 664, 674 (1970)].[53]

In *Lemon* the Court moved away from a doctrine of strict separation between church and state and toward a more accommodating ap-

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[50] Of course, relying on Thoreau as the example of a secular believer is problemmatic. Those who have studied Thoreau have concluded that he was profoundly religious. Thoreau believed in both a personal God and in the transcendent. Thoreau thought that the universe was part of God and that God was more than the universe. *See, e.g.*, A. CHRISTY, THE ORIENT IN AMERICAN TRANSCENDENTALISM 187-222 (1972); R. COOK, PASSAGE TO WALDEN 140-42 (1949); 2 THE JOURNAL OF HENRY DAVID THOREAU 472 (B. Torrey and F. Allen eds. 1906); ROGERS, *God, Nature, and Personhood: Thoreau's Alternative to Inanity*, in RELIGION IN LIFE, 101 (1979).

[51] Use of the term test must only be made with acknowledgement of Chief Justice Burger's warning:

> There are always risks in treating criteria discussed by the Court . . . as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.

Tilton v. Richardson, 403 U.S. 672, 678 (1971).

[52] Lemon v. Kurtzman, 403 U.S. 602 (1971). Because the programs at issue called for detailed administrative oversight by the states to ensure that funds were used only for secular purposes, the Court held that they involved excessive, constitutionally impermissible administrative entanglement between church and state.

[53] *Id.* at 612-13.

proach.[54] The *Lemon* approach is one of flexibility, which necessarily suggests a sacrifice of clarity and of predictability in establishment clause cases.[55]

The Supreme Court has held that the following curricula decisions violated the establishment clause. A release time program, whereby religious teachers provided religious instruction in public schools during the school day to students who chose to attend, was struck down.[56] Classroom Bible readings with teachers leading or participating violated the establishment clause even though students, upon request, were to be excused.[57] The required posting of the Ten Commandments on the walls of public school classrooms was held to violate the establishment clause.[58] Although these cases were all decided prior to *Lemon*, it is plain that they are in accord with the *Lemon* test. Specifically, a required moment of silence for meditation or prayer was found to violate the secular purpose prong of the *Lemon* test and, therefore, constituted an establishment clause violation.[59]

D. *Free Exercise Clause Analysis*

The Supreme Court has departed from the narrow view that the free exercise clause protects only belief and opinion, not practices.[60]

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[54] Katz, *The Case for Religious Liberty*, in RELIGION IN AMERICA 95, 97 (J. Cogley ed. 1958); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953). Katz was an early advocate of a general neutrality test that prevents government from aiding or deferring to religion as opposed to a straight forward separation approach. It must be noted that strict separation continues to enjoy academic support. *See, e.g.*, Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 MINN. L. REV. 561, 564 (1980).

[55] *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) ("What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility. . . .").

[56] McCollum v. Board of Educ., 333 U.S. 203 (1948).

[57] Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

[58] Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

[59] Wallace v. Jaffree, 472 U.S. 38 (1985). This decision is discussed in the text accompanying *infra* notes 92-149. The goal of insulating public school students from any apparent governmental endorsement of religion was also perpetuated in Lynch v. Donnelly, 465 U.S. 668 (1984). The *Lynch* opinion cited and discussed the earlier school curricular decisions. *Id.* at 672-87.

[60] Reynolds v. United States, 98 U.S. 145 (1879).

In *Abington School District v. Schempp*[61] the court described the free exercise clause.

> Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.[62]

Indeed, direct governmental compulsion is required.[63] The coercive burden must also outweigh the public interest of the state in imposing the burden.

It is within the context of the free exercise clause issues that the Court has embraced a concept of religion sufficiently expansive to encompass nontheistic beliefs. Lower courts have considered a variety of free exercise claims, with mixed results. In these cases it has been asserted that the subject matter of the courses taught,[64] the books and materials presented,[65] the manner of instruction,[66] and the imposition of rules and regulations[67] unconstitutionally burden the free exercise of religion.

III. The Function of Compulsory Public Education

A mission is inherent in American institutions of public education. That mission includes "the preparation of individuals for

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[61] *Abington School Dist.*, 374 U.S. 203.

[62] *Id.* at 223.

[63] *See, e.g., Engel*, 370 U.S. at 430 ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion. . ."); *Torcaso* 367 U.S. 488; Hobble v. Unemployment Appeals Comm'n, ___ U.S. ___, 107 S. Ct. 1046 (1987).

[64] *See, e.g.*, Roman v. Appleby, 558 F. Supp. 449 (E.D. Pa. 1983) (counseling session with student on matters of religion, sex, family relationships, etc. did not violate student's or parent's free exercise rights).

[65] *See, e.g.*, Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974) (parents sought to have children excluded from health and music classes as well as classes in which audio-visual equipment was used); Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985).

[66] *See, e.g.*, Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill. 1979) (Mandatory co-educational physical education classes in which "immodest" clothing was worn violated free exercise rights of students where the state could not show a compelling interest or that a less restrictive means could not be employed).

[67] *See, e.g.*, Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983) (prohibition against headgear in basketball games not unconstitutional in excluding yarmulkes).

participation as citizens, and. . .preserv[ing]. . .the values on which our society rests."[68]

The constitutions of each of the fifty states provide for a system of free public education.[69] A number of these constitutions explicitly recognize that the purpose for the development of an educational system is that knowledge, learning, and wisdom or intelligence are essential to the preservation of the rights and liberties of the people in a republic.[70] Likewise, a number of these constitutions stress that

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[68] *See, e.g.*, Ambach v. Norwick, 441 U.S. 68, 76 (1979). *See also*, Island Trees Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1986) (plurality opinion) noting that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." *Id.* (quoting Brief of Petitioners at 10). Tyack has identified five historical purposes of compulsory public education:

(1) Education is the mechanism whereby people are incorporated into a nation-state. Essentially, education creates and legitimates citizens while institutionalizing the authority of the nation-state.

(2) Education socializes members of a variety of ethnic and cultural groups into becoming representatives of the dominant white, middle-class, protestant, republican American culture.

(3)Education has enabled an educational bureaucracy to develop and maintain itself.

(4) Education is a means of increasing the human capital of the society by increasing worker competency, productivity, and earnings.

(5) Education perpetuates hierarchical social relations within the capitalist system of production.

Tyack, *Ways of Seeing: An Essay on the History of Compulsory Schooling*, 46 HARV. EDUC. REV. 355 (1976). *See also*, J. CHILDS, EDUCATION AND MORALS 3-20 (1950); L. CREMIN, THE AMERICAN COMMON SCHOOL 219 (1951); R. DERR, A TAXONOMY OF SOCIAL PURPOSES OF PUBLIC SCHOOLS (1973).

[69] ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, §§ 1, 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAWAII CONST. art. IX, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2d § 3; KAN. CONST. art. VI, § 1; KY. CONST. § 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. § 91; MICH. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1-2; N.H. CONST. pt. 2, art. 83; N.J. CONST. art. VIII, § 4 ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, §§ 1-2; N.D. CONST. art. VIII, §§ 1-4; OHIO CONST. art. VI, §§ 2-3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, §§ 1-2; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. II, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, §§ 1-2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

[70] *See, e.g.*, IDAHO CONST. art. IX, § 1 ("The stability of a republican form of government depend[s] mainly upon the intelligence of the people. . ."); IND. CONST. art. VIII, § 1 ("Knowledge and learning . . . being essential to the preservation of a free government. . ."); MASS. CONST. § 91 ("Wisdom and knowledge . . . diffused generally among the body of the people, [are] necessary for the preservation of their rights and liberties. . .").

the purpose of the public schools is to inculcate morality, virtue, and integrity.[71]

A. *The Epistemic Function*

Education is central to the realization of a democratic society, for it is through education that people gain the skills necessary to responsibly and intelligently exercise citizenship.[72] This epistemic aspect of education has two functions. First, in a democracy it is important that citizens have access to information necessary to form rational decisions and that they are capable of interpreting and using that information to guide their political actions.[73] Thus, citizens must be trained in the skill of drawing conclusions from facts. Second, a society comprised of educated individuals will be better able to produce goods and services to achieve a higher standard of living. In other words, an educated citizenry serves an economic purpose.[74]

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[71] *See, e.g.*, N.D. CONST. art. VIII, § 3 ("In all schools instruction shall be given as far as practicable in those branches of knowledge that tend to impress upon the mind the vital importance of truthfulness, temperance, purity, public spirit, and respect for honest labor of every kind."); N.C. CONST. art. IX, § 1 ("Religion, morality and knowledge [are] necessary to good government and the happiness of mankind. . ."); VT. CONST. ch. II, § 68 ("Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force, and duly executed; and a competent number of schools ought to be maintained. . .").

[72] *See generally*, J. DEWEY, DEMOCRACY AND EDUCATION (1924); P. SEXTON, THE AMERICAN SCHOOL (1967); V. THAYER and M. LEVIT, THE ROLE OF THE SCHOOL IN AMERICAN SOCIETY (1966).

[73] *See*, M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 32 (1983). Education develops cognitive skills which primarily include the ability to read, write, and compute. Secondarily, individuals must have knowledge of a basic set of facts with respect to their environment, of conventional methods of organizing facts, and of general patterns into which facts are organized. Moreover, cognitive development involves the ability to deal with materials and problems, to generalize, to analyze relationships between parts of a whole, to join elements into a whole, and to evaluate the extent to which a particular factor satisfies criteria. B. BLOOM, TAXONOMY OF EDUCATIONAL OBJECTIVES: COGNITIVE DOMAIN (1956).

[74] Some commentators have argued that the economic function was the primary purpose in establishing a system of public education. These commentators argue that economic elites urged the states to insure that all citizens received a minimal education in order to provide industry with a skilled but docile labor force. F. PIVEN, PUBLIC EDUCATION AND POLITICAL DEMOCRACY 208-11 (1980). *See also*, S. BOWLES and H. GINTIS, SCHOOL IN CAPITALIST AMERICA: EDUCATIONAL REFORMS AND THE CONTRADICTIONS OF ECONOMIC LIFE (1976). Bowles and Gintis offer a Marxist critique of the American educational system and argue that schools function to perpetuate class inequalities. They contend that lower-class children receive an education that prepares them for lower-class careers while middle-class children are trained to fit into managerial and upper-level jobs.

B. *The Inculcative Function*

The inculcative function of public education is that of serving as a mechanism for the transmission of values, beliefs, and ideology to the next generation.[75] All societies educate their young. Human societies cannot continue to exist if they fail to maintain a method of transmitting common values and beliefs from one generation to the next. This is so because society presupposes a common culture or way of life. Culture includes knowledge, belief, art, morals, custom, and any other capabilities and habits acquired by man as a member of society.[76] Culture is both shared and learned.

Teaching values and beliefs is also simply a by-product of the educational process itself. As one commentator has stressed, values are learned even when that is not the specific goal of the teacher.[77] For instance, honesty is learned when teachers insist that students do their own work. Industriousness is encouraged because good grades are the reward for hard work. Cooperativeness and responsibility are learned when working on group projects. Respect for rules and authority is learned when students are punished for violating rules regarding hall passes, absences or dress codes.[78]

IV. Secular Humanism: I Know It When I See It

From one perspective, the only way that the public schools can be neutral about religion is to ignore the subject; but whether ig-

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[75] *See, e.g.*, R. Stokes, Sociology 348-350 (1984).

[76] *Id.*

[77] Rachels, *Moral Education in Public Schools*, 79 J. Phil. 678 (1982).

[78] Of course, transmission of values must include constitutional values such as freedom of expression, freedom of religious choice, and the right to privacy. Such values cannot be taught in an institutional setting that suppresses them. The Supreme Court has had occasion to observe that the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. As Justice Stevens observed recently, "[t]he schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from school teachers to policemen and prison guards. The values they learn there, they take with them in life." New Jersey v. T.L.O., 469 U.S. 325, 385 (1985) (Stevens, J., concurring in part and dissenting in part). Thus, the values conveyed ought to be consistent with those of the Constitution for the manner in which the schools are operated may deliver a plainer message to the students than the material in their civics or American government textbooks.

noring the topic of religion constitutes neutral treatment is at the center of contemporary debate. Recent disputes have focused on the assertion that the decision of the school not to inculcate various ethical, religious, and moral values necessarily inculcates other values. At issue is the question of the proper place of religious values.

Schools teach subjects that touch directly upon matters of religious controversy. A textbook that teaches evolution is not neutral from the vantage of a Biblical literalist. Courses in sex education produce religious controversy because opinions about sexual morality are closely tied to religious beliefs. The question has become what assumptions about the nature of humanity and the purpose of life guide the school authorities and the teachers in planning the curriculum and teaching.

Opponents of secular humanism argue that the exclusion of religion from education necessarily shapes a religionless world. Further, it is asserted that the theory of religious neutrality is biased toward secularism and against theism. The essence of the argument is that the absence of religion in the curricula constitutes an anti-religion message.

The opponents of secularized education have ascribed a variety of meanings to the vague term secular humanism. Secular humanism has been described as encompassing numerous viewpoints and social importance.[79] One "'parents' group [has] described secular humanism as a belief in 'equal distribution of America's wealth . . . control of the environment, control of energy and its limitation . . . the removal of American patriotism and the free enterprise system, disarmament, and the creation of a one-world socialist government.'"[80] Evangelists

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[79] *See, e.g.*, Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW AND CONTEMP. PROBS. 3, 13 (Spring 1981) (excluding religion from education "shape[s] a religionless world"); Louisell, *Does the Constitution Require a Purely Secular Society?*, 26 CATH. U.L. REV. 20, 34 (1976) (Supreme Court fostering a purely secular society); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177, 184 (Supreme Court biased against theism).

[80] Barringer, *Department Proposes Rule to Curb Teaching of "Secular Humanism,"* WASHINGTON POST, Jan. 10, 1985, at 19, col. 4 (quoting a pamphlet entitled *Is Humanism Molesting Your Child?*). A widely cited scholarly discussion is found in Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978).

have referred to secular humanism as a "godless, atheistic, socialistic, communist religion."[81] Television evangelist Jerry Falwell warned against the satanic influence of secular humanism which calls for "abortion-on-demand, recognition of homosexuals, free use of pornography, legalizing prostitution and gambling, and free use of drugs, among other things."[82] Secular humanism has also been described as entailing beliefs in "a cooperative effort to promote social well-being," "the supremacy of human reason," "science as the guide to human progress," and "man's inherent goodness."[83]

Yet, the term humanism refers to a number of movements and beliefs, both historical and contemporary.[84] It is difficult to assert that there is some single organized movement denoted as secular humanism. Trying to define secular humanism is "like trying to nail jello to a tree."[85]

The specific tenets of organizations that espouse a philosophy of humanism, such as the American Humanist Association and the Council for Democratic and Secular Humanism, are not coextensive with the amorphous view of secular humanism held by those who would purge it from public schools.[86] However, the opponents do not confine their objections to teachers or curricula materials that are affiliated with humanist organizations. Instead, secular humanism is viewed as an expansive doctrine that has pervaded our ed-

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[81] "Editorial Memorandum" dated February 1986, published by People for the American Way, Washington, D.C. at p.2.

[82] *Id.*

[83] "Memoranda of Law of Plaintiffs Smith," Civil Action No. 82-0554-H (S.D. Ala. October 10, 1985).

[84] Originally humanism signified interest in classical arts or letters. It has currently come to signify any doctrine or set of values which rejects supernaturalism, asserts the essential dignity and worth of every human being, and commits itself to the achievement of individual self-realization and collective human welfare through reason and the scientific method. 4 ENCYCLOPEDIA OF PHILOSOPHY 69-72 (1967). *See also*, H. KUNG, ON BEING A CHRISTIAN 530-602 (1984).

[85] Comment is commonly attributed to Norman Lear.

[86] There is a number of organizations including the Ethical Culture Fellowship, World Union of Free Thinkers, American Rationalist Association, and Unitarian-Universalists. The American Humanist Association is based in New York and has about 50 chapters nationwide. It published the Humanist Manifesto I in 1933 and the Humanist Manifesto II in 1973. The Council for Democratic and Secular Humanism publishes a magazine entitled *Free Inquiry*. *See* Davidow, *"Secular Humanism" as an "Established Religion": A Response to Whitehead and Conlan*, 11 TEX. TECH. L. REV. 51 (1979).

ucational institutions to such an extent that people can no longer see it. The supposed rise of secular humanism is traced to John Dewey, the prominent education reformer who was one of the first signers of the Humanist Manifesto.[87] The argument is that teachers and publishers have been unwittingly instilled with principles of secular humanism or "the religion of John Dewey," with the public school classroom as its pulpit and adolescent literature as its bible.

The difficulty with such an expansive definition of secular humanism is obvious. If secular humanism is a religion, *no* book considered secular could be included in the public school curriculum.

V. SMITH V. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY[88]

On March 4, 1987, Alabama federal district judge W. Brevard Hand banned forty-four textbooks from Alabama public schools. Hand based his decision on the notion that if Christianity in the schools is unconstitutional then so is secular humanism. He determined that history and social studies books discriminated against the very concept of religion, theistic religion in particular. Additionally, Hand found that high school home economics books espoused humanistic psychology or education.

The opinion in *Smith v. Board of School Commissioners of Mobile County* had its genesis in an earlier and discredited decision by Judge Hand that permitted school prayer in Alabama.[89] In 1982 Ishmael Jaffree, individually, and as father and next friend of his three children, brought an action against the Board of School Commissioners of Mobile County, its superintendent, and various principals and teachers.[90] Jaffree sought a declaration that certain prayer activities initiated by teachers of his three children in the Mobile

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[87] Whitehead & Conlan, *supra* note 80, at 33 n.177, 41 n.208, 56-57 n.266.

[88] Smith v. Board of School Comm'rs, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd* 827 F.2d 684 (11th Cir. 1987).

[89] Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd, in part and remanded with directions sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984), *aff'd on other grounds sub. nom.* Wallace v. Jaffree, 472 U.S. 38 (1985).

[90] Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1106.

County, Alabama public schools violated the establishment clause of the first amendment to the United States Constitution.[91] Further, Jaffree requested restraining orders to prevent regular religious prayer services or other forms of religious observances in the Mobile County public schools.[92]

Jaffree later amended his complaint to add the Governor of the State of Alabama, the Attorney General, the members of the State Board of Education, and the Superintendent of the State Board of Education.[93] The purpose of the amendment was to challenge the constitutionality of two statutes adopted by the Alabama legislature that dealt with school prayer. Alabama State Code section 16-1-20.2 involved a government composed prayer to "Almighty God" for recitation by "willing students."[94] The second statute, Alabama Code section 16-1-20.1, was the silent meditation or voluntary prayer statute.[95] Jaffree contended that the statutes violated both the establishment clause and the free exercise clause of the first amendment.

Judge Hand granted a motion to intervene filed by over 600 people, including Smith, in support of school prayer.[96] The intervenors had signed a petition first circulated at Mobile's Cottage Hill Baptist Church. The intervenors alleged that their free exercise of religion would be abridged if the court found in favor of Jaffree. The intervenors argued that, if Jaffree was successful in obtaining an injunction, the injunction should be expanded to include the religions of secularism, humanism, evolution and others.[97] Although initially aligned with the state defendants and the school board, the interests of the intervenors were substantially different. At one point, because of the conflict of interests, the school board asked that the intervenors be removed from their counsel table.

Trial was held in November 1982. On January 14, 1983, Judge Hand issued a stunning opinion challenging four decades of Supreme

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[91] *Id.*

[92] *Id.*

[93] *Id.* at 1108.

[94] Jaffree v. Wallace, 705 F.2d at 1528-29.

[95] *Id.* at 1528.

[96] *See Smith*, 655 F. Supp. 942-44 (detailed history of the case).

[97] *Id.*

Court precedent. Hand found that the first amendment proscribed only the establishment of a national religion.[98] Thus, the states were free to establish religions as each state saw fit. Morever, Hand held that the fourteenth amendment, at its ratification in 1868, did not incorporate the first amendment against the states.[99] The holding directly contradicted every Supreme Court ruling on the fourteenth amendment since 1947. Of course, Hand was marching to a different drummer. In concluding that the Supreme Court had repeatedly erred in its reading of history with respect to the first and fourteenth amendments to the Constitution, Hand remarked that "[p]erhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane. . . ."[100]

As Judge Hand anticipated, the *Jaffree* opinion was promptly overruled. Upon Jaffree's request, Justice Powell stayed Hand's order and reinstated the injunction against implementation of the Alabama prayer statutes pending disposition of the appeal in the Eleventh Circuit.[101] In its reversal the Eleventh Circuit noted that the analysis of history set forth by Judge Hand had been considered by the Supreme Court and repeatedly rejected.[102]

On appeal the Supreme Court considered only the Alabama moment of silence or voluntary prayer statute.[103] Justice Stevens writing for the majority simply reiterated the longstanding interpretation that the fourteenth amendment requires state adherence to the first amendment and commented that the Court had "confirmed and endorsed this elementary proposition of law time and time again."[104]

Judge Hand was, however, prepared for reversal. He had explicitly warned that, if the opinion were reversed, he would consider the complaints of the intervenors who argued that the religion of

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[98] Jaffree v. Board of Comm'rs, 554 F. Supp. at 1118.
[99] *Id.* at 1119.
[100] *Id.* at 1128.
[101] Jaffree v. Board of School Comm'rs, 459 U.S. 1314 (1983).
[102] Jaffree v. Wallace, 705 F.2d at 1532.
[103] Wallace v. Jaffree, 472 U.S. at 41-42.
[104] *Id.* at 49.

secular humanism was being taught in Alabama public schools. Indeed, Judge Hand threatened that he would return to the action:

> The second major area that this Court must concern itself with should this judgment be reversed is that raised by the evidence produced by the intervenors dealing with other religious teachings now conducted in the public schools to which no attention has apparently been directed and to which objection has been lodged by the intervenors.
>
> There are many religious efforts abounding in this country. Those who came to these states to establish this present nation were principally governed by the Christian ethic. Other religions followed as the population grew and the ethnic backgrounds were diffused. By and large, however, the Christian ethic is the predominant ethic in this nation today unless it has been supplanted by secular humanism. Delos McKawn, witness for the plaintiff expressed himself as believing that secular humanism has been more predominant through the years than we have imagined and indeed was more akin to the beliefs of George Washington, Thomas Jefferson, Benjamin Franklin and others of that era. Delos McKawn also testified that secular humanism is not a religion, though he ultimately waffled on this point. The reason that this can be important to the decision of this Court is that case law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanistic ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts of teaching or encouraging secular humanism -all without opposition from any other ethic - to such an extent that it has become a brainwashing effort. If this Court is compelled to purge 'God is great, God is good, we thank Him for our daily food' from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a diety.[105]

Following the reversal by the Supreme Court, Hand realigned the 624 intervenors, making them plaintiffs in a new case, *Smith v. Board of School Commissioners*. In September, 1985, the new plaintiffs filed a position paper outlining their argument that the curriculum used in the Alabama school system unconstitutionally advanced the religion of secular humanism, inhibited Christianity, excluded the contributions of Christianity to the American way of life, and denied teachers and students free speech and free exercise of their religion.[106] The focus was placed primarily on the textbooks. The plaintiffs argued that the textbooks advanced humanism. In the final analysis the action centered on the "allegedly improper pro-

[105] Jaffree v. Board of Comm'rs, 554 F. Supp. at 1129 n.41.

[106] *Smith*, 655 F. Supp. at 939.

motion of certain religious beliefs thus violating the constitutional prohibitions against the establishment of religion, applicable to the states through the Fourteenth Amendment."[107]

Judge Hand had previously expressed his view on the merits when, in an earlier opinion, he commented:

> It is apparent from a reading of the decision law that the courts acknowledge that Christianity is the religion to be proscribed. . . . The religions of atheism, materialism, agnosticism, communism and socialism have escaped the scrutiny of the courts throughout the years, and make no mistake these are to the believers religions; they are ardently adhered to and quantitatively advanced in the teachings and literature that is presented to the fertile minds of the students in the various school systems.[108]

Hand indicated that the Court would have to be involved in censoring such material. The Judge further remarked that "[i]t is common knowledge that miscellaneous doctrines such as evolution, socialism, communism, secularism, humanism, and other concepts are advanced in the public schools."[109]

As a statement of law, Judge Hand's opinion in *Smith* is of no value. The decision was promptly reversed. It is significant, however, because it is effective as protest. The opinion reflects the goal of the plaintiffs, with whom the judge plainly sympathizes. The plaintiffs simply do not see their values or their world adequately represented in the textbooks. The effort is directed toward securing public schools to traditional moorings.

One of the plaintiffs' claims was that the humanist values of philosopher John Dewey, the father of modern American education and a signatory to the Humanist Manifesto I, had been transmitted through teachers' colleges and publishing companies to such an extent that humanist values pervade the education establishment.[110] Educators, it was charged, can see the world only through Dewey-colored glasses.[111] Hand relied extensively on Dr. Russell Kirk as an independent expert. After the plaintiffs rested their case, Hand called

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[107] *Id.* at 939.
[108] Jaffree v. James, 544 F. Supp. 727, 732 (S.D. Ala. 1982).
[109] *Id.* at 732 n.2.
[110] *Smith*, 655 F. Supp. at 955.
[111] *Id.*

Kirk as the court's expert witness to address the question of whether secular humanism is a religion. Hand's choice was hardly neutral. Kirk, a writer and scholar, has influenced a generation of conservative thinkers with his book *The Conservative Mind*,[112] published in 1953.

Kirk recently edited a collection of essays for the Conservative Center for Judicial Studies titled *The Assault on Religion*.[113] Interestingly enough the volume contains a glowing account of Hand's overturned *Jaffree* decision and is dedicated to "Judge W. Brevard Hand, defender of the Constitution and religious liberty."[114] Of course, Kirk's conclusion that secular humanism is a religion came as no surprise.

Likewise, Hand's curt discard of the testimony of a defense expert was not a surprise. Dr. Paul Kurtz, professor of philosophy at State University of New York at Buffalo and author of *A Secular Humanist Declaration*, testified that secular humanism is a scientific methodology rather than a religious movement.[115] Hand commented that "Dr. Kurtz's attempt to revise history to comply with his personal beliefs is of no concern to the Courts."[116]

Hand accepted Dr. Kirk's definition of secular humanism as

> a creed or world view which holds that we have no reason to believe in a creator, that the world is self existing, that there is no transcendent power at work in the world, that we should not turn to traditional religion for wisdom; rather we should develop a new ethics and a new method of moral order founded upon the teachings of modern naturalism and physical science.[117]

Moreover, Hand found it worthy of note that Kirk's criticism of secular humanism was that it omitted the doctrine of the soul.

> There is only the human animal the naked ape, if you will. What really distinguishes us human beings from the brutes is possession of a soul. Thus, the development of the spiritual is the highest aim of a good education, that is not

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[112] R. KIRK, THE CONSERVATIVE MIND (1953).
[113] *See generally*, R. KIRK, THE ASSAULT ON RELIGION (Kirk ed. 1984).
[114] *Id.*
[115] *Smith*, 655 F. Supp. at 969.
[116] *Id.* at 982.
[117] *Id.* at 961.

> taken into account at all by the Secular Humanists. They think of man as a mechanism, a fleshy computer.[118]

Hand concluded that secular humanism is a religious belief system for purposes of the first amendment.[119] As such, secular humanism is entitled to the protection of, and subject to the prohibitions of, the religion clauses.[120] Accordingly, secular humanism may not be promoted and advanced in the public schools. As a religion secular humanism was found to make a statement about supernatural existence (a central pillar of its logic), define the nature of man, offer a goal or purpose for individual and collective human beings, and define the nature of the universe.[121]

According to the court, secular humanism establishes a closed definition of reality in the concept that everything is knowable and can be recognized by human intellect.[122] There is a denial of the transcendent or supernatural.[123] As a belief system, there is a moral code, the source of which is claimed to exist in humans and the social relationships of humans.[124] Finally, secular humanism has organizational characteristics demonstrating its institutional character.[125]

Judge Hand barred the use of the home economics books in question on the basis that they espoused humanistic psychology or education which is, according to Hand, an aspect of humanism.[126] Hand found the books objectionable for strongly implying "that a person uses the same process in deciding a moral issue that he uses in choosing one pair of shoes over another."[127] The home economics books contain passages to the effect that students must determine right and wrong based on his or her experience, feelings and values. A reasonable, thinking student has no choice but to infer from the home economics books "that moral choices are just a matter of preference

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[118] *Id.* at 963.
[119] *Id.* at 982.
[120] *Id.*
[121] *Id.* at 987.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.* at 983.
[126] *Id.* at 987.
[127] *Id.*

because . . . you are the most important person in your life."[128] Judge Hand concluded that the books promoted a relativistic and individualistic approach that could only be made on the basis of a fundamental faith claim.[129] "This faith assumes that self-actualization is the goal of every human being. That man has no supernatural attributes or components, that there are only temporal and physical consequences for man's actions, and that these results, alone, determine the morality of an action."[130] It was commented that "teaching that moral choices are purely personal and can only be based on some autonomous, as yet undiscovered and unfulfilled, inner self is a sweeping fundamental belief that must not be promoted by the public schools."[131] Some of the passages supposedly demonstrating humanistic belief, which were taken out of context, include:

> You are the most important person in your life.
>
> . . .
>
> A conscience is a set of guidelines or beliefs which help you to tell the difference between right and wrong. Part of the process of discovering yourself is the development of your own beliefs. Of course, in most cases you will still accept the ones of your family.
>
> . . .
>
> It takes time and experience for people to arrive at the beliefs best for their life.
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> . . .
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> A standard is a mental picture of how something should be. It is a measure of what is acceptable to you. Making a grade of C may be all right for one student but not for another.
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> . . .
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> Standards are a personal decision and will vary with each person.
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> . . .
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> Morals are rules made by people.
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> . . .
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> Children learn morals mainly at home. Of course, moral standards vary in different families. Children also learn morals in school, at places of worship and from friends.
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> . . .
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> Values are personal and subjective.
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> . . .
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> People of all races and cultural backgrounds should be shown as having high ideals and goals.[132]

Judge Hand concluded that the history and social studies textbooks violated the establishment clause. The conclusion was based on the finding that the textbooks failed to include an adequate discussion

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[128] *Id.*
[129] *Id.* at 986.
[130] *Id.*
[131] *Id.* at 987.
[132] *Id.* at 999-1013.

of the role of religion in American history and culture.[133] According to Hand the books failed to integrate religion into the history of American society and virtually ignored the role of theistic religion. Thus, the books lacked "so many facts as to equal ideological promotion."[134]

The conclusions are grounded in two notions. First, omissions can constitute a first amendment violation. Second, "adherents to the religion of Humanist Manifestos affirmatively seek the exclusion of influence by theistic religions in the public schools."[135] Yet, there was no showing that the textbooks were chosen for anything other than the secular purpose of educating students in the area of history and social studies. In essence, the *Smith* opinion simply attaches the label "secular humanism" to the absence of religion in the Alabama curriculum.

In reversing Judge Hand's decision, the Eleventh Circuit did not attempt to establish a test for determining what constitutes a religious belief for purposes of the first amendment.[136] Instead, the court determined that even if secular humanism is a religion for establishment clause purposes the plaintiffs had failed to prove a constitutional violation.[137] The court analyzed the situation through the second prong of the *Lemon* test.[138] Inquiry centered on "whether the use of the challenged textbooks had the primary effect of either advancing or inhibiting religion."[139] That is, "whether the message in fact conveyed is one of endorsement or disapproval."[140] The court easily found that the primary purpose of the textbooks was to convey essentially neutral information to school children and that none of them "conveyed a message of governmental approval of secular humanism or governmental disapproval of traditional theism."[141]

The Eleventh Circuit looked at the home economics textbooks

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[133] *Id.* at 985.
[134] *Id.*
[135] *Id.* at 984.
[136] *Smith*, 827 F.2d at 689.
[137] *Id.* at 689.
[138] *Id.*
[139] *Id.* at 690.
[140] *Id.*
[141] *Id.*

as a whole rather than simply isolating discrete passages. Importantly, the court determined that the message conveyed "is one of 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"[142] which are entirely appropriate.

With respect to the history and social studies books the court observed that "selecting a textbook that omits a particular topic for nonreligious reasons is significantly different from requiring the omission of material because it conflicts with a particular religious belief."[143] It was determined that the textbooks did not convey a message of governmental approval of secular humanism or disapproval of theistic religion.

The Eleventh Circuit criticized the district court for its implicit assumption that the actual requirement of the establishement clause is "equal time" for religion.[144] Moreover, it was remarked that the district court opinion has the effect of turning the establishment clause neutrality requirement into an affirmative obligation on the part of the public schools to speak about religion.[145]

VI. Mozert v. Hawkins County Board of Education[146]

Mozert v. Hawkins County Bd. of Educ. involved a challenge to the use of the Holt, Rinehart and Winston basic reading series in grades one through eight at the public schools in Hawkins County, Tennessee.[147] The Hawkins County schools teach "critical reading" rather than exercises that simply teach word and sound recognition.[148] Critical reading develops the "higher order cognitive skills

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[142] *Id.* at 692.

[143] *Id.* at 694.

[144] *Id.* at 695.

[145] *Id.*

[146] Mozert v. Hawkins County Pub. Schools, 579 F. Supp. 1051 (E.D. Tenn. 1984) (dismissing all but one allegation in complaint), *aff'd in part and rev'd in part*, 582 F. Supp. 201 (E.D. Tenn. 1984) (granting summary judgment dismissing sole remaining allegation in complaint); *rev'd.* and *remanded*, 765 F.2d 75 (6th Cir. 1985) *rev'd sub nom.* Mozert v. Hawkins County Bd. of Educ,. 827 F.2d 1058, (6th cir. 1987).

[147] *Mozert*, 827 F.2d at 1059-60.

[148] *Id.* at 1060.

that enable students to evaluate the material they read, to contrast the ideas presented, and understand complex characters that appear in reading material."[149]

The *Mozert* plaintiffs contended that they held sincere religious beliefs that were contrary to the values inculcated by the Holt textbooks and that it was a violation of their religious beliefs and convictions to be required to read the Holt books or to permit their children to read them. The challenge was brought under the free exercise clause of the first amendment. The plaintiffs objected to material described as evolution, secular humanism, futuristic supernaturalism, pacifism, feminism, world-community, magic and false views of death.[150] The plaintiffs sought an injunction allowing religiously objecting students to learn from reading other state-approved textbooks and excusing them from class when the challenged books would be read or discussed.[151]

In dismissing all the allegations but one the district court noted that the first amendment does not offer protection "from exposure to merely offensive value systems or . . . to antithetical religious ideas."[152] The plaintiffs had alleged only that their free exercise rights were violated by the students' mere exposure to the objectionable ideas and values, not that the students were forced to perform any symbolic act or profess any belief. In dismissing the various allegations the district court ruled that mere exposure to textbooks would violate religious free exercise rights only if it could be shown that the books "teach a particular religious faith as true . . . or that the students must be saved through some religious pathway, or that no salvation is required. . . ."[153]

In a second opinion, the *Mozert* district court dismissed the complaint's sole remaining allegation. The plaintiffs objected to what they perceived as the textbooks' underlying philosophical aim of

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[149] *Id.*

[150] *Id.* at 1062.

[151] The school authorities had denied plaintiffs' request that their children be excused from the regular reading program and allowed to hold their own alternative reading classes.

[152] *Mozert*, 579 F. Supp. at 1052.

[153] *Id.*

promoting a sense of world community and religious tolerance.[154] The district court accepted the plaintiffs' allegation that the books' perceived underlying philosophy conflicted with their sincerely held Christian belief in salvation. Nevertheless, the court concluded that exposure to the challenged books did not violate the religious freedom of the plaintiffs.[155] Accordingly, the court entered summary judgment in favor of the defendants.

In 1985, the Sixth Circuit Court of Appeals reversed the district court's order dismissing the *Mozert* complaint and remanded the case for trial.[156] The Sixth Circuit concluded that summary judgment was improper because issues of material fact were present. The appellate court found that there were essentially two genuine issues of material fact: First, whether the plaintiff parents and children sincerely held religious beliefs requiring that they not be exposed to the ideas contained in the challenged textbooks;[157] second, whether the school's interest in using the same textbooks to teach reading to children was sufficiently compelling to override the plaintiffs' asserted free exercise right to participate in an alternative reading program.[158]

After the action was remanded the Commissioner of Education of the State of Tennessee was permitted to intervene as a defendant. Counsel for the parties entered into significant stipulations. The defendants stipulated that the plaintiffs' religious beliefs were sincerely held and the passages in the reading offended those beliefs.[159] The plaintiffs stipulated that there was a compelling state interest for the defendants to provide a public education to the children of Hawkins County.[160] Thus, two issues were left for trial: First, whether the plaintiffs could show a burden on their free exercise right, in a constitutional sense; and second, whether the defendants could show a compelling interest in requiring all students in grades one

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[154] *Mozert*, 582 F. Supp. at 201-02.

[155] *Id.* at 203.

[156] *Mozert*, 765 F.2d at 78-79.

[157] *Id.* at 78.

[158] *Id.*

[159] *Mozert*, 827 F.2d at 1061.

[160] *Id.*

through eight of the Hawkins County public schools to use the Holt textbooks.[161]

The district court held that the plaintiffs' free exercise rights had been burdened because their "religious beliefs compel them to refrain from exposure to the Holt series."[162] Moreover, the court found that the defendants had "effectively required that the student plaintiffs either read the offensive text or give up their free public education."[163] It was determined that the defendants could accommodate the plaintiffs. Therefore, the court entered an injunction prohibiting the defendants " 'from requiring the student-plaintiffs to read from the Holt series,' and ordering the defendants to excuse the student plaintiffs from their classrooms '[d]uring the normal reading period' and to provide them . . . space . . . elsewhere. . . ."[164]

The district court opinion analytically rested on an analogy to two Supreme Court cases. The plaintiffs were analogized to the sabbatarian who was denied unemployment compensation benefits for refusing to work on Saturdays in *Sherbert v. Verner*,[165] and to the Jehovah's Witness who was denied unemployment compensation benefits after quitting a job that required him to work on military tanks in *Thomas v. Review Board*.[166] However, both *Sherbert* and *Thomas* involved governmental compulsion to engage in activity that violated religious convictions. Such compulsion is strikingly absent in the *Mozert* case. Reading assigned materials does not involve an affirmation or denial of a religious belief, nor does it involve the performance or nonperformance of a religious practice.

The defendants appealed the ruling of the district court for fear it "could turn schools into a cafeteria line from which parents of different persuasions could choose and reject courses that pleased or offended their beliefs."[167] On August 24, 1987, the Sixth Circuit

[161] *Id.*

[162] *Id.* at 1062 *quoting Mozert*, 647 F. Supp. 1194, 1200.

[163] *Id.*

[164] *Id.* at 1063.

[165] Sherbert v. Verner, 374 U.S. 398 (1963).

[166] Thomas v. Review Bd., 450 U.S. 707 (1981).

[167] *Fundamentalists Win a Federal Suit Over Schoolbooks*, N.Y. TIMES, Oct. 25, 1986, at A1, col. 3.

reversed the district court's grant of injunctive relief and award of damages. The Sixth Circuit held "that the requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion."[168]

The opinion of the Sixth Circuit is interesting in its approval of the inculcative goals of public education. The court noted that by statute the Tennessee public schools must include in the curricula "character education."[169] Character education is "to help each student develop positive values and to improve student conduct as students learn to act in harmony with their positive values and learn to become good citizens in their school, community, and society."[170] The court observed that public schools teach values that are "essential to a democratic society."[171] One such value in a pluralistic society is civil tolerance of divergent religious views.[172]

The court found that the reading curriculum was designed to acquaint students with a multitude of ideas and concepts that contain no religious or anti-religious messages. That the ideas and concepts are not in the proportions that the plaintiffs would prefer does not make the textbooks unconstitutional.[173]

The court distinguished the cases relied upon by the plaintiffs. *Torcaso v. Watkins*,[174] which held that a state could not deny public office to a person solely because of the person's refusal to declare a belief in God, was not analogous because the students were never "required to profess or deny a religious belief."[175] Likewise, *Board of Education v. Barnette*,[176] involving school flag salute and the pledge

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[168] *Mozert*, 827 F.2d at 1070.

[169] TENN. CODE ANN. § 49-6-1007 (1986 Supp.).

[170] *Id.*

[171] *Mozert*, 827 F.2d at 1068 *quoting* Bethel School Dist. v. Fraser, ___ U.S. ___, 106 S. Ct. 3159, 3164 (1986).

[172] *Id.* at 1068.

[173] *Id.* at 1069.

[174] *Torcaso*, 367 U.S. 488.

[175] *Mozert*, 827 F.2d at 1070.

[176] *Barnette*, 319 U.S. 624.

of allegiance, was distinguished because it involved a compulsion of students to declare a belief, and no similar compulsion existed in *Mozert*.[177] *Wisconsin v. Yoder*,[178] which held that the state could not compel children of the Amish community to attend public schools beyond the eighth grade, was limited to the facts and the narrowness of its holding because of the unique 300 year history of the Old Amish Order who separate themselves from the world, avoid assimilation into society, and attempt to protect their children from worldly influences.[179]

The Eleventh Circuit concluded that governmental actions that merely offend or cast doubt on sincerely held religious beliefs do not, on that account alone, violate the free exercise clause.[180] Rather, an actual burden on the expression or exercise of religion is required. A distinction was drawn between governmental actions that actually interfere with the free exercise of religion and those that simply result in exposure to attitudes and outlooks at odds with various religious perspectives.[181]

VII. COMMENTS

The difficulty with the position taken by the plaintiffs in *Smith*, *Mozert*, and others with similar challenges is the treatment of the terms secular and humanism as synonyms for anti-religious. According to this definition, the universe is divided into two diametrically opposed categories, the religious and the anti-religious. The anti-religious half of the universe is the secular half. However, the Supreme Court has drawn a third category — the non-religious. The plaintiffs cannot succeed in demonstrating a violation of the establishment clause by a mere showing that the school authorities are advancing secular goals.

Of course, exposure to materials in a classroom does not in and of itself lead to indoctrination. The religion clauses simply do not protect against the mere exposure to ideas or beliefs that are of-

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[177] *Mozert*, 827 F.2d at 1070.
[178] *Yoder*, 406 U.S. 205.
[179] *Mozert*, 827 F.2d at 1067.
[180] *Id.* at 1068 *quoting* Grove v. Mead School Dist., ___ U.S. ___, 106 S. Ct. 85 (1986).
[181] *Id.*

fensive to or supportive of any religion. Even if religion is to be narrowly defined, there will still be a myriad of ideas introduced in the classroom, including topics such as evolution, which are essential to scientific, political and social discussion but are at odds with some religious beliefs. If the public schools were compelled to purge ideas that collided or incidentally coincided with religious beliefs, the curricula would contain few, if any, ideas. Further, one might question how students can be taught democratic norms if access to values and ideas of other communities, societies and political or economic systems is not promoted. Certain basic elements surely must be presented.

As has been observed: "[O]ur society has constitutionalized some basic conceptions of equality, freedom, and political democracy. It has a stake in seeing that its citizens are at least exposed to its point of view."[182] Certain principles are essential to our constitutional system. First, is a tolerance for a diversity of thought, be it religious, political or economic. Second, is the notion that all people should have equal rights and opportunities regardless of their race, sex, religion or national origin. Our society must be permitted to educate its citizens to the basic concepts of social justice. Students and parents with religious objections to these principles should not be able to eliminate them from the public school system, just as they are unable to eliminate the principles from the gesellschaft. Private schools provide an option for dissenting parents and students.

The emphasis on the establishment clause in voiding the various attempts to introduce religious worship or teachings into the public school may in itself teach a value — that government and religion are to be separate. Children may learn that the Constitution prohibits the establishment of a religion by the state even if it is the desire of the affected majority.

A test of reasonableness should be imposed in determining broad-based challenges to secular humanism in the public schools. For instance, if a school library contains Hitler's *Mein Kampf* or if Marx's

[182] Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 652 (1980). *But see*, Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979).

Das Capital is included as a reading assignment, it is simply not reasonable to infer that the school endorses anti-semitic values or supports communism. Some states encourage instruction in the tenets of communism for the purpose of "instilling in the minds of the students a greater appreciation of democratic processes, freedom under law and the will to preserve that freedom."[183]

We do well to recall the words of Justice Jackson:

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.[184]

[183] ALA. CODE § 16-40-3 (1975).

[184] McCollum v. Bd. of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring).