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# "Public Education in Shreds": Religious Challenges to Curricular Decisions

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## “Public Education In Shreds”: Religious Challenges To Curricular Decisions

In 1985, the head of the National Library Association's Office for Intellectual Freedom reported calls from parents who were concerned about the inclusion of certain books on school library shelves. One father voiced concern over a book entitled *Making it with Mademoiselle*, saying that he was “sure it was very titillating stuff.”<sup>1</sup> The book was actually a collection of sewing patterns published by “Mademoiselle” magazine.<sup>2</sup> While this is an extreme case, the controversy and notoriety surrounding recent cases such as *Smith v. Board of School Commissioners*,<sup>3</sup> *Mozert v. Hawkins County Board of Education*,<sup>4</sup> and *Edwards v. Aguillard*<sup>5</sup> illustrate that parental scrutiny of classroom materials and litigation based on moral or sectarian grounds are making curriculum decisions one of the most sensitive areas in the field of education today.

Parents are concerned with the ideas and values being conveyed to their children through the texts and classroom activities used by the public school systems.<sup>6</sup> Schools, as state agencies, are concerned with selecting books and materials that will contribute to their goal of developing a responsible, informed citizenry which knows and has internalized societal expectations, values, and educational skills.<sup>7</sup> Thus, although parents and educators share the goal of developing this nation's children into mature adults, the route to achieving this common goal is often seen in diverse, and divisive, terms. Parents, on the one hand, may want their children exposed only to ideas congruent with their own religious beliefs—or at least with those considered mainstream. Public educators, on the other hand, may wish to present a broad spectrum of ideas from various cultures and subcultures, or a more limited “core” of ideas that do not accord with the religious beliefs of all the students and their parents. School officials must also be guided by the

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1. “Banned Books Week ‘85” *Off To Burning Start*, Chi. Daily L. Bull., Sept. 10, 1985, at 2, col. 2.

2. *Id.*

3. 827 F.2d 684 (11th Cir. 1987). See *infra* text accompanying notes 99-120.

4. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988). See *infra* text accompanying notes 131-80.

5. 107 S. Ct. 2573 (1987). See *infra* text accompanying notes 199-208.

6. See generally A. BURRON, J. EIDSMOE & D. TURNER, *CLASSROOMS IN CRISIS* (1986) [hereinafter *CLASSROOMS IN CRISIS*]; K. GOW, *YES, VIRGINIA, THERE IS RIGHT AND WRONG!* (1980).

7. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), the Supreme Court stated that “the objectives of public education [are] the ‘inculc[ation of] fundamental values necessary to the maintenance of a democratic political system.’” (quoting *Ambach v. Norwich*, 441 U.S. 68, 76-77 (1979)).

principle that the first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>8</sup> Textbook selection committees are thus faced with a weighty, yet delicate task: They must choose texts which 1) satisfy traditional expectations for materials, such as thorough topic coverage, clear presentation and appropriateness for grade and skill level;<sup>9</sup> 2) promote the kind of societal values which the state has an interest in engendering in its citizens;<sup>10</sup> and 3) avoid treatment of religion that would constitute an unconstitutional offense to, or burden on, students' religious beliefs.<sup>11</sup>

In recent years, parents have increased efforts to influence school administrators to select a curriculum and materials that conform with their views on what public education—particularly moral education—should be.<sup>12</sup> The potential danger of this situation was understood as early as 1947 by Justice Jackson, concurring in *McCollum v. Board of Education*:

Authorities list 256 separate and substantial religious bodies to exist in the United States. Each of them . . . has as good a right [as any other]

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8. *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968) (quoting *Keyishian v. Board of Regents*, 383 U.S. 589, 603 (1967)). In this context, the reference to "law" pertains to administrative decisions made by the local school board.

9. School officials must be given the latitude to select one book over another based on determinations that the book is "more relevant to the curriculum, or better written[, or] . . . psychologically or intellectually [appropriate] for the age group . . . or because [of a belief] that one subject is more important or is more deserving of emphasis." *Board of Educ. v. Pico*, 457 U.S. 853, 880 (1981) (Blackmun, J., concurring) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 757 (1978) (Powell, J., concurring)); cf. *Smith*, 827 F.2d at 693-94.

10. The Supreme Court has often recognized the appropriateness of the role of public schools in "promot[ing] civic virtues," *Ambach*, 441 U.S. at 80, and in "awaken[ing] the child to cultural values," *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). The Court has even suggested that local schools have a "duty to inculcate community values." *Pico*, 457 U.S. at 869. The choice of textbooks that a school system will use is clearly germane to the pursuit of these concededly legitimate government goals.

11. There is a countervailing concern that textbook publishers have gone to such lengths to avoid accusations of promoting religion through their materials that the role and influence of religion in the birth and growth of the United States has been downplayed to the point of historical distortion. See *War Between the Faiths*, A.B.A. J., June 1, 1987, at 128 (discussing a federal district court's finding that certain textbooks should be removed from the public schools because their "failure to discuss the importance of religion in American history and culture was 'so grave as to rise to a constitutional violation'"); Woodward & Taylor, *Secular Humanism in the Dock*, NEWSWEEK, Oct. 27, 1986, at 96 (criticizing the studious avoidance of religion in public education by saying that "American teachers and textbook publishers are so wary of discussing religion in the classroom that they are willing to distort history and literature in order to avoid the subject"); Brandt, *Defending Public Education From the Neo-Puritans*, EDUC. LEADERSHIP, May, 1987, at 3 (noting that "a growing number of liberals and conservatives agree that the role of religion in human affairs should be more adequately represented in the school curriculum").

12. Parent groups, ranging from those extremely conservative to those extremely liberal, are producing publications that advise concerned parents on how to organize and mobilize locally as efficient lobbying groups. See generally CLASSROOMS IN CRISIS, *supra* note 6, at 157-67; PEOPLE FOR THE AM. WAY, THE ATTACK ON PUBLIC EDUCATION: NORTH CAROLINA'S EXPERIENCE 30-34 (1985).

to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines. 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.<sup>13</sup>

Despite this admonition, sects are currently demanding that schools, on an informal basis, or governmental entities, through use of their coercive power, eliminate "everything that is objectionable"<sup>14</sup> from the public schools. Federal courts are now being asked to balance the interests of three significant forces at work in the public schools: 1) the state's interest in providing a sound educational program within the practical confines of available time, space, and resources; 2) the individual's interest in freedom from coercion of conscience by the state; and 3) society's interest in maintaining religious neutrality in education as guaranteed by the Constitution. While these demands are not new to the federal judiciary, the current wave of parental challenges to public education has made them more acute.

State officials have a legitimate interest in overseeing the education of the youth of this country and a constitutionally imposed duty to ensure that its institutions are not used to force unwanted religious doctrine upon its citizens. Parents have a legitimate interest in the education of their children and a constitutional right to free exercise of their religious beliefs. These interests, duties, and rights often come into sharp conflict in the arena of public education, particularly in the determination of the content of the curriculum. As state officials seek to provide a complete educational experience for public school students, parents seek remedies from state-imposed burdens on their religion. Through a series of hypotheticals, this Note will present the means by which parents try to shield their children from ideas and materials opposed to their religious beliefs and practices. Methods ranging from administrative accommodations to legal remedies to resort to the political process will be analyzed in terms of their probability of success and their educational ramifications.

Part I examines adjustments made by mutual agreement which work to shield particular children from exposure to the challenged materials, while allowing continued use of the texts by the remainder of the children enrolled in the school system. Part II discusses litigation aimed at invalidating school board decisions. Part III examines efforts by parent groups to influence public schools through the political process by lobbying the state legislature for passage of statutes that provide what they consider to be "fair" or "equal" treatment of their views.<sup>15</sup> More directly, parent groups may organize to elect school board members whose decisions reflect their beliefs.

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13. 333 U.S. 203, 235 (1947) (Jackson, J., concurring).

14. *Id.*

15. See, e.g., LA. REV. STAT. ANN. §§ 17:286.1-.7 (West 1982). See *infra* notes 199-208 and accompanying text.

Part III will also suggest the potential limitations that may be placed on the decisions of a board elected through such parental activism.

### I. ADMINISTRATIVE STRATEGIES

*Hypothetical 1:* A local school board, following the procedure established by the state board of education, adopts a set of textbooks covering subjects including biology, literature, home economics, and health. A parent group, consisting primarily of fundamentalist Christians, has voiced objections to the adoption of the texts. The parents contend that the selected texts present and advocate ideas and values contrary to their religious beliefs. To avoid exposing their children to these texts and materials, the parents petition the local school board to substitute materials which they find acceptable or to excuse their children from class when the challenged materials are being used or discussed. If the board is unwilling or unable to accommodate their wishes, the parents plan to remove their children from the public school and educate them at home.

#### A. Substitution and Exclusion

Substitution<sup>16</sup> and exclusion<sup>17</sup> are the most informal, least expensive, and possibly the least intrusive remedies parents might seek. They are also the remedies most likely to succeed.<sup>18</sup> Often either remedy can be worked out

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16. A substitution remedy allows a student with religious objections to an officially adopted text or activity to complete an alternative assignment which is mutually satisfactory to the child, the parents, and the school.

17. An exclusion remedy allows a student to be excused from the classroom while activities which she finds objectionable are being conducted.

18. The district court that heard *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd sub nom. Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988), found that the state could achieve its legitimate educational goals by means less restrictive than by compulsory use of a uniform textbook series. *Id.* at 1202. Substitution and exclusion remedies were considered to be implicitly allowed by legislative provisions for private and home schooling. *Id.* at 1201. The court reasoned that temporary accommodations previously provided by the school indicated that such arrangements were not too difficult to administer. *Id.* The court further supported the feasibility of an alternative program with a prediction that "[a]ccommodating the beliefs of [a few students] probably would not wreak havoc in the school system by initiating a barrage of requests for alternate materials." *Id.* at 1202.

A school's provision of a substitution and exclusion option was the determinative factor in *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985). The objecting student was given an alternative selection to read and was to be excused from class during discussion of the offending material. The court of appeals found that any burden on the student's free exercise rights arising from keeping the challenged book in the curriculum was "minimal" and that no unconstitutional coercion was present. *Id.* at 1533. The significance of the option is underscored in the concurring opinion, which noted that facts "sufficient to present a free exercise challenge" would probably have existed had the

amicably between the parents and the teacher without any administrative or other state involvement.<sup>19</sup>

Parents who wish to challenge curricular decisions are typically fundamentalist Christians. Organizers of these parents identify substitution and exclusion as viable protections against secular humanism,<sup>20</sup> which they believe

student been compelled to read the book and participate in class discussion, rather than having been offered and having rejected an alternative. *Id.* at 1542 (Canby, J., concurring).

A substitution or exclusion remedy will most likely fail if it is determined that the proposed alternative is overly intrusive into the operation of public schools. Both the majority in *Grove* and the Sixth Circuit Court of Appeals in *Mozert* rejected the adjustments to curricula advocated by the plaintiffs at least in part on administrative grounds. The *Grove* court stated that "[t]he state interest in providing well-rounded public education would be critically impeded by accommodation of Grove's wishes [to remove the book from the curriculum entirely]." *Grove*, 753 F.2d at 1533.

The *Mozert* court cited Supreme Court admonitions to use "care and restraint" when contemplating judicial interference "chang[ing an] educational program adopted by duly chosen local authorities." *Mozert*, 827 F.2d at 1069-70 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Although the vulnerability of schools to increased litigation based on curricular decisions "is certainly not determinative," the court indicated that it should be a consideration since "nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant lawsuits." *Id.* at 1069 (quoting *McCollum v. Board of Educ.*, 333 U.S. 203, 235 (1947) (Jackson, J., concurring)).

The two concurring judges in *Mozert* focused more on the day-to-day implementation concerns facing the teachers and schools that will be called upon to carry out an individualized remedy. Judge Kennedy described the mechanics of implementation at the classroom level—review of materials by the parents and review of parental objections by the teacher, determination of what is objectionable, and omission of those topics from class coverage or dismissal of the objecting student during their discussion—and concluded that requiring the school district to "accommodate exceptions and permit other students to opt-out of the reading program and other core courses . . . would result in a public school system impossible to administer." *Id.* at 1072-73 (Kennedy, J., concurring).

Judge Boggs concluded that a school's decision to deal with religious objections to curricular content should be permissive rather than mandatory where the establishment clause is not implicated. He stated that "[i]t is a substantial imposition on the schools to *require* them to justify in each instance of not dealing with students' individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment)." *Id.* at 1080 (Boggs, J., concurring) (emphasis in original).

19. Hulsizer, *Public Education on Trial*, EDUC. LEADERSHIP, May, 1987, at 12, 16. See also Jurenas, *A Delicate Balance—A Familiar Dilemma*, 16 AM. SECONDARY EDUC. 28, 30 (1987) ("[A]s a relatively common practice, on an individual basis, alternative texts, novels, activities, etc. have frequently been made available to children whose parents found [the officially adopted materials] somehow offensive.").

20. Fundamentalist parents found their concerns shared and their resistance efforts substantiated in Judge Brevard Hand's decision in *Smith v. Board of School Commissioners*, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). Judge Hand held that secular humanism is a religion, that it was being unconstitutionally advanced in the Mobile County schools, and that the use of 46 texts considered to be violative of the establishment clause had to be enjoined. *Id.* at 988.

The Supreme Court has never definitively ruled on the question of whether secular humanism is or is not a religion within the meaning of the first amendment. Opponents of secular humanism, who seek to have its influence purged from the public sphere, cite as determinative of the issue its inclusion in a footnote listing "religions in this country which do not teach what would generally be considered a belief in the existence of God." See *Torcaso v. Watkins*,

is communicated through public school texts. They advise parents to pursue progressive actions beginning with a request to substitute materials.<sup>21</sup> They suggest the following course of action for parents: explain religious objections to the school's selection of materials, consider alternative selections offered by the teacher, and recommend their own selection of materials.<sup>22</sup> They go on to state that while most reasonable recommendations will be accepted, parents should be prepared to go to the principal, superintendent, school board, and court.<sup>23</sup>

Seeking substitution or exclusion is often the first step toward litigation. For example, a California student, Cassie Grove, was assigned to read the novel *The Learning Tree* in her sophomore English class. After her mother voiced religious objections to the book, Cassie was assigned another book and allowed to leave class when *The Learning Tree* was discussed.<sup>24</sup> In Tennessee, a group of parents convinced a middle school principal and two elementary school principals to provide a completely separate reading program for their children.<sup>25</sup> While these accommodations appeared to address the concerns of the parents, the situations ripened into *Grove v. Mead School District No. 354*<sup>26</sup> and *Mozert v. Hawkins County Board of Education*.<sup>27</sup> However, the issue ultimately litigated in both cases was not the individualized remedy sought by these parents for their children. Not satisfied with an individualized or group-specific remedy, the parents in *Grove* and *Mozert* sought to have the challenged books deemed unfit for any child and removed from use by the entire school system.<sup>28</sup>

While the remedies of substitution and exclusion can alleviate tension between parental religious beliefs and the responsibility of schools to educate

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367 U.S. 489, 495 n.11 (1960). Federal courts, however, have not accepted this contention. See *infra* notes 123-27 and accompanying text.

Although the federal judiciary has thus far declined to define or classify secular humanism, definitions and classifications from other sources abound. For extensive discussions on the topic, see generally Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978); Note, *Secular Humanism, the Establishment Clause, and Public Education*, 61 N.Y.U. L. REV. 1149 (1986) [hereinafter *Establishment Clause*]. For the purposes of this Note, secular humanism will be defined as a school of thought which stresses the application of human reason in problem solving, even in moral dilemmas; which emphasizes the autonomy of man; and which has been identified by some as a religion, worshipping man over an omnipotent supernatural being, and by others as an antireligion, actively working toward the destruction of traditional theism.

21. CLASSROOMS IN CRISIS, *supra* note 6, at 38.

22. *Id.*

23. *Id.*

24. *Grove*, at 1531.

25. *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988).

26. 753 F.2d 1528.

27. 827 F.2d 1058.

28. See *infra* text accompanying notes 98-120.

children adequately, serious concerns emerge in the process of implementing either device. What book will be substituted and who will choose it—the child, the parent, the teacher, the parent with some sort of school supervision, some independent decisionmaker? Will the substitute provide an equivalent as well as an alternative learning experience? How will the child's progress be monitored and evaluated? These questions implicate both the substantive content of public education<sup>29</sup> and the practical limitations of the school's capacity to accommodate diversity.<sup>30</sup>

For the individual teacher or principal, the practical issues arising from substitution or exclusion are daunting. Excluding a child during discussion of objectionable material calls for many logistical decisions. Should she go to the library, to a study hall or another class, or should she just sit in the hallway until the session is over? Another consideration is how the teacher should deal with subsequent class sessions. Is he allowed to make reference to or answer questions about the objectionable material in the presence of the religious objector? If he is not, must he forestall questions from other students until he can make arrangements to protect the objecting child? What procedure should be followed and what effect would this have on course continuity? Who will police the arrangement to see that the exclusion or substitution is being carried out properly?

The situation is complicated when more than one student is involved. The logistics of location and supervision are much more difficult. Individuals and groups could seek exemptions from different classes and activities and ask for various alternatives. The school is left with merely a proposed curriculum in which "any students whose beliefs are contradicted in the classroom [are allowed] to participate selectively only in inoffensive parts of the curriculum."<sup>31</sup> This would shatter any public school system unable to provide the staff, funding and materials necessary to operate such a fragmented program.<sup>32</sup>

It can be predicted that most schools would instead call a halt to the accommodation process and would probably find support in the courts. "Despite the judiciary's tendency to respect parental requests for specific [religious] exemptions, such requests have not been honored when they have resulted in a disruption of the school or a significant interference with the student's educational progress."<sup>33</sup> In *Mozert*, the parents succeeded with

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29. See *supra* notes 9 and 10.

30. See *supra* note 18.

31. Hulsizer, *supra* note 19, at 16.

32. See *Mozert*, 827 F.2d at 1072-73 (Kennedy, J., concurring) ("[Accommodating] exemptions from core subjects because of religious objections . . . would result in a public school system impossible to administer.").

33. M. McCARTHY, *A DELICATE BALANCE: CHURCH, STATE, AND THE SCHOOLS* 63 (1983). The author cites *Hopkins v. Hamden Board of Education*, 289 A.2d 914 (Conn. C.P. 1971),



alternate reading programs in three schools.<sup>34</sup> But when a petition was submitted to provide the alternative program to an additional school *and* to remove the text series from use in the system, the board balked.<sup>35</sup> The alternative program was withdrawn and a resolution was passed stipulating that only officially adopted textbooks were to be used.<sup>36</sup> Substitution and exclusion are highly individualized remedies, and providing accommodations for free exercise claimants directly and significantly conflicts with a school's ability to fund and administer its overall curriculum. Courts have thus far been leery of and resistant to sweeping systemic changes in curriculum and text selection, evidencing a commitment to the state's compelling interest in operating a feasible, manageable school system.<sup>37</sup>

Attention must also be given to the emotional effects that substitution or exclusion may have on the child. Children, particularly teenagers, are acutely conscious of differences among students.<sup>38</sup> Requiring a student to leave class in front of peers is often embarrassing, and the child may be subject to challenge or ridicule later. Even if the student could go directly to the alternative location, class absences might still be questioned by other students.

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*aff'd*, 305 A.2d 536 (Conn. 1973) (students not exempt from mandatory health class which included instruction in sex education and family life) and *Davis v. Page*, 385 F. Supp. 395 (D.N.H. 1974) (students not exempt from health and music classes where instructional media were used for academic, rather than solely entertainment purposes) as examples of denials of exemption requests based on a "substantial disruption" rationale.

34. *Mozert*, 647 F. Supp. at 1196.

35. See *Jurenas*, *supra* note 19, at 28.

36. *Mozert*, 647 F. Supp. at 1196.

37. See *supra* note 18, paragraphs 3-6.

38. The Supreme Court has indicated in its decisions in other areas of school law that the Court is aware of and concerned about the coercive pressure to conform to which students may be subjected from the authoritative institution of public schooling and from the informal, but formidable influence of their peers. The Court's concern has taken the form of invalidating school practices involving prayer or scripture reading, see *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); and mandatory flag salute, see *Board of Educ. v. Barnette*, 319 U.S. 624 (1943), even where the school provides a nonparticipation option for objecting students.

The Court's most recent pronouncement in this area leaves no doubt that the public schools will be scrupulously policed for instances of governmental attempts to coerce orthodoxy of belief. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court invalidated an amended Alabama statute which required that each school day be opened with a moment of silence for meditation "or voluntary prayer." Justice Stevens, writing for the Court, noted that while the availability of a nonparticipation alternative "may reduce the constraint[,] it does not eliminate the operation of influence by the school . . . outside [of its] domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children." *Id.* at 61 n.51 (quoting *McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1947) (Frankfurter, J., concurring)).

Justice O'Connor best described the dilemma facing a student whose beliefs conflict with a school-mandated practice. She said that the student is "left with the choice of participating, thereby compromising the nonadherent's beliefs, or withdrawing, thereby calling attention to his or her nonconformity." *Id.* at 72 (O'Connor, J., concurring).

Besides this awkwardness, ostracism is inherent in a remedy of exclusion. An elementary student undoubtedly feels confused and isolated when she is told that she cannot participate in class activities such as holiday observances or the daily routine of a flag salute. While an adult is capable of understanding the deprivations and persecutions that may attend religious practice, these are advanced concepts for an elementary-aged child to accept on a daily basis.

A distinct complication arises when an older child approaches school officials saying that her personal religious convictions do not require pursuing the exclusion remedy, or that she has no religious objection to the assigned material. The courts have never addressed the issue of whether the school is obliged to enforce the remedy granted to the parents or to defer to the judgment of the child for whose benefit the remedy was originally sought.<sup>39</sup>

In spite of the initial complications and potential complexities, substitution and exclusion may be the best options for parents who have objections to the materials being used in the public school. Academic and administrative

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39. Most disputes arising in the area of school law are phrased in terms of state interests clashing with individual interests. Little attention is paid to the two distinct types of *individuals* involved and their respective rights. Parents have an interest in rearing their children free of undue governmental interference. This right has been recognized as having constitutional stature as one of the privacy rights guaranteed by the fourteenth amendment. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Children have an interest, distinct from their parents, in exercising as much autonomy as possible in a society that imposes significant limitations on a minor's capacity to act independently. The Supreme Court has recognized that "[s]tudents in school as well as out of school are 'persons' under our Constitution. . . . [They are] possessed of fundamental rights which the State must respect." *Tinker v. Des Moines School Dist.* No. 511, 393 U.S. 503, 511 (1969).

Among those constitutional rights inhering in school children are freedom of speech, *Id.* at 506, and freedom from unreasonable search and seizure, *New Jersey v. T.L.O.*, 469 U.S. 325, 333-34 (1985). The Court has also alluded to an autonomy interest in students in a discussion of the "unique role of the school library" where "selection of books . . . is entirely a matter of free choice; [students have] an opportunity at self-education and individual enrichment that is wholly optional." *Board of Educ. v. Pico*, 457 U.S. 853, 869 (1981). The Court has also cautioned, however, that considerations particular to public schools, such as the need to maintain order and discipline and the overriding concern for the "captive audience," justify limitations imposed on the rights of students which would be unconstitutional if applied to adults. *T.L.O.*, 469 U.S. at 341; *Tinker*, 393 U.S. at 506-07. *See also Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 567 (1988); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986).

The potential for conflict between a parent and a child concerning an educational decision to be made on behalf of the child was recognized by the Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Consideration and determination of the issue was circumvented, however, as the majority found "no reason for the Court to consider that point since it [was] not an issue in [this] case." *Yoder*, 406 U.S. at 231. Justice Douglas would have remanded the case in order to ascertain the opinions of the children involved, stating that if "the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views." *Id.* at 242 (Douglas, J., dissenting in part).

concerns<sup>40</sup> can be settled in advance so long as each side is aware of the other's needs and of what is being given up under the arrangement.

Either substitution or exclusion may also be the least costly remedy. The school may have texts that are acceptable, or parents may be allowed to provide substitute materials from books they have at home. A court battle can be forestalled and, if the change is implemented smoothly, the disruption of removal from public school, the cost of private school, and the financial and time investment that home schooling entails could be avoided.

### B. Home Schooling

At the end of Hypothetical 1, the parents indicated that they might remove their children from public school and engage in home schooling. According to one survey, devout Christian parents who are dissatisfied with the secular nature of public schools and who have not found satisfactory religious schools comprise the largest growth group among home schoolers.<sup>41</sup>

Dissatisfaction with values education often motivates removal of children from public schools. Most teachers conduct discussions of values by asking open-ended questions about values, ethics, or morals and by presenting a variety of optional responses without giving authoritative right and wrong answers. Critics of this method warn that exposure to different or situational values will leave children "confused and valueless" and susceptible to adopting the values of others.<sup>42</sup> A Texas mother explained that she and her husband elected home schooling for their children because "[we] want them to have our values, not the values of their peers."<sup>43</sup> An estimated 120,000 to 260,000 children are currently being educated at home.<sup>44</sup>

Home educators must meet statutory requirements to satisfy state compulsory education laws and must select materials that will both ensure an adequate education and satisfy the increasing regulatory standards being set by state boards of education.<sup>45</sup> Educational authorities seek to extend their influence over home schools as far as possible in an attempt to assure that home-educated children develop in social areas as well as in academic and religious areas. The socialization of children is considered to be one of the core functions of public education,<sup>46</sup> and widespread home schooling potentially could subvert the accomplishment of that state goal.

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40. See *supra* notes 9, 10, 18 and accompanying text.

41. Lines, *An Overview of Home Instruction*, 68 PHI DELTA KAPPAN 510 (1987) [hereinafter *Overview of Home Instruction*].

42. Note, *Delconte v. State: Some Thoughts on Home Education*, 64 N.C.L. REV. 1302, 1325 (1986) [hereinafter *Home Education*].

43. Solorzano, *Teaching Kids at Home Stirs a New Uproar*, U.S. NEWS AND WORLD REPORT, Aug. 19, 1985, at 59.

44. *Overview of Home Instruction*, *supra* note 41, at 510.

45. *Home Education*, *supra* note 42, at 1313 & n.104.

46. *Cf. supra* note 7.

State compulsory education laws have been adjusted to accommodate increasing demands for home schooling.<sup>47</sup> Today every state permits some form of home instruction.<sup>48</sup> Twenty-nine states explicitly allow in-home instruction by a parent or tutor,<sup>49</sup> while twelve require either public school attendance or some equivalent, non-school alternative with home schooling statutorily or judicially recognized as "equivalent."<sup>50</sup> Nine states require school attendance with home instruction recognized as "school."<sup>51</sup>

States, however, typically enumerate additional requirements that must be met before a home instruction program qualifies as a school within the meaning of the statute.<sup>52</sup> Parents may be required to submit their home tutoring plan to the state or local board of education,<sup>53</sup> or the progress of the program may be monitored by certified teachers.<sup>54</sup> Three states require that the parent/tutors themselves be certified teachers.<sup>55</sup> Parents seeking to educate their children at home must study their state's compulsory education laws and be prepared to make a showing that their proposed program will adhere to the statutory provisions.<sup>56</sup>

Another consideration is the quality of the education that will be afforded to home-schooled children,<sup>57</sup> and again the issue of material selection will become both critical and controversial. One commentator, however, has noted that although "some home-schooled children probably suffer from negligent or incompetent parent/tutors . . . scattered testing data suggest that successes are more numerous than failures in home-schools."<sup>58</sup> This

47. Solorzano, *supra* note 43, at 59.

48. *Overview of Home Instruction*, *supra* note 41, at 514.

49. *See, e.g.*, ARK. STAT. ANN. § 6-15-501 (1987); MISS. CODE ANN. § 37-13-91(2)(i), (3)(c) (Supp. 1987); MO. ANN. STAT. § 167.031 (Vernon 1965 & Supp. 1988); VA. CODE ANN. §§ 22.1-254 (1985 & Supp. 1987); WASH. REV. CODE ANN. § 28A.27.010(4) (Supp. 1987).

50. *See, e.g.*, DEL. CODE ANN. tit. 14, § 2703 (1981 & Supp. 1986); IDAHO CODE § 33-202 (1981); IND. CODE ANN. § 20-8.1-3-34 (West 1984); OKLA. STAT. ANN. tit. 70, § 10-105 (West 1972 & Supp. 1988).

51. *See, e.g.*, KY. REV. STAT. ANN. § 156.160(2) (Michie/Bobbs-Merrill 1987); N.C. GEN. STAT. § 115C-378 (1987); N.D. CENT. CODE § 15-34.1-01 (1981 & Supp. 1987).

52. *See, e.g.*, ARK. STAT. ANN. § 6-15-503; MO. ANN. STAT. § 167.031(2)(1)-(5).

53. Solorzano, *supra* note 43, at 59. *See, e.g.*, ALA. CODE §§16-46-1 to 10 (1987).

54. Solorzano, *supra* note 43, at 59. *See, e.g.*, FLA. STAT. ANN. § 232.02(4) (West 1980 & Supp. 1988).

55. *Overview of Home Instruction*, *supra* note 41, at 514. *See* IOWA CODE ANN. § 299.1 (West 1949 & Supp. 1988); MICH. COMP. LAWS ANN. § 388.553 (West 1976 & Supp. 1988); N.D. CENT. CODE § 15-34.1-03(1).

56. North Carolina, for example, requires that teachers and curricula of home schools be approved by the state board of education and that such schools adhere to attendance, health and safety, and testing regulations. *See* N.C. GEN. STAT. §§ 115C-378, 115C-555 to 558.

57. One fundamentalist home educator has commented that "[a]ll you need to know is how to read and apply common sense, and you can teach just about anything." Solorzano, *supra* note 43, at 59. This kind of naiveté concerning good teaching methods and the learning process must certainly reinforce the concern of public educators.

58. *Overview of Home Instruction*, *supra* note 41, at 513.

success rate has been attributed to individualized instruction, the personal stake parent/teachers have in the child's progress, the increasing support of home education associations, and the availability of professionally prepared instructional materials<sup>59</sup> such as packaged texts and workbooks, correspondence course style materials, and videotaped lessons. Ironically the increased availability and use of these materials, rather than assuaging the fears of public educators with their professional preparation and comprehensive scope, appear to be leading to the next phase of academic and legal controversy.<sup>60</sup>

As prepared home instructional materials become more prevalent, it is foreseeable that states will seek to regulate the curricula of home schools and that home educators will seek to avoid regulation, just as they currently seek to avoid public school attendance.<sup>61</sup> Home educators will argue that curricula regulation by state authorities will negate the desired effects of home schooling. State approval could be conditioned on guidelines that require instruction on the very concepts and values that parents are trying to avoid. State boards of education will seek to expand their regulatory power to ensure that home-schooled children will be provided a broad education, adequate to prepare them for informed participation in society, as well as the spiritual training their parents desire for them.<sup>62</sup> While statutorily allowed home schooling resolves the problem of efficiently accommodating individual religious beliefs through the institutional structure of public education, the remedy leaves unresolved the underlying conflict between two constitutional values: the state's compelling interest in socializing students to be "good citizens," and the parents' free exercise right to socialize their children according to wholly different value choices.

As home schooling becomes more common, legislators will be called upon to draft compulsory education laws, home school qualifying provisions and curriculum requirements that are specific enough to reassure educators that

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59. Bolick, *Home Schooling Offers Parents Some Alternatives*, L.A. Daily J., Mar. 25, 1987, at 4, col. 5.

60. It has been predicted that the next wave of litigation will center around the content of curricula in home schools as public education officials push to prescribe texts or require that materials used be submitted for approval. *Overview of Home Instruction*, *supra* note 41, at 514-15.

61. *Id.*

62. Ironically, criticisms by public educators leveled at Christian-oriented materials closely parallel those made by fundamentalist parents against texts adopted in public schools. See *supra* note 11. See generally Fleming & Hunt, *The World as Seen By Students in Accelerated Christian Education Schools*, 68 PHI DELTA KAPPAN 518, 523 (1987) (accusing materials prepared by Accelerated Christian Education [ACE] of giving "a very limited and sometimes inaccurate view of the world—one that ignores thinking above the level of rote recall"). But see Johnson, *ACE Responds*, 68 PHI DELTA KAPPAN 520 (1987) (justifying the ACE approach by maintaining that instruction should be conclusive rather than speculative and that "the final interpretation of facts and events should [not] be left up to immature, inexperienced minds, as [in] mainline secular curricula").

adequate general instruction is being provided. The provisions will also have to be flexible enough to afford home schoolers the latitude to tailor education for their children.<sup>63</sup> Once the legislation is passed, it is sure to be challenged by both parents and schools. Parents will more likely test the statute's validity in the courts, claiming that it restricts their free exercise rights and should be invalidated.<sup>64</sup> Schools probably will use the legislative process and seek direct changes in the statutory provisions. It is possible that a school might bring truancy and neglect charges against parents whose home instruction plans are considered inadequate in order to amass evidence to present to the legislature that the statute is too lax to achieve state educational goals.

Once presented with a challenge to the state's home education statute, a court will implement a decision-making process which balances how well the particular law and the particular home instruction program advance the state's goal while affording the individual his free exercise and free speech rights.<sup>65</sup> Presumably workable laws will be developed on a case-by-case basis as courts validate some legislative provisions by requiring home schoolers to bring their plans up to statutory standards and invalidate other legislative provisions by sustaining parental challenges. States are generally recognized to have the power to set the minimum school day and year, to require students to take standardized achievement tests, and to require the school to submit test scores and other relevant data to state authorities.<sup>66</sup> However,

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63. Legislators must also be aware of the danger of being overly broad. In the evolution of current compulsory education laws, at least one state's statute was invalidated as being void for vagueness because it required school attendance without defining what constituted a school. See Lines, *Private Education Alternatives and State Regulation*, 12 J.L. & EDUC. 189, 211 (1983).

64. Cf. *infra* text accompanying notes 144-49. The same kind of analysis used to assess the constitutionality of an administrative decision made by a government agency would be used to test such a statutory provision for a first amendment violation.

65. One commentator has indicated that once a home schooling plan is instituted, the choice of texts and materials used would implicate free speech issues based on the right to have or not have communicative materials in one's home. See *Overview of Home Instruction*, *supra* note 41, at 514-15. Free speech considerations of curricular choices in home instructional plans are beyond the scope of this Note, but it is difficult to see how a free speech challenge to curricular regulation in a home schooling plan would have any more force than any other challenge to the contents of compulsory education. The Supreme Court has long recognized that the state has a powerful interest in defining the content of mandatory public education. See *Pico*, 457 U.S. at 863-64; *Yoder*, 406 U.S. at 213; *Pierce*, 268 U.S. at 534. This interest, and its attendant power to regulate, is limited marginally, however, by an individual's right to religious or intellectual autonomy. See *Farrington v. Tokushige*, 273 U.S. 284 (1927) (state overstepped authority in regulating private foreign-language schools); *Meyer*, 262 U.S. 390 (state statute prohibiting the teaching of German to public or private school students in grades 1-8 held unconstitutional).

66. *Overview of Home Instruction*, *supra* note 41, at 515. The Supreme Court has held that state funds may be spent for texts and testing services provided to nonpublic schools since "[t]here is no question that the State has a substantial and legitimate interest in insuring that its youth receive an adequate secular education." *Wolman v. Walter*, 433 U.S. 229, 240 (1977).

the extent of legitimate state regulation of content in home schools is yet to be determined.

The ability of the home-schooled child to function in the larger society should also be taken into account. Schools provide one of the primary opportunities for the social growth and development of children, and there is concern that home-educated children "are not acquiring fundamental skills needed for good citizenship and self-sufficiency."<sup>67</sup> Proponents of home schooling recognize the validity of the state's interest in socialization. They maintain, however, that there is no "correct" socialization process in a pluralistic society<sup>68</sup> and suggest scouting, church groups, and community activities as alternative social outlets.<sup>69</sup>

Most public educators, however, are not convinced that such alternatives are sufficient. An Idaho school superintendent has commented that "part of the whole schooling process is learning to live in society and communicate with others . . . . People who are home-schooled miss out on that."<sup>70</sup> The inclusion or omission of alternative social activities might be a factor in evaluating the adequacy of a proposed home instruction plan, but cannot, by itself, be determinative. Given the previous legislative and judicial determinations<sup>71</sup> that home schooling represents an acceptable alternative to education outside the home, it may be too late for public educators to argue that the social process contained in the school building is a central feature of the compelling state interest in education.

## II. JUDICIAL RESPONSES

*Hypothetical 2:* The school board decides that it does not have the funds, facilities, or personnel necessary to substitute materials and adequately ensure equivalent topic coverage and mastery, or to excuse students and provide supervision and meaningful activity during time spent out of class. The parents who wish to home educate their children do not meet the statutory requirements to exercise this option. Having been denied a local administrative remedy, the parents turn to the judicial system.

The parents seek to invalidate the school board's decision to adopt the challenged texts, claiming that the use of the books and materials is an

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The Court then appears to authorize at least threshold state regulation of such schools by saying that "[t]he State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction . . . and may examine both teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Id. Accord* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653-54 (1980). See also *Home Education*, *supra* note 42, at 1308-09.

67. Lines, *supra* note 63, at 191.

68. *Home Education*, *supra* note 42, at 1322.

69. Bolick, *supra* note 59, at 4.

70. Solorzano, *supra* note 43, at 59.

71. See *supra* text accompanying notes 47-52.

unconstitutional establishment of religion by a governmental body. The parents seek a broad remedy which would prevent the use of the materials by the entire school system based on a finding that the textbook series is unsuitable for their children and also for all other children in the school district.

Alternatively, the parents seek a more individualized remedy based on a free exercise challenge. The parents ask the court to use its coercive power to force the school system to relieve the burden on the practice of their children's religious beliefs. The remedy would be the same as that initially sought at the informal administrative stage—substitution, exemption or home schooling—but it would be enforced by court order.

### A. Establishment Challenge

An establishment clause challenge to the selection and adoption of a textbook series or a classroom activity will most likely be based on the premise that the target materials impermissibly establish secular humanism as a government-endorsed religion.<sup>72</sup> Fundamentalists claim that the “transferring, through public education, of humanist ideology [sic] to succeeding generations”<sup>73</sup> has displaced traditional theism, particularly Christianity, from its “historically preferred position”<sup>74</sup> in the institutional life and public discourse of the United States.<sup>75</sup> Some materials and activities commonly cited as being particularly offensive include *The Wizard of Oz*, *The Diary of Anne Frank*,<sup>76</sup> keeping diaries,<sup>77</sup> and in-class writing and discussion on

72. Curriculum decisions might alternatively be challenged as being slanted against all religions or as being so permeated with sectarian content as to be non-neutral among religions.

73. Whitehead & Conlan, *supra* note 20, at 29.

74. *Id.* at 7.

75. *Id.* at 6-7.

76. Cooper, *Opposing Sides See Satan as Either Humanism or Censorship*, L.A. Daily J., June 23, 1987, at 4, col. 6. *The Wizard of Oz* is considered objectionable generally for dealing with the occult and mysticism and particularly for telling children that there can be good witches. *The Diary of Anne Frank* faces what is probably the more serious charge of moral relativism for a passage reading as follows: “I don't mean you have to be orthodox or believe in heaven or hell and purgatory . . . I just mean some religion.” Moral relativism can be described as a “[speculatively produced] set of arbitrary absolutes or situational ethics,” Whitehead & Conlan, *supra* note 20, at 55, or as characterizing right and wrong as “entirely relative depending on the situation and especially on the child's point of view at any given time.” K. Gow, *supra* note 6, at 13. The condemnation associated with the term “moral relativism” arises from indicating to children that a person can develop his own value system rather than that there is a set of absolute moral standards. *Id.* at 77-80.

77. Submitting a journal for a class project is challenged on the grounds that it intrudes on family privacy since children are likely to write about occurrences in the home and because the child may feel that she must reveal and defend personal ethical or moral values. Some parents believe that such an activity will cause children to criticize and question parental decisions and authority. K. Gow, *supra* note 6, at 23-24, 194.



resolving moral problems.<sup>78</sup> School representatives typically contend that rather than establishing the tenets of a religious or value system, the texts and materials are used in pursuance of developing critical thinking skills and the broad awareness of cultural differences necessary to function in a pluralistic society.<sup>79</sup>

Although the Supreme Court has decided many establishment clause cases in the area of public education,<sup>80</sup> no case has squarely presented the question of whether a particular curriculum plan or textbook series impermissibly establishes secular humanism as a religion. Until the Supreme Court resolves this discrete issue, lower federal courts will have to decide curricular and textbook issues on the basis of the reasoning behind other establishment clause cases.

In some establishment clause cases, the Supreme Court has used constitutional analyses such as an "original intent" test<sup>81</sup> or a rationale that defers to traditional practices.<sup>82</sup> In the context of public education, however, the Court has consistently applied the three-part test established in *Lemon v. Kurtzman*.<sup>83</sup> The *Lemon* test requires that governmental action 1) have a secular purpose, 2) have no primary effect of advancing religion, and 3) involve no excessive entanglement of government with religion in order to pass constitutional muster.<sup>84</sup> The first and second prongs have been modified

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78. Typically, such an exercise would present a problem and possible responses. The students would write an essay telling which response they would choose and why. The class would then discuss the "ramifications and intellectual sufficiency" of the responses. The activity may be criticized as advocating situational ethics over acting according to a set of predetermined values and as telling children that moral dilemmas can be resolved by applying logical methodology. See Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1205-09 (1982).

79. See, e.g., *Smith v. Board of School Comm'rs*, 827 F.2d 684 (11th Cir. 1987). See also *infra* text accompanying note 113.

80. *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987) (balanced treatment statute invalid); *Aguilar v. Felton*, 473 U.S. 402 (1985) (monitoring system in release time program invalid); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985) (public school teachers not allowed to teach in private schools); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence statute unconstitutional as written); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments may not be posted in classrooms); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (balanced treatment statute invalid); *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963) (disallowed opening of school day with Bible reading); *Engel v. Vitale*, 370 U.S. 421 (1962) (disallowed group recitation of school prescribed prayer); *Zorach v. Clauson*, 343 U.S. 306 (1952) (release time program for off-grounds religious instruction upheld); *McCollum v. Board of Educ.*, 333 U.S. 203 (1948) (disallowed use of public school buildings for religious instruction); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (upheld publically-financed transportation for parochial students).

81. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (opening legislative session with prayer).

82. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668 (1984) (inclusion of a creche in municipally-sponsored holiday display).

83. 403 U.S. 602 (1971).

84. *Id.* at 612-13.

somewhat in subsequent cases.<sup>85</sup> Unless the Supreme Court departs from precedent, the *Lemon* test will likely be the method of analysis applied to textbook challenges in one form or another.<sup>86</sup>

Supreme Court rulings on disputes concerning religion in public schools are highly fact-sensitive.<sup>87</sup> Chief Justice Rehnquist and Justice Scalia have pointed out that establishment clause analysis has produced unpredictable and seemingly inconsistent results from one case to the next.<sup>88</sup> It is probably safe to speculate, however, that establishment clause challenges to curricula and textbooks will produce more predictable results. It is unlikely that an establishment clause challenge will be successful unless the texts openly endorse or discredit a particular religion or advocate atheism, or the activities require a profession or denial of belief. Although to date the Court has found an establishment clause violation in every education case it has considered<sup>89</sup> except two,<sup>90</sup> a school board should be able to demonstrate that its curriculum and textbook choices are in compliance with constitutional mandates by applying the three prongs of the *Lemon* test to the criteria used in making the choices and to the consequences that the implementation of those choices is likely to have.

The first prong of the *Lemon* test requires that a secular purpose underlie the governmental action being challenged.<sup>91</sup> The Court in *Lynch v. Donnelly*<sup>92</sup> seemingly interpreted "a" secular purpose to mean "any" secular purpose.<sup>93</sup> The majority in *Edwards v. Aguillard*,<sup>94</sup> however, subsequently stated that although "the Court is normally deferential to a state's articulation of a secular purpose . . . the statement of such purpose must be sincere and not a sham."<sup>95</sup> The most recent statement of the test came in 1985 when

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85. See *infra* text accompanying notes 91-96, 103-06.

86. *Smith*, 827 F.2d 684, and *Grove v. Mead School District No. 345*, 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985) presented precisely this issue and were decided in this manner. See *infra* text accompanying notes 91-120.

87. Strossen, "Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom, 47 OHIO ST. L.J. 333, 334-35 (1986).

88. See, e.g., *Edwards*, 107 S. Ct. at 2591-2607 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 107-14 (Rehnquist, C. J., dissenting).

89. See *supra* note 80.

90. *Everson*, 330 U.S. 1, upheld the public financing of transportation of parochial school students as a permissible accommodation of religion rather than an impermissible establishment of one. *Zorach*, 343 U.S. 306, reached the same conclusion concerning a student release time program.

91. *Lemon*, 403 U.S. at 612.

92. 465 U.S. 668 (1984).

93. The Court said that celebrating and depicting traditional national holidays were legitimate secular purposes of government agencies, that including a creche in an otherwise nonreligious display did not offend the establishment clause, and that any inference "that the city ha[d] no secular purpose was . . . clearly erroneous." *Id.* 465 U.S. at 681.

94. 107 S. Ct. 2573 (1985).

95. *Id.* at 2579.

the Supreme Court expressly adopted the language suggested in Justice O'Connor's *Lynch* concurrence that the focus of the first prong should be on whether the "government's actual purpose is to endorse or disapprove of religion."<sup>96</sup> Regardless of which statement of the test is used—"a purpose," "any purpose," "a sincere purpose," or "no purposeful endorsement"—a school administration can satisfy the purpose prong of the *Lemon* test so long as the board's decisions concerning curriculum and texts are not tainted by some clear indicia of unconstitutional intent.<sup>97</sup>

An adequate secular purpose can be found in virtually any textbook selection process which bases its decision on skill development, topic coverage, or method of presentation, regardless of any moral or value-oriented message that the materials may be alleged to contain. In spite of the substantial fine-tuning of the doctrine, the presence of a secular purpose is rarely at issue in an establishment challenge. A federal court found an adequate secular purpose, that of exposing students to different cultures and attitudes, in a school board's decision to include the novel *The Learning Tree* in its curriculum in *Grove v. Mead School District No. 354*.<sup>98</sup> *Smith*

96. *Wallace*, 472 U.S. at 56. In addition to the endorsement alternative to the original "neither advances nor inhibits" standard, other statements of the purpose prong have been proposed. These include a neutrality standard, which would divide government action into categories of impermissible pro-religious and anti-religious actions and permissible non-religious actions, *Establishment Clause*, *supra* note 20, at 1173-75; a coercion standard, which would invalidate government action only where there is a threat that a person would be forced to adhere to or denounce a particular belief, Note, *Wallace v. Jaffree and the Need to Reform Establishment Clause Analysis*, 35 CATH. U.L. REV. 573, 588-89 (1986); and a no-preference standard, which would prohibit putting one religious belief, sect, or tradition into a "legally preferred" position, Cord, *Church-State Separation and the Public Schools: A Re-evaluation*, EDUC. LEADERSHIP, May, 1987, at 26, 29. Cord also contends that adopting the no-preference standard would return "policy decisions to the appropriate educational authorities, elected or appointed, and reduce the all too frequent present pattern of government by judiciary." *Id.* at 31. The concept that unifies all of the suggested standards is that the government must *do* something to indicate that one religion, or no religion, is recognized as better than other belief systems. The problem will be in identifying how and at what point a governmental action has conferred such recognition.

97. For example, public statements made by school administrators indicating that religion is being purposefully subrogated, that one religion is being advanced over others, or that religion is being advocated over nonreligion, would be a clear indication that constitutional mandates concerning religion were being violated. The Court, however, has long acknowledged the broad deference to public school administrators in the area of curriculum and textbook decisions. See *Board of Educ. v. Pico*, 457 U.S. 853, 863 (1982). See also *Epperson*, 393 U.S. at 104.

98. 753 F.2d at 1539. *The Learning Tree*, by Gordon Parks, is described by the court as "a novel with autobiographic overtones . . . [It deals with] central theme[s] of] life, especially . . . racism from the perspective of a teenage boy in a working class black family. Comment on religion is a very minor portion of the book." *Id.* at 1534. Judge Canby states in his concurrence that religious hypocrisy is one of the book's themes but that, although Jesus Christ is described as a "poor white trash God" and the protagonist is led to doubt and question simple pieties as "the good die young while the wicked prosper, prejudice reigns, [and] the innocent suffer," these "are not new questions; Job asked them as well. Neither do they reflect hostility toward religion." *Id.* at 1540-41 (Canby, J., concurring).

*v. Board of School Commissioners*,<sup>99</sup> the latest textbook challenge heard in a federal court, did not even address the issue; both parties conceded a secular purpose in the selection of the texts.<sup>100</sup>

One interesting twist on the issue is the assertion made by some school and state authorities that the challengers themselves have the illegitimate purpose. It has been alleged that "fundamentalists are using the issue of secular humanism as a cover to force their own sectarian values on the public schools."<sup>101</sup> Given current Supreme Court doctrine, its application by federal courts, and the watchdog stance being taken by commentators both inside and outside of the education field, it appears that, absent a serious blunder by the school administration,<sup>102</sup> objecting parents will have to focus on something other than an alleged impermissible purpose on the part of the government in order to win an establishment challenge.

An attack based on the effect prong will rarely succeed in the discrete area of curriculum choice and text selection. The effect prong of the *Lemon* test flags as a constitutional violation government action which advances religion.<sup>103</sup> Justice O'Connor advocated modifying the effect test to render unconstitutional any government action which "communicate[s] a message of government endorsement or disapproval of religion . . . whether intentionally or unintentionally" as perceived by the public in her concurring opinion in *Lynch v. Donnelly*.<sup>104</sup> Although this statement of the test has never been officially adopted by a majority of the Court, it is arguably the appropriate standard<sup>105</sup> and it has been implemented in resolving a textbook dispute by a federal appellate court.<sup>106</sup>

Results in curriculum and textbook cases that are decided on the effect prong will be readily distinguishable from results in establishment clause cases dealing with other aspects of public education. In establishment clause analysis, the primary risk to be avoided is that the government action will make students holding minority views feel alienated or pressured to

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99. 827 F.2d 684 (11th Cir. 1987).

100. *Id.* at 690. The court does indicate, however, that the school board's judgment that the books were "more relevant," "better written," or "best suited [for some other nonreligious reason]" would constitute a sufficiently legitimate secular purpose to satisfy the first prong of the *Lemon* test. *Id.* at 694.

101. Woodward & Taylor, *supra* note 11, at 96. See also Park, *The Religious Right and Public Education*, EDUC. LEADERSHIP, May, 1987, at 5, 7; *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1670 (1987) [hereinafter *Religion and the State*].

102. See *supra* note 97. Compare the purpose analysis in *Edwards*, 108 S. Ct. at 2578-84, with that in *Wallace*, 472 U.S. at 56-61.

103. *Lemon*, 403 U.S. at 612.

104. 465 U.S. at 692 (O'Connor, J., concurring). One commentator has indicated that to be a valid test, the message of endorsement or disapproval should be measured by the perception of the minority group, rather than by the public at large. *Religion and the State*, *supra* note 101, at 1648.

105. See Strossen, *supra* note 87, at 361-62.

106. See *Smith*, 827 F.2d at 692.

conform<sup>107</sup>—making “adherence to a religion relevant in any way” to their standing in their community.<sup>108</sup> Prominent posting of the Ten Commandments in a classroom<sup>109</sup> or opening the school day with prayer<sup>110</sup> or Bible reading<sup>111</sup> could clearly have the effect of conveying a message to students that the school is presenting these doctrines and practices as ones that they should or must follow. It is much less clear that the selection and use of texts and materials which do not openly advocate or denounce religious beliefs are subversively undermining traditional theism or establishing secular humanism as a state religion. Moreover, the federal courts have been unwilling to find constitutional injury in mere *exposure* to ideas that might challenge children’s religious commitments.<sup>112</sup> One of the express purposes of public education is to prepare children to live in a pluralistic, tolerant society. Despite the interest parents have in protecting the sectarian purity of their children’s education and socialization, the federal courts have subordinated that interest to the values of the “melting pot.”<sup>113</sup>

This reasoning is borne out in the *Grove* and *Smith* cases. Each court tested the inclusion of the challenged books as either an advancement of secular humanism or as an inhibition of traditional theism. Neither court found an impermissible advancement of secular humanism, based on a consideration of the way in which the challenged materials fit into the context of the overall curriculum.<sup>114</sup> The *Smith* court found no impermissible inhibition of religion based on a finding that the texts were not antagonistic toward religion nor an attempt to discredit it<sup>115</sup> and that they were included to instill “entirely appropriate” secular values such as logical decision-making, self respect, and tolerance of diverse views.<sup>116</sup> A more interesting example of judicial reasoning is the concurring opinion in *Grove*. While the majority opinion disposed of the issue almost summarily, Judge Canby’s concurrence explained that although the challenged novel was, in fact, derogatory toward religion generally, there was no unconstitutional inhibition of religion.<sup>117</sup> Canby explained the validity of the inclusion of the book by saying that “to pose [ultimate] questions is not to impose answers.”<sup>118</sup>

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107. Strossen, *supra* note 87, at 359-60.

108. *Lynch*, 465 U.S. at 687 (O’Connor, J., concurring).

109. *See Stone*, 449 U.S. 39.

110. *See Engel*, 370 U.S. 421.

111. *See Schempp*, 374 U.S. 203.

112. *See, e.g., Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988). *See also infra* text accompanying notes 161-69.

113. *See, e.g., Epperson*, 393 U.S. at 107-08; *Mozert*, 827 F.2d at 1069; *Grove*, 753 F.2d at 1539 (Canby, J., concurring).

114. *Smith*, 827 F.2d at 692; *Grove*, 753 F.2d at 1539.

115. *Smith*, 827 F.2d at 692.

116. *Id.*

117. *Grove*, 753 F.2d at 1540-41 (Canby, J., concurring).

118. *Id.* at 1541.

Where the issue of values education is raised,<sup>119</sup> it appears that courts will defer to the judgment of the local school boards until the materials they choose not only raise ultimate questions, but also give definitive answers.

To prevail in an establishment clause challenge, objecting parents will have to make a strong showing that the challenged selections are in derogation of religion and that they send a message of hostility toward religion by their inclusion in the overall context of the curriculum. This demanding interpretation of what constitutes an impermissible effect will protect public education since plaintiffs must assert much more than merely subjective conflict between their religious beliefs and the content of the curriculum before a federal court will step in to review issues such as the system-wide use of materials. The *Smith* court recognized the strain that would otherwise be put on school officials in making curriculum and textbook decisions: "If the standard were merely inconsistency with the beliefs of a particular religion there would be very little that could be taught in the public schools."<sup>120</sup> Given the Supreme Court's inclination to look for some affirmative act in order to find a violation of the effect prong and the exacting scrutiny to which federal courts are subjecting parental challenges to textbooks, an establishment clause claim based on an alleged effect prong violation is not likely to be successful.

The entanglement prong of the *Lemon* test requires that the challenged state action not involve excessive entanglement of government and religion.<sup>121</sup> To date, no establishment challenge to textbook choices has been based on an alleged entanglement violation. Should such a challenge be brought and succeed, the likely remedy would require that the board adopt texts and materials that do not advance secular humanism nor inhibit traditional theism or any other belief system. This remedy would probably be more susceptible to an entanglement challenge than the practices currently under fire since school systems would have to install some sort of administrative process to evaluate which texts meet this requirement. Such an evaluation system would itself constitute an entanglement violation since state education

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119. The conflicting demands put on the public schools in the area of values education are described most clearly by the assertion that teaching moral values can have the effect of religious indoctrination, which schools must avoid, but that eradicating moral teaching "establish[es] a preference for those who believe in no morals," *i.e.*, secular humanists. See Whitehead & Conlan, *supra* note 20, at 19-20. This paradoxical situation leaves public schools "caught in crossfire" between competing assertions that teaching values from either theistic or from nontheistic views violates the first amendment. M. McCARTHY, *supra* note 33, at 33-34. Judge Canby's concurrence in *Grove* asserts that for the establishment clause to have meaning, there must be an area of "nonreligious" thought, rather than the "fallacious dichotomy [of dividing] value laden thought into only two categories—the religious and the anti-religious." *Grove*, 753 F.2d at 1536 (Canby, J., concurring). See also *Establishment Clause*, *supra* note 20, at 1174-75.

120. *Smith*, 827 F.2d at 693 n.10.

121. *Lemon*, 403 U.S. at 613.

officials would have to decide whether a given set of beliefs constitutes a religion in order to ensure adequate representation in the texts.<sup>122</sup>

The ultimate first amendment claim based on an alleged establishment of secular humanism will succeed or fail on the answer to the following question: Is secular humanism a religion?<sup>123</sup> If it is a religion, secular humanism clearly "has no more constitutional right to be taught in public schools than the Protestant, Roman Catholic, or Jewish faiths."<sup>124</sup> Its status as a religion, non-religion, or anti-religion, however, has proven as elusive as its definition.<sup>125</sup> The Supreme Court has never made a definitive ruling on the issue despite protests of some observers to the contrary.<sup>126</sup> Lower federal courts have, therefore, successfully evaded answering the question to date "by holding that the beliefs, whatever their nature, were not being established."<sup>127</sup> So long as no case presents the issue squarely, courts can continue to dispose of disputes without deciding whether secular humanism is a religion or not. If secular humanism is ever found to be a religion, *and* if the content of public education is found to constitute establishment of secular humanism, the resulting purge of secular influence from curricula and textbooks will leave Mr. Jefferson's wall<sup>128</sup> in shambles, public education

122. In *Aguilar*, 473 U.S. 402, the Supreme Court invalidated a monitoring system installed by a public school to try to save its student release time program from constitutional defect. The Court found that the monitoring system itself "result[ed] in the excessive entanglement of church and state." *Id.* at 409.

123. Giving a definitive answer to the question is clearly beyond the scope of this Note. Two of the best known works on evaluating belief systems as religions are Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, which suggests the presence or absence of "ultimate concerns" and "extratemporal consequences" as determinative factors; and Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 752 (1984), which advocates determining the status of questioned belief systems analogically "by seeing how closely they resemble what is undeniably religious." *Id.* at 815.

Scholarly attempts to categorize secular humanism as a religion or not a religion include *Establishment Clause*, *supra* note 20, at 1153-72, which uses two analogical standards, in which secular humanism could be classified as a religion under the first, but not the second; and Note, *Secular Humanism as a Religion Within the Meaning of the First Amendment: Grove v. Mead School Dist.*, 61 TUL. L. REV. 453 (1986), which uses Supreme Court precedent and the challenger's claim in *Grove* as criteria, ultimately concluding that no meaningful determination can be made.

124. Woodward & Taylor, *supra* note 11, at 96.

125. See *supra* note 20. See also Park, *supra* note 101, at 7. ("[T]he term has strength in its confusion. It has become a useful label for everything leaders in the religious right consider evil or godless.")

126. Fundamentalists claim that the inclusion of secular humanism in a Supreme Court footnote in *Torcaso v. Watkins*, 367 U.S. 488, 489 n.11 (1961), that lists "religions in this country which do not teach what would generally be considered a belief in the existence of God," constitutes a definitive holding that classifies it as a religion under establishment clause doctrine. *But see supra* note 20.

127. *Establishment Clause*, *supra* note 20, at 1156.

128. *Everson*, 330 U.S. at 16 ("In the words of Jefferson, the clause against the establishment of religion by law was intended to erect a 'wall of separation between church and state.'" (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878))).

in chaos, and sectarian factionalism running amok. However, the federal courts, with perhaps one exception,<sup>129</sup> are aware of what is at stake and will undoubtedly continue to avoid the issue by refusing to determine the status of secular humanism.

### B. Free Exercise Challenge

It can be predicted that a free exercise challenge to curriculum and textbook decisions is more likely to succeed than a claim based on an alleged violation of the establishment clause. Courts are more amenable to the individualized remedies available in a successful free exercise suit than to the system-wide purge that rectifying an establishment clause violation would require.<sup>130</sup> However, the most recent federal decision in this area, *Mozert v. Hawkins County Board of Education*,<sup>131</sup> indicates that in order to prevail, objecting parents will have to show with a high degree of specificity how the challenged materials burden their religious freedoms.<sup>132</sup> It is instructive to look at the analyses employed in the *Mozert* decisions at both the court of appeals<sup>133</sup> and district court<sup>134</sup> levels.

The controversy in *Mozert* arose when a group of parents voiced objections to the texts adopted by the Hawkins County schools. Initial requests by the parents for the substitution of texts for their children and the exclusion of their children from class discussion of the objectionable materials were granted in three Hawkins County schools. The parents submitted a petition to a fourth school for similar accommodations<sup>135</sup> and for removal of the adopted series from the entire school system.<sup>136</sup> The school board denied the petition and terminated the accommodations that had been made after the initial requests.<sup>137</sup> Thereafter, the objecting students refused to attend classes or complete assignments, and were suspended as a result. The parents withdrew many of the students from the Hawkins County public school system and enrolled them in private schools. Suit was instituted

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129. See Judge Brevard Hand's opinion in *Smith v. Board of School Comm'rs*, 655 F. Supp. 939 (S.D. Ala.), *rev'd* 827 F.2d 684 (11th Cir. 1987).

130. See generally *Religion and the State*, *supra* note 101, at 1705-22 (discussing the Court's recognition of a wide variety of individual accommodations under the free exercise clause). The author also discusses the tension such accommodations create under a strict interpretation of the establishment clause and notes a failure on the part of the Court to "develop a principled basis for choosing which free exercise claimants to accommodate." *Id.* at 1712-13.

131. 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988).

132. *Id.*

133. *Id.*

134. *Mozert v. Hawkins County Pub. Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd sub nom. Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, *cert. denied* 108 S. Ct. 1029 (1988).

135. *Mozert*, 647 F. Supp. at 1196-97.

136. Jurenas, *supra* note 19, at 28.

137. *Mozert*, 647 F. Supp. at 1196-97.



based on an alleged violation of the first amendment right to free exercise of religion under 42 U.S.C. § 1983.<sup>138</sup>

With the exception of the district court's award of damages,<sup>139</sup> the district court and the court of appeals reached identical conclusions on how parents could protect their children from texts described as "so inimical" to their religious views that mere exposure would be harmful.<sup>140</sup> Both courts found that removal of the children from public school was the appropriate remedy for the parents' concerns. The critical difference, however, is each court's view of the nature of that remedy. The district court felt that private or home schooling should be judicially mandated to relieve an unconstitutional burden on the plaintiffs' free exercise rights.<sup>141</sup> The court of appeals found no constitutional violation and stated that private and home schooling were statutorily authorized options available to parents who wished to shield their children from "exposure to some ideas they find offensive."<sup>142</sup> The court of appeals freed the school system of its damages liability, which indicates that "[i]n religion . . . government has no general duty to subsidize the exercise of constitutional rights."<sup>143</sup> While parents may have their children educated somewhere other than in public schools, the financial burden of that choice rests with the parents, not with the school system.

The key to assessing the two decisions is to understand the principles underlying a free exercise challenge and to recognize how each court characterized the case's facts when applying those principles. The Supreme Court has indicated that individual religious liberty will be protected, stating that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion . . . or force citizens to confess by word or act their faith therein."<sup>144</sup> In evaluating free exercise claims, the Supreme Court has developed a test designed to assess whether a particular governmental action has impermissibly attempted to prescribe orthodoxy and coerce adherence to its strictures. This test was most recently stated in *Thomas v. Review Board*.<sup>145</sup> Under *Thomas*, if the state conditions the receipt of a benefit<sup>146</sup> on conduct proscribed by religious belief, or denies a benefit because of conduct required by a religious belief, a burden on the free exercise of religion exists.<sup>147</sup> In

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138. *Id.*

139. The district court awarded over \$51,000 in damages to the plaintiff parents to defray the costs of enrolling their children in private church schools and pursuing the suit. *Mozert*, 827 F.2d at 1063.

140. Reidinger, "If Thy Textbook Offends Thee . . .", A.B.A. J., Jan. 1, 1987, at 78.

141. *Mozert*, 647 F. Supp. at 1203.

142. *Mozert*, 827 F.2d at 1067.

143. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1275 (2d ed. 1988).

144. Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

145. 450 U.S. 707 (1981).

146. In this context, the benefit at issue is the provision of a public education.

147. *Thomas*, 450 U.S. at 717-18.

order to assert a free exercise claim, a person objecting to a governmental regulation must first show that his beliefs are sincerely held and are of a religious nature, and that the challenged regulations act to inhibit the practice of his religion.<sup>148</sup> Once the religious objector has made such a showing, the burden shifts to the state to show that the regulation is the least restrictive means of pursuing a compelling state interest.<sup>149</sup>

Both courts and all parties in *Mozert* agreed that the parents asserted sincerely held beliefs rooted in religion<sup>150</sup> and that the state had a compelling interest in the education of its young citizens.<sup>151</sup> The courts and the parties did not agree, however, on the characterization of the state's requirement of a compulsory uniform reading program, leading to a split in the results. The characterization of requiring students enrolled in public schools to attend class, read from the adopted and assigned texts, and participate—at least by listening—to class discussion was the determinative factor in each decision.<sup>152</sup> Neither court's decision is a fully satisfactory guide for future litigation. Arguably, the district court's analysis gives too much latitude to the religious objector, while the court of appeals may have substituted legal semantics for an empathetic evaluation of the undeniably real effects that the regulation had on the objectors.

The district court seems to have applied a mechanical syllogism to find that the parents' religious beliefs had been burdened. The parties stipulated that the plaintiff's beliefs were both religious and sincerely held and that certain materials in the textbooks were offensive to them.<sup>153</sup> The court then reasoned that since the board's resolution to use only state adopted books ran afoul of the parents' belief that they must shield their children from exposure to the texts, the uniform reading requirement constituted a burden on the plaintiffs' free exercise rights.<sup>154</sup> The court noted the home schooling statutes and the alternative programs that the school provided prior to the suit and concluded that the "state [could] achieve literacy and good citizenship for all students without forcing them to read the [challenged texts]."<sup>155</sup>

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148. *Id.* Both *Mozert* courts rejected the state's assertion that the belief being burdened must be a "central" or "fundamental" tenet of the religion to sustain a free exercise challenge. One commentator, however, has noted that "at least . . . some analysis of the relative doctrinal importance of a plaintiff's religious objection or practice is appropriate . . . for judging free exercise claims." *Recent Developments—Constitutional Law: The Free Exercise Clause and Compulsory Reading in Public Schools—Mozert v. Hawkins County Public Schools*, 10 HARV. J.L. & PUBL. POL'Y 768, 771 (1987) [hereinafter *Free Exercise Clause*].

149. *Thomas*, 450 U.S. at 717-18.

150. *Mozert*, 827 F.2d at 1061; *Mozert*, 647 F. Supp. at 1197.

151. *Mozert*, 827 F.2d at 1068; *Mozert*, 647 F. Supp. at 1200.

152. Current free exercise doctrine has been criticized as being "excessively malleable" in that the interests of either the individual or the state can be highlighted by the court to justify whatever result it has reached. *Religion and the State*, *supra* note 101, at 1708.

153. *Mozert*, 647 F. Supp. at 1197.

154. *Id.* at 1200.

155. *Id.* at 1201.

On the surface, this analysis is appealing. The result seems to be a reasonable application of the *Thomas* test and is very solicitous of the rights of the individual. However, the analysis poses serious problems for future litigation. First, it would be ill-advised for any state to stipulate to the sincerity or religiosity of beliefs or to the offensiveness of the contested materials to those beliefs given the mechanical, checklist-style analysis that the district court employed: Sincere religious beliefs + Offensiveness + Requirement to read + School's refusal/inability to implement sufficiently less restrictive alternatives = Unconstitutional burden mandating judicially enforced accommodation. Instead of stipulating to facilitate proceedings, the state would be forced to contest these issues, and courts would be forced to make much more detailed inquiries into the sources and depths of the beliefs. This kind of inquiry could implicate entanglement concerns under the establishment clause.<sup>156</sup>

A second weakness in the district court's analysis is its contradictory handling of the state's claim that the uniform reading program was the least restrictive means of achieving its compelling interest. The state asserted that, given the objections the parents raised concerning the texts, it would be impossible for the board to select another series that they would find suitable. The court dispensed with this argument by stating that since the parents had not raised "multi-subject, multi-text objections . . . [t]he defendants may not justify burdening the plaintiffs' free exercise rights in this narrow case on the basis of what the plaintiffs might find objectionable in the future."<sup>157</sup> In fashioning its remedy, however, the court explicitly cites the unlikelihood that any "single, secular reading series on the state's approved list would be acceptable to the plaintiffs without modifications"<sup>158</sup> as a reason to mandate a publicly financed home or private schooling accommodation. Both the school system and the court decided that these children must attend either private or home schools in order to be educated according to the requirements of their state and within the strictures of their religion. It is inconsistent, therefore, for the court to refuse to allow the state to base its decision on the parents' broad objections to state-adopted materials and then to rest its own decision on those very same objections.

The district court's holding has potential for abuse as a bargaining tool. Fundamentalist parents could use this precedent to exert excessive leverage in negotiating with school boards on the selection of other texts and materials that are potentially objectionable.<sup>159</sup> School boards might react to this

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156. L. TRIBE, *supra* note 143, at 1246-47. See also *supra* notes 122-23 and accompanying text.

157. *Mozert*, 647 F. Supp. at 1201.

158. *Id.* at 1203.

159. *Free Exercise Clause*, *supra* note 148, at 772.

holding by conceding to pressure groups and adopting "inoffensive" books rather than face the possibility of an extended suit and an exorbitant damage award. This effective veto power could give religious objectors the potential to shape the school's curriculum to a single creed.<sup>160</sup> The free exercise clause is a constitutional defense to over-intrusive regulation by the government. It is not a doctrine which can legitimately be used offensively to effect systemic changes. The decision of the district court, while superficially more protective of individual liberty, is also broad enough to be open to abuse.

The court of appeals never reached the question of whether the uniform reading program was justified as the least restrictive means of achieving legitimate state goals. According to the court, the evidentiary burden never shifted to the state to make this showing because the "plaintiffs failed to establish the existence of an unconstitutional burden."<sup>161</sup> This finding was based on the court's characterization of the two forms an unconstitutional burden may take: compelling a student to make an affirmation or denial of his beliefs, or requiring a student to participate in activities contrary to his beliefs.<sup>162</sup> According to the court, compliance with the board's policy subjected students to neither of the prohibited forms of coercion.

All students were required to read assignments from texts adopted from the state-approved list and to participate, at least by listening or observing, in class discussions or activities.<sup>163</sup> Since an objecting child was forced neither to profess or deny any belief nor to actually take part in the activities, the court found the element of coercion to be missing.<sup>164</sup> The

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160. *Religion and the State*, *supra* note 101, at 1670.

161. *Mozert*, 827 F.2d at 1070. In a thinly veiled criticism of the lower court's decision, Judge Lively said that "when asked to 'interpose,' courts must examine the record very carefully to make certain that a constitutional violation has occurred before they order changes in an educational program adopted by duly chosen local officials." *Id.*

162. *Id.* The most well-known examples of such unconstitutional regulations are those requiring student participation in flag salute and school prayer, which the Court has consistently struck down since 1943. *See, e.g., Wallace*, 472 U.S. 38; *Engel*, 370 U.S. 421; *Barnette*, 319 U.S. 624.

163. *Mozert*, 827 F.2d at 1069.

164. *Mozert*, 827 F.2d at 1063-68. Some of the particular materials and activities which the parents asserted to be unconstitutional burdens, and which the appellate court found to be noncoercive, included textual references to evolution, magic, and achievements by women outside the home, and engaging in role playing, haggling, and making up chants. *Id.* at 1062, 1066. A poem called "Look at Anything," with a theme that one can use the imagination to "become" a thing and thus understand it better, was objectionable because it is "'occult practice' for children to use imagination beyond the limitation of scriptural authority." *Id.* at 1062. A passage in a first grade text was found to be objectionable because it allegedly indoctrinated children in the tenets of secular humanism. The story depicted a boy cooking while a girl read. The objecting parent claimed that "the religion of John Dewey is planted in the first graders [sic] mind that there are no God-given roles for the different sexes." Strossen, *supra* note 87, at 340 n.44 (quoting a letter from Bob Mozert, one of the named plaintiffs, to the editor of the Kingsport, Tenn. Times (Oct. 18, 1983)).

absence of coercion, an element not mentioned in the district court's burden equation, was found to be determinative by the court of appeals.<sup>165</sup>

The court of appeals made a distinction between the constitutional guarantee of free exercise of religion—which the court defined as freedom from compulsion to speak or to act contrary to one's religious beliefs—and what it saw as the parents' claim—a guarantee of freedom from exposure to ideas they found offensive to their religion. The court quoted Judge Canby's concurrence in *Grove v. Mead School District No. 354*,<sup>166</sup> saying that “governmental actions that merely offend or cast doubt on religious beliefs do not on that account violate free exercise.”<sup>167</sup> This is consistent with Supreme Court doctrine. Writing for the majority in *Epperson v. Arkansas*,<sup>168</sup> Justice Fortas stated that there is no legitimate state interest in protecting the adherents of particular religions from views “distasteful to them.”<sup>169</sup> While *Epperson* dealt with a statute regulating the teaching of evolution, the same reasoning is equally applicable to themes found in texts other than science books. Since evolution is taught openly as a scientific theory, while secular humanism is allegedly purveyed in other courses on a more subliminal level, validating textbook choices by finding no constitutional guarantee of freedom from exposure is either obvious or insidious, depending on one's stance.

The court of appeals decision is troubling. While it seems reasonable to say objectively that exposure to texts and discussions does not constitute coercion, the Supreme Court has recognized that “mere exposure” to majoritarian practices in the classroom, as in the contexts of school prayer<sup>170</sup> and ritual flag salute,<sup>171</sup> can have a coercive impact sufficient to warrant constitutional protection. In the Sixth Circuit's *Mozert* decision, the subjective impact on the religious objectors is seemingly not taken into account. The result is that the majority is willing to turn its back on an injury that

165. This finding, however, may not withstand close examination. Students who are not allowed to absent themselves during the discussion of materials contrary to their religious beliefs arguably are being passively coerced into acceptance of mainstream philosophy. Forced exposure to these kinds of activities are virtually indistinguishable from forced participation in or exposure to the flag salute and prayer recitation activities which the Court has consistently found to impose an unconstitutional burden of individual religious beliefs. See *supra* note 162 and accompanying text.

166. 753 F.2d 1528, 1535 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

167. *Mozert*, 827 F.2d at 1068 (quoting *Grove*, 753 F.2d at 1543 (Canby, J., concurring)).

168. 393 U.S. 97 (1968).

169. *Id.* at 107 (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)). See also Will, *Tailored Textbooks*, Wash. Post, Nov. 9, 1986, at H7, col. 1. (The free exercise clause “is not . . . a commitment to protect parents and children from influences that might complicate the transmission of sectarian beliefs.” (quoted in L. TRIBE, *supra* note 143, at 1275.)).

170. See *Wallace*, 472 U.S. 38; *Engel*, 370 U.S. 421.

171. See *Barnette*, 319 U.S. 624.

merits constitutional consideration simply because, on the balance, the remedy sought by these particular plaintiffs was not appropriate.

Judge Boggs, who concurred only in the result, has the plight of the plaintiffs in better focus. He describes their burden as "many years of education, being required to study books that . . . systematically undervalue, contradict and ignore their religion."<sup>172</sup> These plaintiffs maintained that they would keep their children in the public schools only if following discussion of the offending topics, their children were instructed that the "other views are incorrect and that the plaintiffs' views are the correct ones."<sup>173</sup> Given this extreme position, the court of appeals clearly could not accommodate these plaintiffs within the forum of the public schools without running afoul of the establishment clause.<sup>174</sup> There will undoubtedly arise, however, challenges by religious objectors whose views are not so extreme and whose proposed remedies will pose less of a threat to the integrity of public education.<sup>175</sup> The danger in these borderline cases is that the appellate decision could be applied as mechanically as that of the district court. The risk that one party's interest will be subjugated without proper evaluation is precisely the same. The difference is that under the court of appeals' analysis, the individual's rights will bow to pursuance of state interests.

In spite of the foregoing criticism, the court of appeals decision is preferable to that of the district court because it more clearly recognizes the dilemma faced by public schools and more accurately describes the goals of public values education. Public schools are expected to be the inculcators

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172. *Mozert*, 827 F.2d at 1079 (Boggs, J., concurring).

173. *Id.* at 1062.

174. Any exemption from state regulation opens establishment clause questions as to whether the exemption is an impermissible preference, advancement, or endorsement of the beliefs being accommodated. There is no easy resolution to this concern. Justice O'Connor believes that exemptions which act to relieve a state-imposed burden are justifiable as free exercise "modifications" of the establishment clause. *Wallace*, 472 U.S. at 83 (O'Connor, J., concurring). Some believe that free exercise exemptions should be the rule, with denials of exemptions allowed only when the government's interest is very high. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U.L. Rev. 146, 153 (1986). Others, however, warn that such an accommodation might still violate the establishment clause if it seemed to prefer among religions, or was costly or "hamper[ed] school authorities' ability to carry out their functions." *Religion and the State*, *supra* note 101, at 1666 n.129. One commentator would find a judicially created exemption preferable to one created by statute. He believes that judicial decisions "do not ordinarily threaten the intrusion of religious life into the secular sphere" while legislative exemptions promote inequality by accommodating some, but not all, legitimate objectors. *Id.* at 1731, 1738. Another commentator asserts that the legislature may be in a better position than the courts to decide when the "advantages of strict neutrality are overstated." L. TRIBE, *supra* note 143, at 1194-95. Case-by-case consideration and determination seems more congruent with the spirit of the free exercise clause, but the development of some statutory guidance is probably preferable to ad hoc decision-making by the bench.

175. See McConnell, *supra* note 174, at 148 ("[A]s society becomes ever more secular, many more persons of varying religious persuasions (even the 'religious right') will require 'special treatment' in order to remain faithful to their religious tenets.").

of values "essential to a democratic society,"<sup>176</sup> while remaining faithful to the strictures of the establishment clause. Among these desired values is a "tolerance of divergent political and religious views."<sup>177</sup> The court of appeals makes an important distinction when it describes the tolerance promoted in the challenged textbook series as being civil in nature rather than religious.<sup>178</sup> In a pluralistic society, one may be free to privately consider another morally damned, but no one is free to use the organs of the state to force his own salvation on that other. The cost of pluralism, however, appears to be that religious beliefs sincerely held by some sects will be burdened to an uncomfortable degree, either through the exposure to conflicting ideas or through the added costs of providing private education.

It is particularly important to foster civil tolerance in children who are expected to become members of society at large. The court of appeals distinguished *Wisconsin v. Yoder*,<sup>179</sup> where children of Old Order Amish parents were exempted from state compulsory schooling laws, by pointing to the long history of separateness of the Amish culture. The *Mozert* parents differed from the *Yoder* parents in that they wanted their children to "acquire all the skills required to live in modern society."<sup>180</sup> In today's American culture one of those skills certainly must be to recognize and tolerate a diversity of views.

One commentator recommends that to facilitate civil tolerance, public schools should "encourage as wide a range of views to be presented and expounded as is practical, and to avoid when possible an authoritative position on issues known to be controversial."<sup>181</sup> This teaching method, however, has been subject to condemnation by fundamentalists as promoting moral relativism.<sup>182</sup> The court of appeals decision could protect public schools from being molded to the demands of sectarian factions and, through various opt-out alternatives, simultaneously afford the religious adherent the latitude to be educated according to the tenets of his faith and the requirements of his state.

*Mozert v. Hawkins County Board of Education* is the latest word from federal appellate courts on fundamentalist challenges to textbook choices.<sup>183</sup> Although the Sixth Circuit requires a relatively substantial showing of a burden in order to prevail in a free exercise challenge, such a challenge is more likely to be successful than one based on the establishment clause. A free exercise action seeking a narrowly tailored remedy has a better prospect

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176. *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

177. *Id.*

178. *Mozert*, 827 F.2d at 1069.

179. 406 U.S. 205 (1972).

180. *Mozert*, 827 F.2d at 1067.

181. McConnell, *supra* note 174, at 165.

182. *Religion and the State*, *supra* note 101, at 1671. See also *supra* note 76.

183. See *supra* text accompanying notes 130-75.

than one that seeks a broad remedy. First, since local school boards have a great deal of discretion in setting curriculum, an individualized accommodation will be favored over systemic change.<sup>184</sup> Second, the focus of the inquiry will be on the challenger's beliefs and how the materials, regardless of their nature, affect those beliefs.<sup>185</sup> Courts, therefore, will be able to escape the decision that an establishment challenge will entail: deciding whether or not secular humanism is a religion. Third, much of the machinery is already in place to make a free exercise remedy easily available to parents and not overly burdensome to schools. All states currently have private and home schooling options,<sup>186</sup> and if supplemental materials are available, substitution and exclusion options might also be implemented to accommodate minority beliefs.<sup>187</sup> Finally, given the highly individualized nature of religious beliefs and given the institutional nature of public schools and their difficulty in providing tailored instruction, a free exercise challenge seems more congruent with the complaints of parents concerning the education of their children. While it is entirely appropriate for a parent to want to control the development of his own child, it is inappropriate for a parent to presume to do so for someone else's child.

### III. POLITICAL REMEDIES

*Hypothetical 3:* The judicial challenges brought by the parents are unsuccessful because the court rendering the decision follows the reasoning of the Eleventh Circuit decision in *Smith v. Board of School Commissioners* to dismiss the establishment challenge and applies the coercion standard adopted by the Sixth Circuit in *Mozert v. Hawkins County Board of Education* to find no unconstitutional burden on their free exercise rights. The parents, still aggrieved by the requirements of the board's decisions, look to another forum for relief—the political process.

The parents have two opportunities for effecting change via the political system. First, they can lobby the state legislature to add provisions to the state's education code to require adequate representation of their views in school curricula. Second, they can focus on making changes locally by electing representatives to the school board which chooses the texts and

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184. M. MCCARTHY, *supra* note 33, at 63 (asserting that requests for exemptions are often not honored where they disrupt the operation of the school or interfere with the students' educational progress).

185. See *supra* text accompanying notes 161-69.

186. See *supra* text accompanying notes 47-56.

187. One commentator warns, however, that substitution and exclusion give students the choice of participating or waiting elsewhere, which "implies that the [objectionable] exercise is a valid element of a legally required education; the norm is religion and dissenters must opt out." L. TRIBE, *supra* note 143, at 1170.



materials that will be used in the particular school in which their children are enrolled.

### A. State Legislation

Religiously motivated efforts to enact state-wide legislation concerning the curriculum in public schools are most commonly limited to disputes about instruction on the origins of man.<sup>188</sup> More specifically, the statutes focus on the presence or absence of evolution and creationism in science curricula. Many fundamentalists view evolution as being in diametric opposition to their religious beliefs, and therefore seek its eradication from public education.

One such effort was the Arkansas statute which was the source of controversy in *Epperson v. Arkansas*.<sup>189</sup> Under this statute, instruction on evolution subjected the teacher to criminal charges and dismissal. The Supreme Court invalidated the statute as a violation of the establishment clause, stating that "the First Amendment does not permit the State to require that teaching and learning be tailored to the principles or prohibitions of any religious sect."<sup>190</sup> While *Epperson* closed the door on seeking a complete prohibition of the teaching of evolution, it did not close the door on less extreme provisions.

Since the *Epperson* era, proposed enactments typically legislate the inclusion of instruction on creationism rather than exclusion of the instruction on evolution. These provisions are commonly called "balanced treatment" or "equal treatment" acts since they advocate the presentation of both theories. Proponents urge adoption of the statutes, asserting that students' academic freedom is restricted by being presented with only one theory on man's origin.<sup>191</sup> The societal value of pluralism, they say, will be promoted by allowing diverse views to be voiced in the classroom.<sup>192</sup>

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188. While evolution-creation statutes are by far the most common, other efforts to legislate religiously-based theories into public education have been documented. One suggested provision, dating from the 1920s, would have "prescribe[d] by law that pi should be changed from 3.1416 to 3.000 . . . partly because the Bible described Solomon's vase as three times as far around as across." D. NELKIN, *THE CREATION CONTROVERSY* 31 (1982). An issue which is receiving increasing legislative attention is whether schools can constitutionally be required to make their facilities available for religiously oriented student groups. See generally *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a state university which has opened a forum generally to student groups cannot exclude a religious group); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986) (presenting the same question as *Widmar* applied at the high school level; while the case was disposed without reaching the merits, four Justices indicated that they would have found *Widmar* controlling). See also Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong In Public Schools*, 81 Nw. U.L. REV. 174 (1986).

189. 393 U.S. 97 (1968).

190. *Id.* at 106.

191. M. MCCARTHY, *supra* note 33, at 82.

192. D. NELKIN, *supra* note 188, at 178-79.

Opponents of creation science focus upon its religious basis to justify keeping it out of the public schools. Creationists maintain that the *Genesis* account of the origins of man is "an alternative scientific hypothesis capable of evaluation by scientific procedures" rather than religious dogma.<sup>193</sup> Their opponents counter by charging creationists with attempting to characterize a religious philosophy as an empirical science<sup>194</sup> and with trying to "dilute the theory of evolution to the level of hypothesis or speculation and to win equal time for the doctrine of special creation."<sup>195</sup> Under current establishment clause doctrine,<sup>196</sup> opponents of creationism have the advantage so long as they can convince reviewing courts that balanced treatment statutes are religiously based and motivated.

Creationists believe that legislation can be drafted which will ensure fair coverage of creation theory within the bounds of the establishment clause. Wendell Bird, a Yale law graduate previously affiliated with the Institute for Creation Research, has asserted that teaching creationism need not violate the establishment clause, but that not teaching it violates the free exercise rights of creationist students.<sup>197</sup> He drafted a model resolution designed to adhere to the strictures of the first amendment by "sharply distinguishing" scientific creationism, which is based on scientific evidence, and religious creationism, which is based on Biblical doctrine.<sup>198</sup> Bird's model was the basis for the statute around which the latest Supreme Court ruling on this question centers.

*Edwards v. Aguillard*<sup>199</sup> involved an establishment clause challenge brought by Louisiana teachers, religious leaders, and parents of school children against the state's "Balanced Treatment for Creation-Science and Evolution-

193. *Id.* at 72-73. For a discussion on how creationism is explained as a scientific theory without reference to religious doctrine, see Comment, *Evolution and Creationism in the Public Schools*, 9 J. CONTEMP. L. 81, 99-105 (1983).

194. Indiana adopted a biology text which included only creationism to be used in conjunction with texts presenting evolution. One school system adopted only the creationist text. In the ensuing litigation, an Indianapolis trial judge found the creationist text unconstitutional no matter how used. "[It is a] transparent attempt to clothe the Genesis account in scientific garb." E. LARSON, TRIAL AND ERROR 144-45 (1985).

195. *Id.* at 126 (quoting University of Tennessee Law Professor Frederic S. Le Clercq on the revival of "monkey laws"). The "dilution" being referred to is an example of the concessions made by textbook publishers in order to keep their products salable. See *supra* note 11. Many science texts precede chapters on evolution with a disclaimer that it is only "hypothesis" or "one of several explanations." Many fundamentalists do not think such prefacing does enough to neutralize the potential harm that exposure could do to their children. See, e.g., *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1062 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988).

196. See *supra* notes 81-121 and accompanying text.

197. E. LARSON, *supra* note 194, at 148.

198. D. NELKIN, *supra* note 188, at 99-100.

199. 107 S. Ct. 2573 (1987).

Science in Public School Instruction Act."<sup>200</sup> The Court applied the test enunciated in *Lemon v. Kurtzman*<sup>201</sup> and found the statute unconstitutional as a violation of its purpose prong.<sup>202</sup> The Court put a great deal of emphasis on the Act's legislative history and the subsequent testimony of its sponsor.<sup>203</sup>

The Court stated that in order to pass the purpose prong, the state's asserted secular purpose must be "sincere and not a sham."<sup>204</sup> The government's proffered purpose of promoting academic freedom was found to be a cover for its primary purpose of "chang[ing] the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine."<sup>205</sup> After the initiation of the litigation, the state argued that the legislature's use of the term "academic freedom" meant the "basic concept of fairness, teaching of all the evidence" rather than "the correct legal sense" of the phrase.<sup>206</sup> Even given this latitude in defining its secular purpose, the state was unable to justify its statute.

First, the statute on its face did not purport to offer "all the evidence" on the origins of man, only that evidence involving evolution and creation science. Second, the Court suggested that outlawing evolution or requiring creationism did not act to expand the scope of a science curriculum.<sup>207</sup> Third, the Act provided that curriculum guides and research services were to be developed and supplied for creation science but not for evolution, and that protections were to be afforded to one "choos[ing] to be a creation-scientist," but not to one who chose to teach evolution or refused to teach creationism.<sup>208</sup> The Court considered these provisions to belie the sincerity of the government's stated purpose of ensuring fair coverage of both theories.

As an application of the *Lemon* test, *Edwards* is clearly sound. Viewed within the context of the other textbook controversies, however, the case raises two concerns. The first is the apparent inconsistency between what

200. LA. REV. STAT. ANN. § 17:286.1 to .7 (West 1982). Justice Brennan, writing for the majority, stated the substance of the act as follows: "The creationism act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.' No school is required to teach . . . [either; if one] is taught, however, the other must be taught." *Edwards*, 107 S. Ct. at 2575-76 (citation omitted).

201. 403 U.S. 602 (1971). See also *supra* text accompanying notes 83-121.

202. *Edwards*, 107 S. Ct. at 2576. Since the Louisiana act was found to violate the purpose prong of the *Lemon* test, no consideration was given to how the act would fare under the effect or entanglement prongs.

203. *Id.* at 2579-83.

204. *Id.* at 2579. This statement of the purpose prong intensified the scrutiny of governmental purpose, which cases following the test's inception had seemingly relaxed. See *supra* text accompanying notes 91-97.

205. *Edwards*, 107 S. Ct. at 2582.

206. *Id.* at 2579.

207. *Id.*

208. *Id.* at 2579-80.

the Court says a teacher may do and what would happen under current establishment clause doctrine should the teacher do it. The Court states that prior to the enactment of the creationism act, teachers had the flexibility to "supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life."<sup>209</sup> This would be an accurate statement until a parent protested that her child was being subjected to religious indoctrination. If litigation ensued, the teacher's supplemental instruction would be tested under *Lemon* and would likely fail the effect prong of the test since a teacher's unilateral decision to include instruction on religious theories could, arguably, "communicat[e] a message of governmental endorsement . . . whether intentionally or unintentionally."<sup>210</sup>

The second concern is the more serious: How legitimate can the process be if the fundamentalists always lose? In *Smith v. Board of School Commissioners*<sup>211</sup> and *Mozert v. Hawkins County Board of Education*,<sup>212</sup> state and education officials prevailed. In *Edwards*, the fundamentalists had amassed sufficient political clout to become the voice of the state through its legislation, and still they lost. Perhaps the distinction is the degree to which the content of the adopted measure is obviously religious. In the textbook cases, the charge against the materials was that they advanced secular humanism. As yet, there has been no definitive resolution about secular humanism's status as a religion.<sup>213</sup> And given the sweeping condemnation of adopted materials and the difficulty in predicting what will offend next, courts may be best advised to err on the side of protecting the institution of public education while ensuring an escape mechanism for the dissenter. Creation science, however, is unambiguously the product of the tenets of certain religions. No matter how it is packaged, a balanced treatment statute is legislating religion into the public school classroom, which is as blatant and intolerable a violation of the establishment clause as opening the school day with a teacher-led, school-prescribed prayer.<sup>214</sup>

The ultimate results that adoption and implementation of such a statute might yield must also be considered. If balanced treatment really means equal time and emphasis, some educators fear that a decline in scientific achievement will result if teachers are not allowed to indicate to students

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209. *Id.* at 2579.

210. *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring). See also *supra* notes 103-08 and accompanying text.

211. 827 F.2d 684 (11th Cir. 1987).

212. 827 F.2d 1058.

213. See *supra* note 20.

214. Such a prayer was found to be an establishment clause violation in *Engel v. Vitale*, 370 U.S. 421 (1962). Proponents of creation science, however, could persuasively argue that the finding in *Mozert* that "mere exposure" to conflicting beliefs does not give rise to a constitutional injury should be equally applicable where it is the beliefs of the minority that are being given exposure. See *supra* text accompanying notes 161-69.

which theory is better supported by scientific data or has better predictive capabilities.<sup>215</sup> Others fear that academic freedom, in its "correct legal sense," will be destroyed. A federal district court in 1982 invoked the protection of academic freedom as one reason to invalidate an Arkansas balanced treatment statute. The court warned that students could be denied a significant part of their education because teachers might forego teaching subjects thought to be "important to a proper presentation of a course" if such instruction would trigger the requirement of teaching other material "which they do not consider academically sound."<sup>216</sup> Most importantly, implementation of balanced treatment statutes may not be the end of the problem for state education officials. Since the accommodation afforded by such statutes "promotes the religious freedom only of those whose beliefs are incorporated into the curriculum,"<sup>217</sup> it is reasonable to predict that adherents to other views can and will clamor to get their views incorporated as well.

Despite the consistent move of the courts to invalidate balanced treatment statutes, it is unlikely that efforts to draft an act that will pass constitutional muster will end. Bill Keith, the sponsor of the doomed Louisiana statute, has said that "[a]s long as you have people in this country who favor something, then it will never die."<sup>218</sup> Parents who wish to see changes effected more immediately and with less likelihood of judicial invalidation, however, may choose to exert their influence on local, rather than state, decision-makers.

### B. Local School Board

*Hypothetical 4:* The parents decide that in the wake of *Edwards v. Aguillard* pursuing the adoption of state legislation would be futile. The parents focus their attention on gaining control of the local school board. Their goal is to use the administrative machinery responsible for the burdens placed on their religious beliefs to alleviate those burdens. The parents organize a campaign to elect members of their group to the local school board, the administrative body that sets school policy and gives final approval for all curricular decisions. In the ensuing election, a number of members of the former board are defeated. The new board now has the majority of its seats filled by members of the parent group.

Issues concerning public schools are common sources for heated political controversy. Most citizens are aware of events and concerns arising in their

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215. D. NELKIN, *supra* note 188, at 173-77.

216. *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1273 (E.D. Ark. 1982).

217. *Religion and the State*, *supra* note 101, at 1673.

218. Reuben, *Justices Reject Creation-Science in Public Schools*, L.A. Daily J., June 22, 1987, at 1, 26, col. 6.

local schools whether or not they have children enrolled. Of particular interest is how schools are operating in their capacity as inculcators of societal values, and "parent community groups, or self-appointed textbook-watchers contest changes in the substance or methods of teaching that violate their perceptions about the values to be conveyed to young citizens."<sup>219</sup> Parents with religious reservations about school matters, particularly in the creationism-evolution context, have exerted considerable influence on school decisions through community pressure.<sup>220</sup> In recent years, fundamentalist parent groups have increasingly organized themselves into effective political units to bring about changes in public schools that they see as necessary.

Gaining control of the local school board can be an effective way for fundamentalist parents to make pervasive changes in the school system. Once board members who represent their interests are in the majority, textbook and curricular proposals will have to meet their standards in order to be adopted. Fundamentalist leaders are fully aware of the power wielded by local boards and how attaining that power could further their interests. Robert L. Simmonds, Director of Citizens for Excellence in Education and the National Association of Christian Educators, has been quoted as follows: "When we get an active Christian parents' committee in operation in all districts, we can take complete control of all local school boards. This would allow us to determine all local policy; select good textbooks, good curriculum programs; superintendents and principals. Our time has come!"<sup>221</sup> The political climate surrounding local school board elections is reactive, and a community concerned about the moral standards of its young people is likely to be responsive to candidates who seem to share those concerns and who have an affirmative plan to make changes. As fundamentalist groups become more politically effective,<sup>222</sup> the curricular decisions of local school boards may increasingly reflect their views.

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<sup>219</sup> D. NELKIN, *supra* note 188, at 57.

<sup>220</sup> *Id.* at 157. Although Nelkin notes that local efforts are typically more successful than those aimed at state legislatures, there is evidence that state officials also feel considerable pressure. A member of the Arkansas state legislature which passed a balanced treatment statute in 1981 stated that "[the act] is a terrible bill . . . but it's worded so cleverly that none of us can vote against it if we want to come back up here." E. LARSON, *supra* note 194, at 152.

<sup>221</sup> Molnar, *The Issue at Hand: Religious Challenges to Public Schools*, EDUC. LEADERSHIP, May, 1987, at 4.

<sup>222</sup> Parents with religious objection to public school curriculum decisions are urged to organize into pressure groups in order to bring about the changes they desire. The author of one book on the current "crisis" in public schools offers parents advice on how to effectively approach school officials with objections to texts and activities. See generally CLASSROOMS IN CRISIS, *supra* note 6, at 127-57. Once initial efforts are rebuffed, the authors advise gaining influence in the community by organizing mass visits to classrooms, arranging confrontative conferences and airing negative reports about the school—in other words, keying on the vulnerability of those who depend on public approval in order to keep their programs funded

Virtually every judicial decision concerning public schools refers to the broad grant of discretion that is accorded the local school board in making curriculum decisions and in setting educational policy.<sup>223</sup> This grant is said to reflect such traditions and concerns as "preserving local democratic control over educational policy; protecting teachers' academic freedom; and maintaining policies that comport with the views of educational experts."<sup>224</sup> The Supreme Court has confirmed the continuing validity of this deference in two of its recent cases. Both cases arose in the context of students' free speech rights. In *Bethel School District No. 403 v. Fraser*,<sup>225</sup> the Court upheld a school's disciplinary actions imposed on a student who gave a speech at a school assembly that school authorities found lewd and vulgar. The Court stated that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>226</sup> In *Hazelwood School District v. Kuhlmeier*,<sup>227</sup> the Court upheld a school official's decision to censor articles from a student newspaper that was operated as a part of the school's curriculum, stating that "educators do not offend the first amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."<sup>228</sup> *Hazelwood* is the more important decision because it may be read to identify the scope of protection to which board decisions are entitled.

This long standing deference should act to legitimate the changes wrought by the new board in two ways. First, the fact that fundamentalists amassed sufficient political power to attain majority membership on the board is an indication that the political process is reflective of the desires of the community. Second, decisions made by school boards should be accorded the same degree of deference, regardless of their composition. One commentator warns that this comprehensive authority granted to boards is "double-edged" as it "insulat[es] the state from parental interference at the judicial level, yet accord[s] influential groups the power to shape education

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and their jobs secure. *Id.* at 157.

Another author has likewise noted that the combination of use of the media and the "conflict avoidance" mentality of public school administrators can greatly further the reformers' cause. D. NELKIN, *supra* note 188, at 151-56. She also believes that court decisions like that in *Edwards* may actually be publicized by defeated plaintiffs in such a way as to make school and state officials look more oppressive and the fundamentalist position look more sympathetic by using judicial defeats to "support their image as a beleaguered group, rejected by a scientific establishment bent on protecting itself against 'new' ideas." *Id.* at 146.

223. See, e.g., *Edwards*, 107 S. Ct. at 2577; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); *Epperson*, 393 U.S. at 104; *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

224. Strossen, *supra* note 87, at 354.

225. 478 U.S. 675.

226. *Id.* at 683.

227. 108 S. Ct. 562 (1988).

228. *Id.* at 571.

along religious lines at the school board level without judicial scrutiny.”<sup>229</sup> This insulation, however, is not as comprehensive as might be feared. The increasing availability of alternatives such as home schooling and other accommodations suggests that parental activism can be influential, and the Supreme Court has indicated that there are limits on a school board’s discretion.

All boards must operate within the confines of the Constitution; therefore, the decisions made by the new board will not be automatically insulated from review. Rather, just like the decisions made by other boards, its decisions will be scrutinized to assess their compliance with establishment clause doctrine. The Supreme Court recently noted the “considerable discretion” afforded both to states and to local school boards in operating the public schools in *Edwards v. Aguillard*.<sup>230</sup> After applying the three-pronged test set forth in *Lemon v. Kurtzman*,<sup>231</sup> however, the Court found that the state of Louisiana had abused this discretion in adopting its balanced treatment act. The Court stated that “discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”<sup>232</sup> This clearly indicates that discretionary governmental acts, whether state or local, are subject to scrutiny and potential invalidation.

The actual ability to shape a school’s curriculum to reflect the values of a school board dominated by religiously affiliated members may further be curtailed or even negated by the paradoxical situation in which the majority of the board’s membership find themselves. The Supreme Court held that a person may not be excluded from the political process on the basis of his religious beliefs or his position in a religious organization when it struck down a Tennessee statute barring clergymen from holding political office in *McDaniel v. Paly*.<sup>233</sup> The Court stated that “the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-establishment interests or less faithful to their oaths of civil office than their unordained counterparts.”<sup>234</sup>

This statement serves as an admonition to any candidate or office holder with aspirations of effecting changes of a religious or moral nature through the political process that such changes must be able to withstand the rigors

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229. *Religion and the State*, *supra* note 101, at 1668.

230. 107 S. Ct. 2573, 2577.

231. 403 U.S. 602.

232. *Edwards*, 107 S. Ct. at 2577 (quoting *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1981)) (emphasis added).

233. 435 U.S. 618 (1978). The Court held that the statute was unconstitutional because it forced the plaintiff to surrender his free exercise rights in order to exercise his right to seek and hold office. *Id.* at 626.

234. *Id.* at 629.



of establishment clause analysis.<sup>235</sup> The Court has made it clear that actions implemented or endorsed by state agencies which are blatantly of a religious nature, such as posting scriptures in public classrooms<sup>236</sup> or legislating prayer into public schools<sup>237</sup> are destined for invalidation. A school board, however, even if identifiable by religious affiliation, may be able to make substantive changes in the curriculum which reflect its own values if the changes are made cautiously and with the constraints of the establishment clause, and the concomitant potential for challenge on constitutional grounds,<sup>238</sup> firmly in mind.

The challenge facing the new board is precisely the one faced by other boards: Can the texts and materials it has identified and adopted as appropriate for use in its school system survive establishment clause analysis under the *Lemon* test? While the former board's decisions would probably be most vulnerable to an effect prong challenge,<sup>239</sup> the choices of the new board would be vulnerable on either the purpose or effect prong.

The new board may assert that its choice was based on such concededly legitimate secular bases as topic coverage or skill development. The Supreme Court, however, has indicated that it will look past asserted purposes for evidence by which to assess whether the decision was primarily motivated by a legitimate secular purpose or whether the asserted purpose was a sham.<sup>240</sup> For example, the statements of the sponsor of the balanced treatment act in *Edwards* were taken as evidence of improper purpose violative of the establishment clause.<sup>241</sup> Statements made by board members to the press or during adoption committee meetings indicating that the texts were evaluated and chosen based on religious criteria might likewise be taken as evidence of improper purpose. Courts might even look back to campaign speeches or slogans that suggest that the board members attained their positions of power on a platform of infusing religion into the schools.

The board may be able to avoid invalidation on these grounds by keeping the "paper trail" following its policy decisions free of comments that could lead to the conclusion that its decisions were based on illegitimate purposes.

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235. See *supra* text accompanying notes 81-121, 199-208.

236. See *Stone v. Graham*, 449 U.S. 39 (1980).

237. See *Wallace v. Jaffree*, 472 U.S. 38 (1985).

238. See *supra* text accompanying notes 81-121, 199-208.

239. See *supra* text accompanying notes 103-20.

240. The Supreme Court has been criticized for relying on motive review as a basis for invalidating legislation or administrative decisions. See generally Note, *Creation Science and the Balanced Treatment Acts: Examining McLean v. Board of Education and a Modest Prediction on Keith v. Department of Education*, 7 OKLA. CITY U.L. REV. 109, 118-22 (1982). As recently as 1987, however, the Court has defended the legitimacy of motive review when it stated that "[t]he plain meaning of the statute's words [for, here, the board's policies], enlightened by their context, and the contemporaneous legislative history, can control the determination of legislative purpose." *Edwards*, 107 S. Ct. at 2583.

241. *Edwards*, 107 S. Ct. at 2579.

Justice O'Connor has indicated that such a clean official record, which "manifest[s] a secular purpose and omit[s] all sectarian endorsements," would constitute a sufficient basis for her to defer, at least initially, to the government's stated purpose, as she has "little doubt that our courts are capable of distinguishing a sham secular purpose from a sincere one."<sup>242</sup> Additionally, given the history of variation that the statement of purpose prong has taken,<sup>243</sup> it is entirely possible that "a" secular purpose may someday be sufficient once again.

Dicta from a 1982 Supreme Court case may bolster the ability of the new board's decision to withstand constitutional scrutiny. In *Board of Education v. Pico*,<sup>244</sup> the Supreme Court invalidated a local board's decision to remove books from the school's library. The Court found that if the removal decision was based on an intent to deny students access to ideas with which the board disagreed, "[the board had] exercised [its] discretion in violation of the Constitution."<sup>245</sup> Although this abuse of discretion standard might appear to work against the new board, the decision specifically differentiates the unique, voluntary nature of the library from the compulsory environment of the classroom, and states that the "[board members] might well defend their claim of absolute discretion in matters of *curriculum*."<sup>246</sup>

Even if the new board's textbook choices can pass muster under the purpose prong of *Lemon*, they may still fail under the effect prong. Adopted texts must not advance nor inhibit religion, either directly or indirectly,<sup>247</sup> but the board's selections may find some degree of shelter in that part of the Supreme Court's establishment doctrine which provides that a governmental act does not necessarily violate the establishment clause simply because it "happens to coincide or harmonize with the tenets of some or all religions."<sup>248</sup> However, if the new board adopts texts which the plaintiffs

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242. *Wallace*, 472 U.S. at 75 (O'Connor, J., concurring).

243. See *supra* text accompanying notes 91-97.

244. 457 U.S. 853.

245. *Id.* at 871.

246. *Id.* at 869 (emphasis in original). A federal court recently focused on this broad discretion to make curricular decisions in upholding a school board's decision to remove two works of literature from the English curriculum. The board decision at issue in *Virgil v. School Board*, 677 F. Supp. 1547 (M.D. Fla. 1988), was based in part on the conclusion that the works contained sexual references and vulgarity inappropriate for the age, maturity, and development of the students. *Id.* at 1549. The court acknowledged that "the school board's decision reflect[ed] its own restrictive views of the appropriate values to which [the school's] students should be exposed," but relied on the deferential review accorded to curricular decisions by the Supreme Court in *Hazelwood* and found that "such content-based decision-making is permissible [as] educators may limit both 'the style and content of curricular decisions if their action is reasonably related to legitimate pedagogical concerns.'" *Id.* at 1552 (quoting *Hazelwood*, 108 S. Ct. at 571).

247. See *supra* text accompanying notes 103-04.

248. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 422 (1961)).

in the cases discussed herein would approve, or which are mass-produced for Christian home educators,<sup>249</sup> it is quite foreseeable that such choices might go beyond the scope of coincidence or harmony.

Election of a school board may be the best way for fundamentalist groups to effect lasting changes in the curricula of their local schools. If the board works within its constitutional limits, which are concededly very broad, the programs and materials implemented by public schools are open to modification. This modification process may result in public schools that reflect and inculcate the kind of values that many parents find deplorably lacking in today's public schools.

### CONCLUSION

Control over the content of public education has become a struggle between competing interests, most typically between school boards, who seek to present progressive, humanistic ideas, and parents, who seek the inclusion of religious convictions which they feel are lacking in contemporary curricula. The substantive questions presented by this struggle center around two poles. First, what kind of moral or religious content can be constitutionally included in public education? Second, what remedies are available for parents who object to the content of public education, even if it falls within what has been identified as the constitutional range?

Parents who wish to instill in their children values different from those inculcated by state-funded schools may seek highly individualized accommodations such as substitution and exclusion remedies or home schooling. Such remedies, however, could raise countervailing concerns regarding the quality of education that the children will receive based on the instructional materials and socialization alternatives that are adopted.

Alternatively, the parents might look to the judicial system for an adjudication of their rights relative to those of the state. The prospects of prevailing on an establishment clause challenge currently appear bleak as federal courts have thus far been resistant to imposing on schools the sweeping systemic change that such a holding would entail. Further, the courts have evaded (and are likely to continue to evade) finding that secular humanism is a religion, a finding that would have to underlie a successful establishment clause challenge. Despite the failure of the *Mozert* claimants, a free exercise challenge is more likely to succeed than a challenge based on the establishment clause. The remedy sought in this type of claim is more individualized and implementation would be less disruptive to the operation of the school system. More importantly, plaintiffs in a free exercise case would not have to prove that secular humanism is a religion in order

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249. See *supra* notes 59-62 and accompanying text.

to prevail. They must instead prove that the school's practices constitute a burden on their religious beliefs sufficient to establish a violation of the first amendment.

Objecting parents might also turn to the political process in order to control the decision-making bodies that shape public education. A political remedy is complicated by the paradoxical constraints that constitutional mandates put on religious actors in the political arena. Religious actors cannot be excluded from the political process; they, therefore, have the capability to attain decision-making power. Once in office, however, it may be very difficult for these officials to make the kinds of changes which undoubtedly prompted their entry into the political scene without running afoul of the establishment clause. At present it seems clear that state legislation that attempts to mandate activities or instruction is certain to be invalidated as a violation of the establishment clause. It is less clear that curricular changes made by school boards that might be justified as "pursuing legitimate pedagogical goals"<sup>250</sup> are doomed to similar invalidation.

The American public educational system provides the vital services of imparting knowledge and instilling qualities and values in young people in order that they may be productive members of society. While this is a compelling state purpose, it cannot be pursued heedless of the burdens that may be placed on the religious beliefs of certain segments of society. At the point where provision of public education becomes oppressive, the opportunity for escape from majoritarian institutions must be provided to the religious adherent; otherwise, the constitutional guarantee of free exercise will have meaning only for the mainstream. At the same time, however, adherence to the constraints of the establishment clause demand that state-provided public education be kept free from sectarian domination. In 1988, the Supreme Court stated that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges."<sup>251</sup> However, because of the rifts that sometimes occur between the entities that the Court sees as the appropriate arbiters of educational policy, federal courts are increasingly called upon to provide judicial remedies and police the constitutional boundaries of non-judicial remedies in an effort to strike the balance between the goals of a state-provided education and the rights of individuals to the free exercise of their religious beliefs.

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250. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 571 (1988).

251. *Id.* at 571.

