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"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to *Mozert v. Hawkins County Public Schools* and *Smith v. Board of School Commissioners*

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"SECULAR HUMANISM" AND THE DEFINITION OF RELIGION: EXTENDING A MODIFIED "ULTIMATE CONCERN" TEST TO *Mozert v. Hawkins County Public Schools* AND *Smith v. Board of School Commissioners*

The Supreme Court may no longer postpone defining "religion" under the Constitution.[1] Growing ideological variety in America is creating first amendment establishment clause claims against state aid to left-wing and right-wing ideologies. The Court must bridge the widening chasm between the expansive definition of religion under the free exercise clause[2] and the narrow and unclear establishment clause approach to ideologies.[3]

Two recent "secular humanism" cases illustrate this problem.[4] In these suits against public schools, the definition of religion was an issue under the establishment clause, as well as under the free exercise clause.[5] The plaintiff parents claimed: First, that teaching "secular humanism" to their children impermissibly burdens their free exercise rights;[6] and second, that teaching "secular humanism" amounts to state action establishing a religion.[7] The courts settled each case under one theory. *Mozert v. Hawkins County Public Schools* was decided

1. *See* Edwards v. Aguillard, 107 S. Ct. 2573, 2591–2607 (1987) (Scalia, J., dissenting) (expressing a willingness to consider whether "secular humanism" was a religion being unconstitutionally established in the public schools).

2. Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987).

3. *See Edwards,* 107 S. Ct. 2573.

4. Smith v. Board of School Comm'rs, 655 F. Supp. 939 (S.D. Ala.), *rev'd* 827 F.2d 684 (11th Cir. 1987); 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,* 56 U.S.L.W. 3569 (1988).

5. Plaintiffs asserted that schools denigrate traditional religion, sex roles, and values, while preaching a religion of worldly progress, evolution, internationalism, and atheism, among other beliefs. These largely fundamentalist attacks on state education find support in legal commentary. *See, e.g.,* Whitehead & Conlan, *The Establishment of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1 (1978); Comment, *Secularism in the Law: The Religion of Secular Humanism,* 8 OHIO N.U.L. REV. 329 (1981).

6. *Smith,* 655 F. Supp. at 946; *Mozert,* 647 F. Supp. at 1195.

7. *Smith,* 655 F. Supp. at 946; Mozert v. Hawkins County Public Schools, 579 F. Supp. 1051, 1052, 1053 (E.D. Tenn. 1984), *rev'd,* 765 F.2d 75 (6th Cir. 1985). At a hearing on a motion to dismiss, in *Mozert,* Judge Hull declared that "mere exposure" to disagreeable ideas did not create a free exercise burden, and he also wrote that plaintiffs had a cause of action if the schools taught that any particular religion was true, or that some particular means to salvation must be followed by everyone. 579 F. Supp. at 1052–53. The indoctrination of a means to, and need for, "salvation" is also an establishment clause claim.

under free exercise law.[8] *Smith v. Board of School Commissioners* was decided under establishment clause law.[9] In both cases, the district courts found something behind the phrase "secular humanism" which violated the first amendment.[10]

To address these issues, this Comment defends an expansive definition of religion which is uniform under the establishment clause and under the free exercise clause. This Comment, to effect this expansion, constructs empirical indicators of religion for use in establishment clause cases. This proposed approach distinguishes science from values and philosophies, and only the latter two might be called "secular humanism." This distinction incorporates longstanding Supreme Court jurisprudence allowing the teaching of evolution.[11] Expanding religious protection under the free exercise clause made a balancing approach necessary.[12] Similarly, using an expansive definition of religion to broaden the scope of the establishment clause will require more extensive balancing of state interests against disestablishment values.[13]

8. *Mozert,* 579 F. Supp. 1053 (E.D. Tenn. 1984), *dismissed,* 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd,* 765 F.2d 75, 78 (6th Cir. 1985) (Sixth Circuit remanded for trial on merits, directing consideration of free exercise burden and compelling state interests), *later proceeding,* 647 F. Supp. 1194 (E.D. Tenn. 1986) (finding for plaintiffs under free exercise rules), *rev'd sub nom.* Mozert v. Hawkins County Bd. of Educ. 827 F.2d 1058 (6th Cir. 1987) (dismissal under free exercise law; no "burden" existed).

9. *Smith,* 655 F. Supp. at 974–88 (establishment clause analysis, with free exercise burdens stated to be incidental to the establishment of "secular humanism"), *rev'd,* Smith v. Board of School Comm'rs, 827 F.2d 684 (11th Cir. 1987) (reversing trial court under establishment clause law).

10. *Smith,* 655 F. Supp. at 988; *Mozert,* 647 F. Supp. at 1200, 1203.

11. In Edwards v. Aguillard, 107 S. Ct. 2573 (1987), the Court put to rest the legislative attacks upon the teaching of evolution. In *Edwards* the Court struck down a statute which required equal time for "creation science." *See also* Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolution statute struck down); Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (evolution exhibits do not establish secular humanism); McClean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) ("creation science" law, similar to that in *Edwards,* struck down), *aff'd,* 723 F.2d 45 (8th Cir. 1983). *But see* Gelfand, *Of Monkeys and Men—An Atheist's Heretical View of the Constitutionality of Teaching the Disproof of a Religion,* 16 J. L. & EDUC. 271 (1987).

12. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

13. For the establishment clause balancing test, see Larson v. Valente, 456 U.S. 228, 249 (1982).

I. THE EXPANSIVE FREE EXERCISE CLAUSE AND THE UNKNOWN SCOPE OF THE ESTABLISHMENT CLAUSE

A. The Current Law

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[14] This statement comprises the establishment clause and the free exercise clause of the United States Constitution. The exact scope of each clause is uncertain. However, the constitutional rules within each clause are relatively settled.

1. Establishment Clause Law: Agreeing To Disagree

The Court in *Lemon v. Kurtzman*[15] set forth a three-pronged test for determining establishment clause violations: First, does the state action have a predominantly religious *purpose;* second, does it have the (primary) *effect* of establishing or inhibiting religion; or third, does it *entangle* religion and the state?[16] Failure on any one prong invalidates the state action.[17]

A balancing test articulated in *Larson v. Valente* complements the *Lemon* test. *Valente* applies to governmental actions that would otherwise be impermissible establishments of religion.[18] The case holds that a state action impinging upon establishment clause values is allowable if it serves a compelling state interest and employs means "closely fitted" to that state interest.[19]

The Supreme Court rarely needs to define "religion" in deciding establishment clause cases, because the parties generally agree that the issue is "religious."[20] When, as in *Smith,* plaintiffs wish to prove that a religion does exist, despite its practitioners' claims to the contrary, the courts cannot escape the need to define religion. The issue changes

14. U.S. CONST. amend. I.

15. 403 U.S. 602 (1971).

16. *Id.* at 612–13. The Court confirmed the vigor of the *Lemon* test in Edwards v. Aguillard, 107 S. Ct. 2573, 2577 (1987).

17. *Edwards,* 107 S. Ct. at 2577.

18. Larson v. Valente, 456 U.S. 228, 245–49 (1982).

19. *Id.*

20. For example, in the establishment clause cases regarding state funding of parochial schools, both parties agreed that parochial schools are "religious." *See, e.g.,* Board of Educ. v. Allen, 392 U.S. 236 (1968); *see also* Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) (state funding of seminary training); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (state funding teachers in parochial schools); Stone v. Graham, 449 U.S. 39 (1980) (posting the Ten Commandments in a classroom); Abington School Dist. v. Schemp, 374 U.S. 203 (1963) (Bible in school at issue).

from "given religion, what is establishment?" to "given rules of establishment, what is religion?"

2. *Free Exercise Law: Sincerity as Religion*

The current law consists of the four-part test articulated in *Thomas v. Review Board*.[21] First, is a religious belief *sincere*? This sincerity prong of the *Thomas* test does not mean to test the ultimate truth of religious statements.[22] Second, is that belief *burdened* by the state action at issue?[23] Third, what *compelling state interests* exist to justify that burden? Finally, in balancing compelling state interests against the free exercise right, has the state used the *least burdensome means* to achieve those state interests?[24]

In free exercise cases, the definition of "religion" is more often an issue.[25] The problem of definition arises when a holder of nontraditional views seeks constitutional protection against state actions, and the state pleads that no religious issue exists. The Court has recognized that a traditional definition of religion would risk implicitly establishing those beliefs because of discriminatory free exercise protections.[26] The Court has therefore only provided a definition when forced to construe a statute.

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21. Thomas v. Review Bd., 450 U.S. 707 (1981) (state could not deny unemployment benefits to claimant whose religious beliefs forbade working to produce armaments; this "indirect coercion" impermissibly burdened plaintiff's free exercise of religion). *Thomas* was reaffirmed on similar facts in Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046 (1987). *See also* Sherbert v. Verner, 374 U.S. 398 (1963) (state could not deny unemployment benefits to Sabbatarian who refused to work on Saturday).

22. The Court, since United States v. Ballard, 329 U.S. 187 (1944), has not wished to enquire into the "truth" of religious claims. Sincerity, not truth, nor even doctrinal coherence, was the test in *Thomas*:

> Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ . . . . [A]nd the guarantee of free exercise is not limited to beliefs which are shared by all members of a religious sect . . . . Courts are not arbiters of scriptural interpretation.

Thomas, 450 U.S. at 715–16; *see also Hobbie*, 107 S. Ct. at 1051 n.9 (explicitly reaffirmed *Ballard*).

23. Conditioning receipt of "an important benefit upon conduct proscribed by a religious faith" creates an "indirect coercion" which satisfies the coercion requirement. *Thomas*, 450 U.S. at 717.

24. *Id.* at 717–19.

25. *E.g.*, Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). In *Thomas*, a referee accepted Thomas' moral objections as religious, as did the Review Board and the courts. 450 U.S. at 714.

26. "There is even a danger of unintended discrimination—a danger that a claim's chances of success would be greater the more familiar or salient the claim's connection with conventional religiosity could be made to appear." Gillette v. United States, 401 U.S. 437, 457 (1971); *see also* Fowler v. Rhode Island, 345 U.S. 67, 69–70 (1953) ("it is no business of courts to say that what is

3. United States v. Seeger: *Free Exercise Origins of the "Ultimate Concern" Test*

In *United States v. Seeger,* the Supreme Court sought to avoid religious favoritism in defining religion under a statute. To protect nontraditional beliefs, the Court expanded the definition of religion to include a person's "ultimate concern."[27] The "ultimate concern" test raised conscientious objection, under a statutory exemption to the military draft, to the status of religion. In so ruling, the Court reasoned that the objector's "ultimate" beliefs held a position "parallel" to that which traditional religion has for mainstream believers.[28]

An influential *Harvard Law Review* Note, published in 1978, defended the "ultimate concern" definition of *Seeger,* but only under the free exercise clause.[29] The Note advocated Lawrence Tribe's bifurcated definition of religion, with an expansive definition in free exercise cases, and with a narrow definition of religion for establishment clause cases.[30] The narrow establishment clause definition was recommended to prevent wholesale invalidation of legislative actions.[31]

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a religious practice or activity for one group is not religion under the protection of the First Amendment"); United States v. Ballard, 322 U.S. 78, 85–88 (1944) (freedom of religion includes the right to ideas "which are rank heresy to followers of orthodox faiths . . . . The Fathers of the Constitution . . . fashioned a charter of government which envisaged the widest possible toleration of conflicting views.").

27. United States v. Seeger, 380 U.S. at 187 (quoting P. TILLICH, THE SHAKING OF THE FOUNDATION (1948)). Arguably, the statutory construction of *Seeger,* restricted by congressional action under military law to only pacifist beliefs, is narrower than the sincerity standard under free exercise rules.

28. The Court reaffirmed this approach in Welsh v. United States, 398 U.S. at 340. Justice Harlan concurred in the judgment only for reasons of administrative necessity, but believed that the statute providing for "religious" conscientious objection should have been struck down for discriminating against nonreligious conscience. *Id.* at 356–57. Justice Harlan wrote:

> [Congress cannot act] without equal regard for men of nonreligious conscience. It goes without saying that the First Amendment is perforce a guarantee that the conscience of religion may not be preferred simply because organized religious groups in general are more visible than the individual who practices morals and ethics on his own. Any view of the Free Exercise Clause that does not insist on this neutrality would engulf the Establishment Clause and render it vestigial.

Id. at 361 n.12.

29. Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056 (1978).

30. *Id.* at 1085. Under the free exercise clause, anything "*arguably* religious" would be protected. Under the establishment clause, the state could do anything "*arguably* not religious." *Id.* at 1085 n.138 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 828–29 (1st ed. 1978)). Greenawalt noted that intermediate groups, arguably religious-arguably nonreligious, would receive free exercise benefits without bearing establishment restraints. Greenawalt, *Religion as a Concept in Constitutional Law,* 72 CALIF. L. REV. 753, 814 (1984).

31. Note, *supra* note 29, at 1084; *see also* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment,* 45 U. CHI. L. REV. 805, 821

B. Alternatives to Seeger: *The Analogical Methods*

Defining religion by analogy to traditional religions is the only method explicitly adopted by a lower court.[32] Other alternatives to the *Seeger* approach generally are variations upon the analogical method. The two greatest flaws of this method are that it implicitly prefers currently dominant religious forms, and it narrows judicial awareness of the great variety of religions.

1. Explicitly Defining Religion by Analogy to Recent and Dominant Religions

The most influential decisions explicitly developing the analogical method arose from two Third Circuit cases in which the definition of religion was directly at issue. The method was first introduced by Judge Adams in *Malnak v. Yogi,* which upheld the finding that Transcendental Meditation was a religion whose teaching in the public schools violated the establishment clause.[33] In *Africa v. Commonwealth of Pennsylvania,* Judge Adams applied this definition in an opinion which unanimously rejected a claim that a "back to basics" community, MOVE, was a religion under the first amendment.[34] Judge Adams stated three criteria for the decision:

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature, and it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs [such as, hierarchy, ritual, and ceremony].[35]

Judge Adams named his doctrinal creation "definition by analogy."[36] In applying the analogical approach, Judge Adams found that MOVE's doctrines were not fundamental because they were not "sufficiently analogous to more 'traditional' theologies."[37] Based on this finding he had little trouble stating that MOVE's doctrines were not

(1978) ("any law may offend the religious sensibilities of some one individual"). Merel has actually posed a free exercise, not an establishment, problem, because an "offense" to a religion is a "burden."

32. Malnak v. Yogi, 592 F.2d 197, 200, 207 (3d Cir. 1979) (Adams, J., concurring).

33. *Id.* at 207–15.

34. 662 F.2d 1025, 1032 (3d Cir. 1981), *cert. denied,* 456 U.S. 908 (1982). MOVE's doctrines included a rejection of ritual and hierarchy, a belief in the unity of all life and a desire to return to "original" simplicity of life, including the special prison dietary requirements at issue for MOVE leader Frank Africa.

35. *Id.*

36. *Id.*

37. *Id.* at 1033–36.

"comprehensive."[38] Finally, because some of MOVE's tenets were congregational and anarchic, Judge Adams found no hierarchy or ceremony.[39]

Judge Adams' formulation illustrates the problems inherent in an analogical method of definition. This approach explicitly prefers "traditional" religions, to the exclusion of less conventional beliefs.[40] Additionally, Judge Adams' method grants preference to religions which have incubated in a leisured elite long enough to become "comprehensive" in a systematic sense; in contrast to the less intellectually systematized passions of MOVE, and of lower classes everywhere.[41] Finally, the analogical method's views of "fundamental" and "ultimate" questions are severely ethnocentric, as evidenced by the failure to recognize MOVE's beliefs as a variant upon common forms of pantheism.[42]

Nonetheless, many commentators prefer the analogical method.[43] Although Professor Kent Greenawalt offers his own formulation of the analogical method, he praises Judge Adams' opinions.[44] Greenawalt believes that courts have been implicitly using the analogical approach, and that religion must continue to be defined in terms of the "indisputably religious."[45] Greenawalt establishes recent dominant Christian experience as the "family" of relevant characteristics which

38. *Id.* at 1035.

39. *Id.* at 1035–36.

40. Judge Adams simply missed a huge portion of Christianity with his excessively conventional concepts. This approach excludes even the anarchic traditions of Christianity which eschewed ceremony and hierarchy. *See, e.g., Anabaptism,* in I THE ENCYCLOPEDIA OF RELIGION AND ETHICS, 406–12 (1922). Historian Christopher Hill writes of the pantheistic doctrine of one radical protestant: "But if God is everywhere, if matter is God, then there can be no difference between the sacred and the secular: pantheism leads to secularism." C. HILL, THE WORLD TURNED UPSIDE DOWN 150 (1978).

41. M. WEBER, ECONOMY AND SOCIETY 399–640 (1978). The lower classes tend to have "magical" religions: unsystematic religions and gods from which they can receive worldly benefits. In contrast, leisured intellectuals in privileged social strata consider "meaning," not physical discomfort, to be problematic in life. Therefore, it is leisured intellectuals who construct the great systems of religious thought. Lower classes seek "compensation" for their pain, while upper classes seek "legitimation" of their position. *Id.* at 490–92.

42. Especially disadvantaged are populist forms of religion. No intellectual caste materially benefits from keeping alive these ideas, and thus they are lost to the general culture.

43. *See, e.g.,* Freeman, *The Misguided Search for a Constitutional Definition of Religion,* 71 GEO. L.J. 1519 (1983); Greenawalt, *supra* note 30.

44. "[O]nly in Judge Adams' opinions does the analogical approach rise to articulate self-consciousness." Greenawalt, *supra* note 30, at 774.

45. *Id.* at 790. *But see* United States v. Gillette, 401 U.S. 437, 457, 461 n.23 (1971) (Court hopes to avoid favoring "familiar" religions).

define "religion."[46] To come within this definition of religion, other religions must *resemble* this orthodoxy.[47]

Further applying his analogical method, Greenawalt rejects the social scientific idea that an ideology, such as Marxism, is a religion: "Marxism presents a comprehensive view covering the deepest questions of human existence that is not usually considered religious."[48] This methodological position should be rejected as too narrow and as contrary to fact.[49] Greenawalt's approach would fail to protect American society from the establishment of modern ideologies, while also failing to protect the free exercise even of older forms of Christianity.

2. *Implicit Use of the Analogical Method: "Religion" and "Irreligion" as "Conscience"*

Other approaches to defining religion change the vocabulary, and even add atheism to the definition. For example, Gail Merel declares the "fundamental principle of both religion clauses [to be] maximizing the scope for expression of individual choice, permitting state interference . . . only when *essential* for the accomplishment of a substantial state purpose."[50] To this end, Merel defines "religion" as traditional religion, and she uses "irreligion" to describe atheism and agnosticism. The residual category is "nonreligion," which she deems synonymous with "secular."[51] Only "religion" and "irreligion" receive first amendment protection.[52]

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46. Greenawalt uses Wittgenstein's idea of a word referring to a "family" of characteristics. For example, "game" is used to describe many very different activities which share some, but not all, characteristics. Greenawalt, *supra* note 30, at 768.

47. One could only justify this bias on power grounds: e.g., dominant religious organizations are too strong to be subjected to the ideals of the Constitution. *Cf.* Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 840 (1984) (Johnson argues that first amendment doctrine only makes sense as political compromise). It is beyond the scope of this Comment to argue that "realpolitik" is only a means-ends analysis, and that Constitutional analysis is a moral-rhetorical, as well as a scientific (realpolitik), undertaking.

48. Greenawalt, *supra* note 30, at 768.

49. *See, e.g.*, M. KIDRON & R. SEGAL, THE STATE OF THE WORLD ATLAS Map 34 (1981) (listed religions of Marxism-Leninism include: Moscow denomination, Peking denomination, Moscow alignment, local variant); *see also* P. BERGER & T. LUCKMANN, SOCIAL CONSTRUCTION OF REALITY 116–28 (1966) (Marxism as a "symbolic universe").

50. Merel, *supra* note 31, at 821 (emphasis in original). For similar problems, under a different vocabulary, see Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982).

51. Merel, *supra* note 31, at 812–15. This approach has been cited approvingly by appellate courts. *See* Smith v. Board of School Comm'rs, 827 F.2d 684, 692 n.9 (11th Cir. 1987); Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1536 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

52. Merel, *supra* note 31, at 812–15. For example, a conscientious objector is not advancing either religion or irreligion, and does not merit first amendment protection, but an atheist's

The first problem with Merel's formulation is that it begs the issue of defining religion. She simply adopts by default a conventional, traditional definition of religion, to which she adds the opposing sceptical doctrines, "irreligion."[53] This is the equivalent of receiving a complaint that "2" is not the entirety of extant numbers, and then responding by expanding the set to include "-2." The opposite of a conventional idea reflects that conventional idea. Merel's formulation simply uses a new vocabulary to establish traditional religious ideas in the legal lexicon.

Second, Merel's formulation intentionally restricts freedom of conscience. She conflates moral law and state law when she writes: "But to protect the exercise of conscience in all things would effectively render every citizen, at his own option, a law unto himself."[54] All forms of religions of conscience, known as antinomian religions, do render persons moral laws unto themselves.[55] In fact, state laws will be obeyed by minorities out of respect for the majority process. Losing minorities need not accept state laws as coterminous with "moral laws."[56] Merel sees the antinomian implications of the first amendment, but then retreats into conventional religion and its opposite.[57]

Merel's approach discriminatorily benefits traditional beliefs. In contrast, the Supreme Court has worried about defining "religion" in a way which implicitly established religion.[58] Lower courts and commentators should share the Court's concern.

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attempt to advocate "irreligion" in the public schools would violate the establishment clause. *Id.* at 814–15.

53. *Id.*

54. *Id.* at 812.

55. In United States v. Seeger, 380 U.S. 163 (1965), the Court wrote that Seeger's beliefs resembled the Quaker conscience. 380 U.S. at 189. The difference between Seeger's antinomian conscience and a Quaker's is one of the metaphysical assumption about God guiding the choice. Either form of antinomianism renders each person a moral "law unto himself." *See* Miller & Tucker, *What is a Quaker,* in RELIGION IN AMERICA 218 (1975) (Quakers as logical outcome of protestantism, including development of a morality guided by an "inner light"). On the importance of antinomianism for democracy, see M. WEBER, *supra* note 41, at 1204–11.

56. Merel's formulation subverts the first amendment's purpose of providing the greatest possible separation of state law and the "objectified values" of "moral law." *See infra* notes 59–100 and accompanying text. Merel's conflation leads to a majoritarian, but still totalitarian, state, which demands obedience to its "General Will." *E.g.,* Rousseau, *The Social Contract,* in THE SOCIAL CONTRACT 272–73 (1978).

57. Merel is quite correct to note that atheism is a religion. *See* II THE ENCYCLOPEDIA OF RELIGION AND ETHICS 173–90 (1922) (Article titles on types of atheistic doctrines include: *Christian Atheism; Egyptian Atheism; Greek and Roman Atheism; Ancient Indian Atheism; Modern Indian Atheism; Jain Atheism; Jewish Atheism; Muslim Atheism*).

58. Gillette v. United States, 401 U.S. 437, 457 (1971).

II. MODIFYING *SEEGER:* ULTIMATE VALUES, ULTIMATE MEANINGS, AND ESTABLISHMENT CLAUSE IMPLICATIONS

Although the Supreme Court developed the *Seeger,* "ultimate concern," definition of religion as part of statutory construction, this Comment advocates the general adoption of a reformulated *Seeger* for three major reasons: To protect sincere believers of nontraditional religions, to protect individuals from state sponsored ideologies, and to protect democracy itself from state establishments which might destroy freedom of thought.[59] The modified-*Seeger* definition of religion brings into judicial awareness the diversity of totalitarian and theocratic dangers to freedom from state establishment of nontraditional "ultimate" doctrines. In addition, the modified-*Seeger* definition of religion would not lead to wholesale invalidation of laws under establishment law, because majority "enactments" are distinguishable from majority indoctrinations of either "ultimate values" or "ultimate meanings."

To unify the Constitutional definition of religion, the Court should extend the expansive modified-*Seeger* definition to the establishment clause.[60] Making *Seeger* useful under the establishment clause requires splitting "ultimate concern" into "ultimate values" and "ultimate meanings." "Ultimate values" are life-guiding "oughts" or ends. "Ultimate meanings" are the untestable "explanations" which begin where science must stop. This conceptualization provides empirical indicators of religion necessary to show establishment, while not narrowing the sincerity approach of free exercise law.

As part of modifying *Seeger,* the standard should be made "plural" and uniform under both religion clauses. For example, Kent Greenawalt rejects the idea that humans have a single "ultimate concern," pointing out that humans have multiple "ultimate concerns."[61] Consonant with this observation, *Seeger* should be reformulated in terms of multiple, "ultimate concerns."[62] Without acknowledging the multi-

59. *E.g.,* L. GOODWYN, THE POPULIST MOMENT *passim,* 153 (1978) (effective democracy requires that people be able to think outside of received, established modes of thought).

60. Greenawalt points out that the word "religion" appears only once in the first amendment, logically implying that the definition should be the same under both clauses. Greenawalt, *supra* note 30, at 758. Greenawalt's criticisms of the *Harvard* Note coincide with this Comment's, but Greenawalt draws opposite prescriptions. *See also* Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting).

61. Greenawalt, *supra* note 30, at 808 (1984); *see also* Freeman, *supra* note 43.

62. Greenawalt criticizes the *Seeger* approach, not to improve it, but in hopes of displacing it with his "analogical" approach. *See supra* notes 32–49 and accompanying text.

plicity of "ultimate concerns," a definition of religion is unrealistic, as well as more narrow than current Constitutional law.[63]

A. The Elements of a Reformulated Seeger

1. "Ultimate" Defined: The Unprovable, the Untestable, and the Nonrational

Ethical and other value judgments do not have rational grounds. "Means" are rational, but "ends" are not. Rationality can inform one's choice between various means to an end, including the efficiency and the likely consequences of one's chosen means. However, after rationality clarifies the options, the choice of an end rests upon "nonrational" grounds.[64] For example, just because one uses reason to "deduce" ethics from nonrational premises does not mean that those initial premises have rational support.[65]

In contrast, Kent Greenawalt, believing that rational as well as nonrational values exist, states that many "ethical judgments are supportable on rational grounds."[66] He gives the following example: "Human beings must teach that killing innocent people is wrong if we are to live in minimally peaceable and stable relations with each other."[67] Here Greenawalt has conflated two issues: The first is the empirical means-ends issue of how to live in stable relations; the second is the shared nonrational preference for "peaceable and stable relations." Greenawalt's "rational" ethic is actually an empirical (rational) statement conditioned by an "if" on a nonrational value. This nonrational value, "stable relations," is an "ultimate" value as defined in this Comment.

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63. For example, Sherbert had refused to work on her Sabbath and was fired. The Court stated that it was a "burden" on Sherbert to forgo "*one* of the precepts" of her religion. Sherbert v. Verner, 374 U.S. 398, 404 (1963). This is a plural standard which does not require that the burdened precept be the sole precept of Sherbert's religion.

64. Choosing between means because of their "secondary" consequences, apart from reasons of efficiency in achieving the "primary" end, also involves a nonrational balancing of competing values. *E.g.*, R. BRUBAKER, THE LIMITS OF RATIONALITY: AN ESSAY IN THE SOCIAL AND MORAL THOUGHT OF MAX WEBER 72, 101 (1984) (no objective standards exist for judging ends or choices between competing ends, although choices may be rationally framed).

65. *See, e.g.*, M. WEBER, FROM MAX WEBER: ESSAYS IN SOCIOLOGY 281 (1946) (no matter how systematic or how "rationalized" an ethical doctrine becomes, that doctrine still rests upon a nonrational foundation of primary "values").

66. Greenawalt, *Religiously Based Premises and Laws Restrictive of Liberty*, 1986 B.Y.U. L. REV. 245, 248 (1986).

67. *Id.*

Greenawalt also argues that "nonrational" judgments exist and are acceptable bases of political involvement.[68] Defining "nonrational" judgments, Greenawalt writes: "[N]onrational judgments are those for which one can assign no grounds other than a subjective reaction."[69] As Michael Perry points out, Greenawalt properly defines "nonrational," but then simply fails to follow the logic of his own arguments.[70] Professor Perry correctly collapses the distinction between nonrational and rational value judgments and collapses the distinction between religious and nonreligious value judgments.[71] At least Greenawalt does concede that the philosophy behind this modified-*Seeger* approach has a long and vital history.[72]

For purposes of the modified-*Seeger* definition of religion, since only subjective grounds exist for a judgment about value or meaning, that judgment is "ultimate," beyond reason.[73] "Ultimate" refers to all values and "knowledge" which cannot be proven true, or even tested, by empirical evidence.[74] "Ultimate" judgments rest upon some type of nonrational "faith."

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68. Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment,* 27 WM. & MARY L. REV. 1011 (1986).

69. *Id.* at 1050. This Comment assumes that "no grounds other than a subjective reaction" exist in support of any values.

70. Perry, *Comment on "The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment,"* 27 WM. & MARY L. REV. 1067 (1986).

71. *Id* at 1067–69.

72. Greenawalt admits that "there is a strong, though always controversial, tradition in liberal philosophy that treats [all] ultimate value judgments as subjective." Greenawalt, *supra* note 68, at 1055. As an example of "objective" value judgments, Greenawalt calls people who wish to stick pins in other people "irrational." *Id.* However, sadists rationally pursue their subjective preference when they stick pins in people. In turn, for those who share the nonrational value against sadism, jailing the sadist is a rational means of defending that ultimate value.

73. *See, e.g,* A. JANIK & S. TOULMAN, WITTGENSTEIN'S VIENNA 192 (1973). Greenawalt understands that nonrational judgments seem objective, not subjective, to the choosers, especially if the subjective preference is widely shared ("intersubjective"). Greenawalt, *supra* note 68, at 1051.

74. Though beyond the scope of this Comment to present, the epistemology underlying the modified-*Seeger* approach is "realist." Realist epistemology rejects the correspondence theory of "foundationist" epistemology, and it rejects the radical subjectivism of "post-Kuhnian" phenomenology. For the epistemological realist, human knowledge is a phenomenological construction which is disciplined and shaped by the world. *E.g.*, Secord & Manicas, *Implications for Psychology of the New Philosophy of Science,* 1983 AM. PSYCHOLOGY 399. Simply put, although it has become a dogma in some circles to deny that humans can "know" anything, the epistemological realist accepts the subjectivists' insights that human perceptions and interpretations are imperfect, while also noting that radical subjectists do not cross streets without looking for traffic. *See also* K. MANNHEIM, IDEOLOGY AND UTOPIA 194, 256–59 (1936) ("situationally congruous thought," maligned by Mannheim, is adopted by this Comment as the only morally responsible form of thought).

Legal analysis should not unblinkingly adopt the value-laden language of moral discourse. Moral rhetoric usually attempts to make value judgments seem "objective" and "rational." "Objectifying" values should be left to freely exercised religion. In part, people gather in churches to find social reinforcement of particular ideals of values and of personality. They then subjectively experience their values as "objectively" true.[75] Free exercise includes the voluntary submission to doctrines which "objectify" nonrational values and present them as "true." Free exercise also includes "objectifying" the untestable, ultimate, "meaning" of prayer, of death, of natural processes, among others. State action properly must pass the *Thomas* test before it intrudes into this sphere. The state may only indoctrinate nonrational ideas as objectively true or preferable within the limits prescribed by the *Valente* test.

2. *Criteria for Recognizing Ultimate Values*

The most important distinctions for recognizing ultimate values are the boundaries of science, at which the "Is" of science contrasts with the life-guiding "Oughts" of ultimate values.[76] In establishment cases, courts must first ascertain permissible state action by using the scope of scientific knowledge to draw the boundary of the "ultimate."[77] All the questions which science cannot objectively answer remain for "ultimate" resolution.[78] If, after this initial determination, the state has gone beyond advancing science to advancing values, then analysis

75. *See, e.g.*, P. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION (1967). "Objectivication" is the process by which subjective creations, including values, take on the characteristic of "facts" when humans forget that they created their social world. *Id.* at 81–101. Unlike the objective existence of nature, the "objective" social world rests upon the ever mutable subjective beliefs of the human participants. Changing one's mind changes society.

76. This distinction between the "Is" and the "Ought" has been labeled "critical dualism" by K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1963). Popper argues that to promote democracy, the "natural" world of what "Is" must be distinguished from the "social" world and human "Oughts." *Id.* 61–66.

77. *See, e.g.*, M. WEBER, *supra* note 65, at 129–56, 281; R. BRUBAKER, *supra* note 64, at 49–60.

78. The resolution of "ultimate issues" is important to many people, and they seek intellectuals who create doctrines which present resolutions of ultimate issues, usually in "objective" terms, as palpable commandments, duties, "musts," and so on. The goal of the establishment clause is not to prevent nonstate intellectuals from "objectifying" values and meanings. The point is to free that process of "faith" from state purposes, effects, and entanglements.

must proceed in terms of majority enactments and *Valente* standards.[79]

State interests also affect courts' "ultimate value" definitions, since the state may have an interest in extinguishing certain values. In the free exercise context, courts simply refuse to recognize or protect ultimate values which are dramatically and diametrically contrary to compelling state interests.[80]

To conclude with an example, under the modified-*Seeger* definition of religion, public schools never establish religion by teaching means-ends, scientific, knowledge. If the public schools indoctrinate values beyond those necessary under the *Valente* standard, then they are impermissibly establishing religion. The ensuing burden upon the free exercise rights of children and parents is unconstitutional.

3. *Criteria for Recognizing Ultimate Meanings*

"Ultimate meanings" are any statements, not about values or ends, which are directly or indirectly untestable. Usually "ultimate meanings" give nonscientific explanations regarding the "nature" of life, the universe, and other real and imagined events.[81] The criteria for recognizing an ultimate meaning turn upon a distinction between "reflexive

79. In a free exercise case the "burden" on "religion" rests upon subjective sincerity standards quite impervious to scientific critique; therefore, the Is-Ought distinction can only help clarify state interests under the free exercise balancing test. Thomas v. Review Bd., 450 U.S. 707 (1981). Consistency of ultimate values should not be a free exercise criterion. Most great moral choices balance lesser evils. *See, e.g.*, W. KAUFMANN, WITHOUT GUILT AND JUSTICE: FROM DECIDOPHOBIA TO AUTONOMY 2–34 (1973). Sincerity could still be judged within some evidentiary limits. *See* Dobkin v. District of Columbia, 194 A.2d 657 (D.C. 1963) (working on one's Sabbath precludes one from refusing to appear in court on that Sabbath).

80. For example, the Court has supported state action withdrawing tax exemptions from a racist religion. Although the Supreme Court did formally weigh racist religious beliefs in Bob Jones Univ. v. United States, 461 U.S. 574 (1983), the Internal Revenue Service was allowed to deny the university tax exemptions because of its racism. In this type of case, since the concededly sincere religion receives no protection, sincerity would not be at issue.

81. For example: humans suffer because of sin, or evolution is "God's tool," or history is a "manifestation of Reason." In addition, acts, artifacts and organizations such as prayer, totems, and churches also can have ultimate meaning. "Ultimate meanings" should not be found in organizations apart from the beliefs of their participants. Similarly, Judge Hand took organizational activity to be "evidence of the religion's belief about supernatural or transcendent reality." Smith v. Board of School Comm'rs, 655 F. Supp. 939, 980 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). Taxation, and exemptions, can also create establishment clause claims which raise the issue of religious organizations as existing apart from believers. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemptions are not establishment clause violations because of long history of exemptions based upon social utility of charitable organizations). *Walz* does not go so far as to give religious organizations an existence apart from the actions and meanings of their adherents. *But cf.* Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 107 S. Ct. 2862 (1987) (religious organizations may discriminate on religious grounds in employment decisions).

ontologies" of science and other metaphysics.[82] Any metaphysical statement which is not reflexive to empirical evidence is "religious" under the modified-*Seeger* definition of religion. Empirical acts or artifacts, with an untestable meaning are also "religious."[83]

Ultimate meanings are more likely to be established than burdened, because beliefs under free exercise law, distinguished from actions, are presumed to be absolutely free from state intrusion.[84] Practically, the state cannot attain access to one's metaphysical assumptions and beliefs.[85] Once state action actually becomes indoctrination, advancing or inhibiting metaphysical beliefs, then an establishment of religion is occurring.[86]

Teaching evolution incidentally contradicts some religions' ultimate meanings, but teaching evolution is not an establishment.[87] As the Supreme Court has stated, evolution may be taught in the public schools, and legislative action prohibiting the teaching of evolution unconstitutionally establishes religion.[88] Nonetheless, if the schools begin to indoctrinate untestable "ultimate meanings" imputed to

82. While scientific theories are abstract and rest upon ontological premises, what distinguishes a scientific ontology from a metaphysic is that the scientific ontology is "reflexive" to—i.e., changes in response to— empirical data. *See* W. SCHLUCHTER, THE RISE OF WESTERN RATIONALISM: MAX WEBER'S DEVELOPMENTAL HISTORY *passim*, 43–48 (1981) ("reflexive" is used in a similar sense).

83. Very rarely should the state resort to the construction of ultimate meanings, instead of indoctrinations of ultimate values, to create minimal order. There is less political danger in the state teaching values and using majority coercion, because these latter two techniques of social control do not distort citizen perceptions of empirical reality.

84. Cantwell v. Connecticut, 310 U.S. 296, 298 (1940).

85. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (being forced to "confess" a "faith" through the flag salute invades the sphere of belief). In the language of this Comment, *Barnette* states that the flag salute gives an "ultimate" meaning to the flag.

86. Although *Seeger's* "ultimate concern" test referred to a value against war, religions also include doctrinal decrees regarding the "ultimate meaning" of empirical events. *Barnette* provides support for this Comment's inclusion of metaphysics within the modified-*Seeger* definition of religion. 319 U.S. at 624. In addition, the sociology of religion defines all "ultimate" ideas as religious. *See, e.g.*, P. BERGER, THE SACRED CANOPY (1967); M. WEBER, ECONOMY AND SOCIETY 399–640 (1978).

87. McGowan v. Maryland, 366 U.S. 420, 450 (1961) (incidental effects on religion do not violate the establishment clause); *see also* Lynch v. Donnelly, 465 U.S. 668, 683 (1984). Of course, these incidental effects may "burden" free exercise.

88. *See* Edwards v. Aguillard, 107 S. Ct. 2573 (1987). As part of a larger issue of creating democratic culture, compelling state interests in citizenship require that citizens learn a candid approach to the politically relevant empirical world. Some hard facts might incidentally contradict that part of religious "objectification" of values, or more likely "ultimate meanings," which conflate the Is and the Ought. In spite of democracy's need for a scientific and antinomian culture, nonstate intellectuals would still have free reign outside the school house, and beyond the school years.

evolution, they violate the establishment clause and impermissibly burden free exercise rights.[89]

Misrepresenting empirical facts is as much a religious distortion of empirical truth as was the medieval church's distortion in making Galilleo recant his statements that the earth orbited the sun.[90] Once a theory no longer yields before the facts, it becomes an "ultimate meaning," a "religion" under the first amendment. This use of deception and distortion as a tool of social control, common to theocratic and totalitarian states, should pass *Valente* scrutiny before our government may use it.[91]

B. Balancing Interests Under the Establishment Clause: Majority Action and Valente *Scrutiny*

An expansive establishment clause definition of religion requires that the legitimate enactments of majorities be distinguished from majority governmental actions which indoctrinate, advance or inhibit any "ultimate value" or any "ultimate meaning". Once that distinc-

89. The empirical facts underpinning evolution merely inform humans of likely means-ends consequences of their actions. To go further and pretend that evolution creates moral imperatives turns evolution into a religion. For example, while Social Darwinism or millenarian Marxism could be taught factually and historically as ideologies which have been causally important in human affairs, those teleological ideologies should not be taught as if they are objectively "true."

Whitehead and Conlan call Social Darwinism the "cultural application" of evolutionary science. Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH L. REV. 1, 39 (1978). Whitehead and Conlan explicitly claim that the Is-Ought distinction is part of their analysis. *Id.* at 48 n.231. However, they consistently fail to use critical dualism in their analysis of evolution. *See also* Gould, *William Jenning Bryan's Last Campaign,* 96 NAT. HIST. 16 (1987) (Bryan fought Darwinism because of the pro-capitalist Social Darwinists); *cf.* R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (1944). For a description of the theological underpinnings of Marx's teleological theory of historical "progress," see J. ELSTER, MAKING SENSE OF MARX *passim,* 27–37 (1985).

90. As a recent example of right-wing attempts to use this tactic, the Meese Commission tried to create an ultimate meaning it thought would reinforce "traditional" values by distorting public perceptions regarding crime and pornography. This approach resembles medieval Church and modern totalitarian tactics of deceit as a tool of social control. *See Symposium on Pornography,* SOC'Y July/Aug. 1987, at 6–32; *cf.* Fallows, *The Japanese are Different from You and Me,* ATLANTIC Sept. 1986, at 35–36. For an example of the same tactic on the political "left," see Beer, *Resolute Ignorance: Social Science and Affirmative Action,* SOC'Y May/June 1987, at 63.

91. For a succinct theory of how the powerful control social perceptions to manipulate the populace, see P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 108–16 (1966). In past times, this tactic was called "theocratic." In modern times, the totalitarian party state has been equally fierce in monopolizing the power to define ultimate values and meanings. *E.g.,* C. FRIEDRICH & Z. BREZINSKI, TOTALITARIAN DICTATORSHIP AND AUTOCRACY 9 (1962).

tion is made, then only the latter activities will be struck down, unless those actions pass the strict scrutiny of the *Valente* test.[92]

1. Majority Enactments Distinguished

In the United States' political system, political minorities obey majority "enactments" which are passed within Constitutional constraints. Laws are merely the *means* to legislatively determined ends. In other words, majority enactments *contain* values which are derived from the choices of the majority, and from the ultimate, nonrational values of the majority. But the ensuing state action simply expresses constitutionally allowed power, and does not present those majority values as morally superior to minority values. The electoral process merely aggregates values into legislative instructions for state administration.

Rarely, therefore, will the modified-*Seeger* definition of religion create establishment clause problems for majority legislation. Instead, majority actions will continue to be scrutinized under the free exercise clause. For example, the compulsory majority extraction of taxes may create free exercise burdens.[93] Taxation does not create an establishment issue unless it advances or inhibits ultimate ideas.

2. State Interests and Strict Scrutiny: Valente

State actions reach the *Valente* balancing test only if they fail the *Lemon* test.[94] By definition such state actions are, to some degree, state establishments of "ultimate" values.[95] For example, the Supreme Court has allowed state indoctrination of the "fundamental values necessary to the maintenance of a democratic political system," including tolerance.[96] Among other goals, this includes a compelling interest in preparing citizens for economic and political life.[97] The

92. Larsen v. Valente, 456 U.S. 228, 249 (1982).

93. In practice, however, as the Court recently made clear, compelling state interests in taxation overpower most free exercise claims. United States v. Lee, 455 U.S. 252, 260–61 (1982) (employed Amish may not opt out of paying Social Security taxes).

94. *See supra* notes 15–20 and accompanying text.

95. John Mansfield would call this state religion "the philosophy of the Constitution." Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution,* 72 CALIF. L. REV. 847 (1984).

96. Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986) (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979)).

97. Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (Amish allowed to quit school after eighth grade; key fact for plaintiffs in *Yoder* was that they were not going to participate in the general society); *see also* Duro v. District Attorney, 712 F.2d 96, 97–99 (4th Cir. 1983) (*Yoder* distinguished because Duro's children were going to join mainstream society and he had not demonstrated that home instruction would prepare his children to be self-sufficient in modern

empirical questions in *Valente* cases will turn on whether such indoctrination is truly "necessary."[98]

The courts' tests of "necessity" should include these questions: First, do the state's chosen means really effect their purported end?[99] The courts should demand empirical evidence from the state to prevent subversion of the establishment clause by mere assertion. The *Valente* standard of closely fitted means cannot be satisfied by less.[100] Second, have *Valente* interests in the survival of a viable democracy become confused with mere majority interests? At some point, not far beyond a very minimal state establishment, "state necessity" merely becomes an objectification of majority values, the practical equivalent of a majoritarian theocracy.[101] As always *Valente* places the burden of proof on the state.

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society or enable them to participate intelligently in the political system). Also, the state has a compelling interest in public health and welfare. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding religiously offensive child labor laws); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory vaccinations).

98. Other than teaching the substantive values of constitutional politics and economic self-sufficiency, democracy requires a dedication to certain forms of thought, but not to any particular content of thought. For example, critical thought must be taught, so that citizens will not merely be an unthinking mass, ripe for the demagogue. For a discussion of the importance to American democracy of the culture of "mature distrust" held by the Founding Fathers, see R. EDEN, POLITICAL LEADERSHIP AND NIHILISM 1–15 (1983).

The mental process of critical thought, and the value of critical thought, can be taught without indoctrinating any political content. The plaintiffs in "secular humanism" cases may be opposed to critical thought precisely because it has been given, unjustifiably, a content of "progressive" values objectified as "rational." Instead of attacking left-wing content, the right-wing now attacks the forms of rational thought. *Compare* Smith v. Board of School Comm'rs, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987) *with* Marcuse, *Repressive Tolerance*, in A CRITIQUE OF PURE TOLERANCE 81 (1970) (advocating selective tolerance).

99. For example, what degree of indoctrination is "necessary" to imbue democratic values? At some point deterrence by punishment for discrimination should be the state "means" to prevent discrimination; in this case, antidiscrimination values are represented factually, not "ultimately," in majority enactments. The use of state power to shape behavior contrasts sharply with allowing the state to indulge in dangerously extensive indoctrination in attempts to shape ultimate values and meanings regarding racial groups.

100. Larson v. Valente, 456 U.S. 228, 248–49 (1982). In comparison with the "least restrictive means" test of free exercise law, the *Valente* test can be thought of as a "most restrictive means" test.

101. That the state will "establish" some values to create a minimal democratic order does not betray freedom. Writing in the midst of World War II, Karl Polanyi poignantly saw that liberal democracies had failed to use state power to protect even a minimal social order, paving the road for the fascists, who were all too ready to use power to end social disorder. Our task, Polanyi writes, is to recognize that social life requires that power be used to organize "society," while still respecting freedom. K. POLANYI, THE GREAT TRANSFORMATION 249–58B (1944).

III. APPLYING THE MODIFIED-*SEEGER* DEFINITION OF RELIGION TO *MOZERT* AND *SMITH*

In two recent cases, plaintiffs attacked "secular humanism" in the public schools on first amendment grounds. In both, the plaintiffs won at the trial court level, and were reversed on appeal.[102] These cases provide useful illustrations of how the modified-*Seeger* definition of religion better protects free exercise and democracy by examining non-traditional ideas as possible establishments.

A. Mozert v. Hawkins County Public Schools: *Free Exercise, State Interests and "Opting Out" of Portions of the Public School Curriculum*

In *Mozert v. Hawkins County Public Schools,* the plaintiff parents, who objected to new texts, arranged for their children to "opt out" of the reading portion of the public school curriculum, while still retaining the general state benefit of public education. Although the relevant principals and teachers accepted this arrangement, the Hawkins County School Board voted unanimously to end any alternative programs. The parents then filed the lawsuit.[103]

At trial, Judge Hull applied *Thomas* rules to find that a *sincere* belief[104] had been *burdened* by conditioning a state benefit upon conduct proscribed by a religion.[105] Further, Judge Hull found that the state interest in requiring the use of standardized reading texts did not outweigh the burden to the plaintiffs.[106] He held that state interests could be met by *less restrictive* means. Since state law included provisions for home teaching, a partial "opting out" program would still serve state interests.[107] The court enjoined the school district from requiring the students to read the new reading texts, and the school district was ordered to allow the students to attend public school, as long as the "opt out" program met state home education standards.[108]

Although Judge Hull had accurately applied *Thomas* rules, on appeal all three judges voted to reverse. However, only Judges Lively

102. Smith v. Board of Comm'rs, 655 F. Supp. 939 (S.D. Ala.), *rev'd,* 827 F.2d 684 (11th Cir. 1987); 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 (6th Cir. 1987), *cert. denied,* 56 U.S.L.W. 3569 (1988); *see supra* notes 8, 9.

103. 647 F. Supp. 1194 (E.D. Tenn. 1986).

104. Defendants had conceded sincerity. *Id.* at 1197. Free exercise rules were probably applied because "opting out" is a free exercise remedy.

105. *Id.* at 1199–1200 (citing Thomas v. Review Bd., 450 U.S. 707, 717–18 (1981)).

106. *Mozert,* 647 F. Supp. at 1202.

107. *Id.* at 1201.

108. *Id.* at 1203.

and Kennedy shared a rationale.[109] They agreed that the plaintiffs had not been burdened by "mere exposure" to the offensive books.[110] This viewpoint clearly rejects the subjective sincerity standard of *Thomas*. Under *Thomas* rules no objective standard of "burden" exists. Therefore, once sincerity is shown, plaintiffs reach the balancing test.

Judge Kennedy assumed that even if a burden existed, compelling state interests in preparing students for citizenship outweighed the plaintiffs' burden.[111] Judge Kennedy defended the Hawkins School Board's means as the least restrictive, given the threat of "divisiveness and disruption" that requests for such exemptions might cause.[112] While this analysis is largely consistent with *Thomas* rules, it is weakened by reliance upon bald assertions regarding the empirical results of allowing the plaintiffs to "opt out." The modified-*Seeger* approach, by contrast, would require the state to present testable, causal evidence of the effects of "opt out" programs. Under this approach the state would bear the burden of providing the evidence that negative results will indeed occur.

Finally, Judge Boggs concurred in the judgment only.[113] He believed that the *Thomas* test was properly applied, including the sincerity test for "burden."[114] However, Judge Boggs believed that school boards are only constrained by the establishment clause, and not the free exercise clause.[115] This school board exemption to the *Thomas* rules leaves such plaintiffs at the mercy of the majoritarian results of school board elections.[116] While Judge Boggs would have liked to help the plaintiffs, he felt that the Supreme Court, not an appellate court, should extend *Thomas* protections to school children and their parents.[117]

Thomas protections should be extended to those children and parents.[118] The modified-*Seeger* approach takes the *Mozert* plaintiffs as far

109. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).

110. *Id.* at 1070.

111. *Id.* at 1071 (Kennedy, J., concurring).

112. *Id.* at 1072. By contrast, in trial court, Judge Hull had considered the school district's fear of a "barrage of such requests." However, he found such a barrage unlikely, and not justicable on the facts before him. *Mozert,* 647 F. Supp. at 1202.

113. 827 F.2d at 1073.

114. *Id.* at 1074. Judges Lively and Kennedy, by rejecting concededly sincere assertions of "burden," imported an objective test into the free exercise clause.

115. *Id.* at 1073.

116. *Id.* at 1081.

117. *Id.*

118. The idea of school board discretion was again stated in *Edwards v. Aguillard;* while the parameters were not clearly stated, the Court reaffirmed the idea that school board discretion must comport with " 'the transcendent imperatives of the First Amendment' ". 107 S. Ct. 2573,

as the free exercise balancing test while applying *Thomas* rules to public schools. The plaintiffs' sincere beliefs deserve this respect. Next, in applying the balancing test, the modified-*Seeger* approach demands that the state provide empirical verification of its interests, and would not settle for mere assertions of cause and effect. Under this approach, Judge Hull's decision probably would be upheld.[119]

B. Smith v. Board of School Commissioners: *Testing the Establishment of "Secular Humanism"*

In *Smith v. Board of School Commissioners,* the plaintiff parents, teachers, and students attacked the entire Mobile County public school curriculum under both religion clauses. The district court determined that the "burden" on the plaintiffs was incidental to the establishment of "secular humanism" in the public schools, and therefore decided the case under establishment clause law.[120] The district court granted the establishment clause remedy of voiding the offensive state action entirely by banning the offensive books from the classroom.[121] In his opinion, Judge Hand applied law that included a definition of religion resembling the modified-*Seeger* approach.[122]

Although *Smith* was unanimously reversed on appeal, Judge Hand was reversed on his factual findings regarding the content and effects of the textbooks, and not on his view of the law.[123] The circuit court applied *Lemon*'s *purpose* prong and found that the texts were chosen

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2577 (1987) (quoting Board of Educ. v. Pico, 475 U.S. 853, 864 (1982)). Judge Boggs appears to have misread the Court.

119. Democracy has endured in Tennessee with the old Holt readers, and the threat from using them is miniscule. If the new Holt readers actually presented resolutions of "ultimate" issues as "true," and not merely factually as ways people have thought, then an establishment clause issue would be present.

120. Smith v. Board of School Comm'rs, 655 F. Supp. 939, 975 (S.D. Ala. 1987).

121. *Id.* at 988.

122. *Id.* at 975–80. The modified-*Seeger* approach to "ultimate meanings" resembles Judge Hand's law: "However, to claim that there is nothing real beyond observable data is to make an assumption based not on science, but on faith, faith that observable data is all that is real." *Id.* at 982. The modified-*Seeger* definition categorizes such untestable statements as "ultimate meanings." *See supra* notes 81–91 and accompanying text. Religion was also defined in terms of "fundamental assumptions," including ultimate ends and the purpose and nature of man, life, and the universe; this was distinguished from a "way of life" which ignores "ultimate issues." 655 F. Supp. at 979. In contrast, the modified-*Seeger* approach would find some ultimate ends in all ways of life.

123. Smith v. Board of School Comm'rs, 827 F.2d at 690, 694, 695. The one criticism Judge Johnson made of Judge Hand's law revealed a misunderstanding. Judge Johnson thought that Judge Hand ordered that all religions be taught equally. *Id.* at 695. Actually, Judge Hand required equal presentation of all religions *only if* any were taught; Judge Hand preferred that no religions be taught as if objectively true in the public schools. 655 F. Supp. at 985–87.

for "the secular purpose of education."[124] Since Judge Hand focused upon actual effects of the school books, the purpose prong of *Lemon* was marginally relevant to the appeal.[125]

On the second prong of *Lemon,* the appellate court measured *effects* in terms of government "endorsement of religion" or "a message of approval."[126] The court never vigorously looked at the empirical effects of the curriculum. The modified-*Seeger* approach would not stop short of judging the testable, measurable impact of the governmental action in advancing or inhibiting "ultimate" values and meanings.[127]

The most difficult issue in *Smith,* not satisfactorily addressed by the appellate court, pertains to the omissions of religious history in the American history texts.[128] Judge Hand found these omissions to be impermissible discrimination against religion.[129] The appellate court found the omissions to be incidental and immaterial.[130] The *Smith* plaintiffs have a colorable claim which a court should not dismiss short of careful fact gathering.

At some point omissions rise to an empirical distortion creating in students' minds an "ultimate meaning" which is impermissibly contrary to the facts of history. Under modified-*Seeger,* once omissions rise to bad science, or to obvious distortions regarding causality, then a real factual issue exists regarding the creation of an "ultimate meaning."[131] Under *Lemon,* failure on one prong invalidates the state action.[132] Therefore, plaintiffs should obviate the need to attack edu-

124. 827 F.2d at 693.

125. 655 F. Supp. at 983. The modified-*Seeger* approach would sharpen the purpose issue by asking: Are the books *intended* to resolve "ultimate" issues by presenting "objectified" answers to those ultimate questions?

126. 827 F.2d at 692–93. While citing the majority opinion in Lynch v. Donnelly, 465 U.S. 668, 682 (1984), Judge Johnson actually seems to be using Justice O'Connor's test of the "message" as the test for the *Lemon* effect prong. *Compare Lynch,* 465 U.S. at 692 (O'Connor, J., concurring) *with Smith,* 827 F.2d at 692–93 (message analyzed in terms of state purpose).

127. This doctrine still leaves room for Judge Hand to be reversed on his findings of fact.

128. Serious scholarly studies of textbook content reveal complete omission even of the religious motivations which were causally crucial in American history. Vitz, *Religion and Traditional Values in Public School Textbooks,* PUB. INTEREST, Summer 1986, at 79 (texts also completely omit traditional family roles). Standards for coverage in history texts could include the causal importance of the events described, as modified by *Valente* citizenship interests.

129. 655 F. Supp. at 985.

130. 827 F.2d at 693–95.

131. For an account, more complex than the scope of this Comment allows, of the importance of factual omissions for controlling the religion (symbolic universe) of a culture, and thereby people, see P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY 112–16 (1966).

132. 107 S. Ct. at 2577.

cators' intentions by instead presenting the effects of such omissions.[133]

Even if Judge Hand was right on all the above issues, the *Valente* balancing test might still protect the textbooks. The appellate court mentioned the state interest in indoctrinating the values of citizenship, but it did so improperly as part of determining the "governmental message."[134] Instead, the court should have balanced the disestablishment values of the first amendment with the state need to indoctrinate its "minimal establishment" of citizenship values.

In sum, the modified-*Seeger* approach would substantially clarify the issues in the "secular humanism" cases, without radically departing from previous law. The resulting legal clarity would make factual findings the most vital determinants of these cases.

IV. CONCLUSION

"We have not yet come close to reconciling *Lemon* and our Free Exercise cases, and typically we do not really try," wrote Justice Scalia in *Edwards v. Aguillard*.[135] The time has come for the Court to finish, under the establishment clause, what it began under the free exercise clause. By recognizing the great diversity of human beliefs as "religious" under the free exercise clause, the Court exchanged a naive ethnocentrism for a complex legal world of balancing lesser evils.[136] This action opened the gap between the religion clauses. In response, the Court cannot, as some would have it, close that gap by returning to nineteenth century Christian theocentrism.[137] Instead, the Court must undertake the weighty task of protecting the full range of first

133. Social "scientists" and teachers simply may not comprehend how many of their "theories" are religious, not scientific. Plaintiffs should rely upon the effects prong of *Lemon* in these cases. *Cf.*, Hacker, *The Decline of Higher Learning*, N.Y. REV. BOOKS, Feb. 13, 1986, at 35, 38 reviewing M. FINKELSTEIN, THE ACADEMIC PROFESSION (1985) (social science professors have the lowest I.Q.'s of any academic group). For example, some social "scientists" still do not understand that functionalist social "theory" is a religion, not a scientific theory. *E.g.*, J. ELSTER, AN INTRODUCTION TO KARL MARX 190–92 (1986); J. ELSTER, MAKING SENSE OF MARX (1985); D. MARTINDALE, SOCIOLOGY AND THE PROBLEM OF VALUES 1–27 (1975); J. TURNER & A. MARYANSKI, FUNCTIONALISM (1979).

134. 827 F.2d at 692.

135. 107 S. Ct. at 2595.

136. To invoke the indigenous metaphor of the Fortunate Fall: As the external paradise of an innocent Eden was left behind, Adam and Eve, somberly weighed down with the knowledge of good and evil, were promised an internal paradise of choices rightly made: "To leave this paradise, but shall possess, a paradise within thee, happier far." J. MILTON, PARADISE LOST, Book XII, ll. 586–87 (Hughes ed. 1957). So, too, must the Court take up the burden of knowledge.

137. Whitehead & Conlan, *The Establishment of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH. L. REV. 1, 65 (1978).

amendment values by broadening the scope of the establishment clause.

The modified-*Seeger* definition of religion expands the establishment clause by providing empirical indicators of religion. This objective establishment clause half of the modified-*Seeger* definition complements, with its other half, the subjective sincerity standard of the free exercise clause. All "ultimate values," from MOVE's pantheistic imperatives to the Ten Commandments, are defined as religious, and so are all "ultimate meanings," from chiliastic Marxism to creationism. Without this untestability standard of "ultimate" culture, the Court will fail to detect state establishments of new religions. The "secular humanism" plaintiffs warn of such a theocratic threat. When the Court finally addresses "secular humanism," it would be a dangerous pretense of innocence to restrict the establishment clause to traditional beliefs. Instead, the Court must protect democratic culture from tyranny in all of its guises.

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