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ARTICLE

Rethinking Church and State: The Case of Environmental Religion

ROBERT H. NELSON*

I. INTRODUCTION

In his magisterial work, *A Religious History of the American People*, Yale Professor Sydney Ahlstrom wrote that the events in American society of the 1960s amounted to a “violent and sudden . . . moral and theological transformation” of the nation.¹ The rise of environmentalism was one of the leading elements of this transformation,² due to catalyzing events such as the 1962 publication of Rachel Carson’s *Silent Spring*;³ the 1964 Congressional enactment of the Wilderness Act;⁴ and the 1969

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1. SYDNEY E. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 1091 (2004).

2. In contrast to a utilitarian anthropocentric view, there exist “the perceptions of those within the environmental community who view environmental protection as a moral, ethical or spiritual obligation.” RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 27 (2004). “Some environmentalists derive their zeal for environmental protection, especially on matters such as endangered species protection, from their religious beliefs. For them, environmental degradation constitutes an affront to God.” *Id.* at 28. “For some persons [in the environmental movement], the choice between one environmental standard and another poses no less than a choice between competing moral absolutes.” *Id.* at 190.

3. RACHEL CARSON, *SILENT SPRING* (1962).

4. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 790 (codified as amended at 16 U.S.C. §§ 1131–1136 (2006)).

Santa Barbara oil spill.⁵ Exemplifying this shift, the first Earth Day was celebrated on April 22, 1970.

It was only a year later, in 1971, that Richard Neuhaus explained that the new American environmentalism raised questions that were essentially religious.⁶ Linda Graber, in 1976, wrote that “the surge of emotion the purist feels in wilderness is a cultural experience with a religious core.”⁷ The “wilderness is a manifestation of the Absolute,” she expounded. In it, an environmental believer “can immerse himself in perfection. . . . When the wilderness ethic is seen in its religious context, it is easier to understand the emotional heat generated” in public debates about wilderness designations.⁸ In 1980, law professor Joseph Sax wrote that he and fellow advocates for the National Parks were “secular prophets, preaching a message of secular salvation.”⁹ In 1986, Alston Chase published *Playing God in Yellowstone*, in which he described the wildlife management policies in Yellowstone National Park as determined by a set of environmental religious dogmas.¹⁰

By the 1990s, environmentalists themselves were often characterizing environmentalism in religious terms. In 1992, Steven C. Rockefeller and John C. Elder edited a book collection, *Spirit and Nature: Why the Environment is a Religious Issue*.¹¹

5. HAL K. ROTHMAN, *THE GREENING OF A NATION?: ENVIRONMENTALISM IN THE UNITED STATES SINCE 1945* 101-05 (1998).

6. “In the view of the early nature romanticists who fostered the conservation movement the sacred was clearly located in extra-human nature. That is sacred which is untainted by human presence or influence. This is a viewpoint characteristic of the bulk of today’s ecological writing.” RICHARD NEUHAUS, *IN DEFENSE OF PEOPLE: ECOLOGY AND THE SEDUCTION OF RADICALISM* 198 (1971).

7. LINDA GRABER, *WILDERNESS AS SACRED SPACE* 113 (1976).

8. *Id.* at 111.

9. JOSEPH SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* 103-04 (1980).

10. *See* ALSTON CHASE, *PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA’S FIRST NATIONAL PARK* 308 (1986) (stating that “[t]he growing spiritualism of the environmental movement . . . nurtured a wilderness ethic of protectionism. If all nature was sacred, environmentalists said in effect, then nothing should be disturbed.”).

11. They write that “the global environmental crisis, which threatens not only the future of human civilization but all life on earth, is fundamentally a moral and religious problem.” Steven C. Rockefeller & John C. Elder,

Then-Senator Al Gore, in 1992, declared in *Earth in the Balance* that “the froth and frenzy of industrial civilization mask our deep loneliness for the communion with the world that can lift our spirits and fill our senses with the richness and immediacy of life itself.”¹² Such matters lie in the domain of religion; as Gore put it, “the more deeply I search for the roots of the global environmental crisis, the more I am convinced that it is an outer manifestation of an inner crisis that is, for lack of a better word, spiritual.”¹³ Many other environmental writings since then have argued that only a religious reformation in America can offer a lasting improvement in the human relationship with nature.¹⁴

II. ENVIRONMENTALISM AS RELIGION: AN INCREASINGLY A MAINSTREAM UNDERSTANDING

To characterize environmentalism as a religion, therefore, is not at all new.¹⁵ What is more novel is that today, this

Introduction, in SPIRIT AND NATURE: WHY THE ENVIRONMENT IS A RELIGIOUS ISSUE 1 (Steven C. Rockefeller & John C. Elder eds., 1992).

12. AL GORE, *EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT* 220-221 (1992).

13. *Id.* at 12.

14. Christopher Hamlin and David Lodge argue that environmental religion must today be rethought, reflecting an imperative “to draw on aspects of religion that have not been prominent in ecotheology.” It will also be necessary to enlist traditional Jewish and Christian religion in the cause:

We believe that Americans will not choose to significantly reduce their environmental impact unless it becomes a priority of the mainstream religions, Judaism and Christianity. . . . Moreover, these changes will have to come, to a large degree, from resources within those traditions. A designer ecotheology that does not draw from core religious beliefs and practices will not work, nor will an approach that treats religion merely as instrumental to environmental change.

Christopher Hamlin & David M. Lodge, *Ecology and Religion in a Post Natural World, in RELIGION AND THE NEW ECOLOGY: ENVIRONMENTAL RESPONSIBILITY IN A WORLD OF FLUX* 280 (David M. Lodge & Christopher Hamlin eds., 2006).

15. See, e.g., Robert H. Nelson, *Unoriginal Sin: The Judeo-Christian Roots of Ecotheology*, 53 *POLY REV.* 52 (1990); Robert H. Nelson, *Environmental Calvinism: The Judeo-Christian Roots of Environmental Theology*, in *TAKING THE ENVIRONMENT SERIOUSLY* 233 (Roger E. Meiners & Bruce Yandle eds., 1993); Robert H. Nelson, *Bruce Babbitt, Pipeline to the Almighty*, *WKLY. STANDARD*, June

recognition is reaching into the mainstream American understanding of the environmental movement. The late best-selling novelist Michael Crichton (who held an M.D. degree from Harvard Medical School) described environmentalism in a 2003 speech as the “religion of choice for urban atheists.”¹⁶ Shortly thereafter, he authored a novel, *State of Fear*, which developed related themes.¹⁷ More and more newspaper columnists, op-ed contributors and others in the mainstream media today are characterizing environmentalism in religious terms.¹⁸ For

24, 1996, at 17; Robert H. Nelson, *Religion as Taught in the Public Schools*, *FORBES*, July 7, 1997, at 69.

16. In remarks before the Commonwealth Club, Crichton said:

Today, one of the most powerful religions in the Western World is environmentalism. Environmentalism seems to be the religion of choice for urban atheists. Why do I say it's a religion? Well, just look at the beliefs. If you look carefully, you see that environmentalism is in fact a perfect twenty-first century remapping of traditional Judeo-Christian beliefs and myths.

There's an initial Eden, a paradise, a state of grace and unity with nature, there's a fall from grace into a state of pollution as a result of eating from the tree of knowledge, and as a result of our actions there is a judgment day coming for us all. We are all energy sinners, doomed to die, unless we seek salvation, which is now called sustainability.

Michael Crichton, Remarks to the Commonwealth Club (Sept. 15, 2003), available at <http://www.forces.org/articles/files/crichton.htm>.

17. See generally MICHAEL CRICHTON, *STATE OF FEAR* (2004).

18. A columnist for the *Los Angeles Times* wrote in 2007 that a strong sense of the pervasive spread of human sinfulness was demanding large reforms in the patterns of living among environmental followers, frequently expressed as a necessity to impose a powerful moral discipline in order to restrain the continuing emission of greenhouse gases that threatened the future of the earth:

Global climate change – along with terrorism – has replaced the Soviet Union as the Monster Under the Bed in our national consciousness. It has reached the level of a full-blown zeitgeist social issue, with far-reaching moral and religious undertones.

Because global warming and the efforts to halt it touch on nearly every realm of policy, the environment has become a moral prism through which all other issues are being filtered. Regardless of whether they actually care about the environment, partisans of all stripes are using the issue to gain the moral edge.

A green think tank in London has urged British couples to think of the environmental consequences of having more than two children. It released a paper showing that if couples had two children instead of three, “they could cut their family’s carbon

example, in the February 21, 2010 edition of *The Washington Post*, columnist George Will observed that “a religion is what the faith in catastrophic man-made global warming has become.”¹⁹ For Will, this even raised a possible tension between the government formulation and implementation of climate policies and the constitutional requirement for separation of church and state. Referring to recent public statements of Todd Stern, the State Department’s special envoy for climate policy, Will wrote that “it is tempting to say, only half in jest, that Stern’s portfolio violates the First Amendment, which forbids government from undertaking the establishment of religion.”²⁰

Joel Garreau is a leading journalist and commentator of our times, a highly regarded former staff writer on *The Washington Post*, and the author of three important books on contemporary geographic and technological developments.²¹ In 2010, he wrote

dioxide output the equivalent of 620 return flights a year between London and New York.”

Similarly, last month a London tabloid featured a 35-year-old environmentalist who asked to be sterilized so she could contribute to the effort “to protect the planet.” “Having children is selfish,” she insisted. “It’s all about maintaining your genetic line at the expense of the planet.”

Environmental rhetoric . . . constantly reminds us of our own culpability. For that reason, environmentalism is more akin to a religious awakening than to a political ideology.

Like evangelicals, environmentalists speak, in their way, of fire and brimstone. Like the preacher, the environmental activist demands that we give ourselves to something beyond ourselves and that we do penance for our wasteful, carbon-profligate sins.

And like any religion that emphasizes sin, devotees will find all sorts of ways to prove their personal righteousness.

Gregory Rodriguez, *Greenness is Next to Godliness* L.A. TIMES, Dec. 10, 2007, available at <http://www.latimes.com/news/printedition/la-oe-rodriguez10dec10,0,5329438.column>.

19. George F. Will, *Global Warming Advocates Ignore the Blunders*, WASH. POST, Feb. 21, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/19/AR2010021903046.html>.

20. *Id.*

21. See generally JOEL GARREAU, *THE NINE NATIONS OF NORTH AMERICA* (1989); JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* (1992); JOEL GARREAU, *RADICAL EVOLUTION: THE PROMISE AND PERIL OF ENHANCING OUR MINDS, OUR BODIES – AND WHAT IT MEANS TO BE HUMAN* (2006).

an article entitled *Environmentalism as Religion*.²² Garreau has not been an active participant in environmental debates. He thus has solid claims of journalistic neutrality and objectivity in this area. Garreau is explicit in that he does not use the term “religion” merely in a metaphorical sense, as some people might suspect. Rather, he means that environmentalism is a religion, literally.²³

Garreau attributes the rise of the environmental religion to a wide “rejection of traditional religion [in our time that] . . . has created a vacuum unlikely to go unfilled; human nature seems to demand a search for order and meaning.”²⁴ For much of the twentieth century, those who had abandoned traditional religion often turned to the worship of economic progress as the path to salvation in this world – to the attainment of a new “heaven on earth.”²⁵ However, Marxist, socialist, and other forms of belief grounded in economic progress faded in the last few decades of the twentieth century. As Garreau explains, environmentalism

22. Joel Garreau, *Environmentalism as Religion*, 28 *NEW ATLANTIS* 61 (2010).

23. Garreau writes that:

William James, the pioneering psychologist and philosopher, defined religion as a belief that the world has an unseen order, coupled with the desire to live in harmony with that order. In his 1902 book *The Varieties of Religious Experience*, James pointed to the value of a community of shared beliefs and values. He also appreciated the individual quest for spirituality – a search for meaning through encounters with the world. More recently, the late analytical philosopher William P. Alston outlined in *The Encyclopedia of Philosophy* what he considered the essential characteristics of religions. They included a distinction between sacred and profane objects; a moral code; feelings of awe, mystery and guilt; adoration in the presence of sacred objects and during rituals; a worldview that includes a notion of where the individual fits; and a cohesive social group of the likeminded.

Environmentalism lines up pretty readily with both of these accounts of religion. As climate change literally transforms the heavens above us, faith-based environmentalism increasingly sports saints, sins, prophets, predictions, heretics, sacraments and rituals.

Id. at 67.

24. *Id.* at 61.

25. See generally ROBERT H. NELSON, *REACHING FOR HEAVEN ON EARTH: THE THEOLOGICAL MEANING OF ECONOMICS* (1991); see also generally ROBERT H. NELSON, *ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND* (2001).

has recently arisen as a religious contender, offering “a faith” that attracts many devout followers “whose worldview and lifestyle have been utterly shaped by it.”²⁶

The processes of secularization are most advanced in former Protestant countries such as Denmark and Sweden, and as Garreau finds, it is in these “parts of northern Europe, [that] this new [environmental] faith is now the mainstream” religion.²⁷ Garreau quotes approvingly the recent statement of a leading twentieth century physicist, Freeman Dyson, that environmentalism has become “a worldwide secular religion” that has “replaced socialism as the leading secular religion” of our times.²⁸ The tenets of this new environmental faith, Dyson adds, “are being taught to children in kindergartens, schools, and colleges all over the world.”²⁹

Another prominent contributor to the growing recognition of environmentalism as a religion is the environmental historian William Cronon.³⁰ Cronon authored the foreword to fellow historian Thomas Dunlap’s 2004 book, *Faith in Nature: Environmentalism as a Religious Quest*, in which Dunlap documents in full detail the religious character of the American environmental movement.³¹ As Cronon explains, environmentalism shares “certain common characteristics with the human belief systems and institutions that we typically label with the word *religion*.”³² Indeed, the parallels are so striking,

26. Garreau, *supra* note 22, at 74.

27. *Id.* at 62.

28. Freeman Dyson, *The Question of Global Warming*, N.Y. REV OF BOOKS, June 12, 2008, available at <http://www.nybooks.com/articles/archives/2008/jun/12/the-question-of-global-warming/?page=2>.

29. *Id.*

30. See Paul Krugman, Op-Ed., *American Thought Police*, N.Y. TIMES, Mar. 28, 2011, at A25, available at <http://www.nytimes.com/2011/03/28/opinion/28krugman.html> (“Mr. Cronon — the 2011 president-elect for the American Historical Association” was recently described by Paul Krugman in the *New York Times* as having “a secure reputation as a towering figure in his field. His magnificent *Nature’s Metropolis: Chicago and the Great West* is the best work of economic and business history I’ve ever read — and I read a lot of that kind of thing.”).

31. William Cronon, *Foreword*, in THOMAS P. DUNLAP, *FAITH IN NATURE: ENVIRONMENTALISM AS A RELIGIOUS QUEST*, at xi-xv (2004).

32. *Id.* at xi.

extending to so many features traditionally associated with religion, that Cronon, in the end, literally finds the presence of a new religion, outwardly secular, but nevertheless borrowing heavily from the Judeo-Christian religious heritage.³³

In the environmental religion, “natural” and “unnatural” become secular substitutes for the “good” and “evil” of Biblical religion, just as “efficient” and “inefficient” substituted in economic religion.³⁴ Mothers and fathers hope to teach their children to do what is right and good in the world. For many families who do not attend Christian churches or Jewish synagogues regularly, the teaching of environmental principles in the public schools, the daily routines of recycling in the home, visits to wilderness areas, and living in many other ways according to the tenets of an environmental faith now serve this purpose.

33. Cronon writes that:

[Environmentalism] offers a complex series of moral imperatives for ethical action, and judges human conduct accordingly. The source of these imperatives may not appear quite so metaphysical as in other religious traditions, but it in fact derives from the whole of creation as the font not just of ethical direction but of spiritual insight. The revelation of seeing human life and the universe whole, in their full interconnected complexity, can evoke powerful passions and convictions ranging from the mystical to the missionary. Certain landscapes — usually the wildest and most natural ones — are celebrated as sacred, and the emotions they inspire are akin to those we associate with the godhead in other faith traditions. Much environmental writing is openly prophetic, offering predictions of future disaster as a platform for critiquing the moral failings of our lives in the present. Leave out the element of divine inspiration, and the rhetorical parallels to biblical prophecy in the Hebrew and Christian traditions are often quite striking. Maybe most important, environmentalism is unusual among political movements in offering practical moral guidance about virtually every aspect of daily life, so that followers are often drawn into a realm of mindfulness and meditative attentiveness that at least potentially touches every personal choice and action. Environmentalism, in short, grapples with ultimate questions at every scale of human existence, from the cosmic to the quotidian, from the apocalyptic to the mundane. More than most other human endeavors, this is precisely what religions aspire to do.

Id. at xi-xii.

34. Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L. REV. 51, 53, 55, 60 (2004).

III. ENVIRONMENTAL RELIGION AS A PROBLEM FOR CHURCH AND STATE

To describe a belief system as a religion is regarded, in some circles, as a pejorative label.³⁵ Such negative views, however, might be described as a disguised form of religious sentiment themselves. Secular religions often make imperial claims for their authority by denying their religious character and claiming instead the mantle of “science” for their beliefs.³⁶ Marxism was a classic example.³⁷ Though capable of being expressed in many different ways, belief in some sort of religion is a central and necessary part of the human experience.³⁸ Religion provides the fundamental framework of understanding and meaning that informs and guides our thinking and actions. Without some kind of religion to frame our understanding of the world, we become

35. RICHARD DAWKINS, *THE GOD DELUSION* 252 (2006).

36. MARK SAGOFF, *PRICE, PRINCIPLE, AND THE ENVIRONMENT* 136-37 (2004); *see also id.* at 136 (“In our secular society, we have come to depend on scientists, particularly ecologists and ecological economists, to remind us of the fundamental truths that clergy taught to earlier generations.”).

37. IGAL HALFIN, *FROM DARKNESS TO LIGHT: CLASS, CONSCIOUSNESS, AND SALVATION IN REVOLUTIONARY RUSSIA* 39 (2000). As a historian of early communism in the former Soviet Union, Igal Halfin reports, “Marxists would doubtless have renounced notions such as good, evil, messiah, and salvation as baseless religious superstitions that had nothing to do with the revolutionary experience. Yet, these concepts, translated into a secular key, continued to animate Communist discourse” in Russia for at least two decades after the 1917 Revolution. *Id.* Most Russian Communists were nevertheless blind to the reality of the close “affinity” of Russian communism “with Christian messianism.” Yet, as described by Halfin, the parallels are obvious to us today:

The Marxist concept of universal History was essentially inspired by the Judeo-Christian bracketing of historical time between the Fall of Adam and the Apocalypse. The Original Expropriation, at the beginning of time, represented a rupture in the timeless primitive Communism, which inaugurated History and set humanity on a course of self-alienation. The universal Revolution, an abrupt and absolute event, was to return humanity to itself in a fiery cataclysm. . . . Imbuing time with a historical teleology that gave meaning to events, Marxist eschatology described history as moral progression from the darkness of class society to the light of Communism.

Id. at 40.

38. Martin Marty, *Introduction*, in WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE*, at xxiv (Penguin Books 1982) (1902).

disoriented, uncertain, and confused. Few people find this a tolerable condition.

Thus, living without religion in some form is virtually impossible. This is not to suggest that all religions are equally meritorious in their truthfulness, fact claims, and other critical respects. National Socialism in Germany, as an extreme example, was such a violently destructive and morally repulsive religion that it had to be eliminated by force.³⁹ Whether done with full awareness or not, each person must make judgments about the relative merits of competing religions as part of everyday life.

Garreau's, Cronon's, and many other similar observations of the religious character of American environmentalism, say little or nothing about the relative merits of environmentalism as a religion per se. Nevertheless, the very fact that environmentalism is a religion in and of itself raises difficult political and constitutional questions. How is it that an environmental religion can be actively supported by the government, while similar government support for older Jewish, Christian, Muslim and other traditional religions would be prohibited?⁴⁰ For example, environmental religion is today

39. See EMILIO GENTILE, *POLITICS AS RELIGION* 110 (George Staunton trans., Princeton Univ. Press 2001) ("The Second World War was fought and experienced by the allies as a war of religion that would decide the fate of mankind. 'Victory for us means victory for religion.' President Roosevelt declared in his State of the Union Address on 2 January 1942.").

40. While tensions of environmental religion, specifically that of church and state conflict, have received little attention thus far, the broader issue of state discrimination in favor of secular religions over and against traditional religions has a considerably longer history. Rebecca French labels the conventional view today as the "modern model" in which religion is regarded as "private and rarely allowed to enter into the political, commercial or intellectual order because it has a dampening effect on the freedom of others." Rebecca Redwood French, *From Yoder to Yoda: Models of Traditional, Modern and Postmodern Religion in U.S. Constitutional Law*, 41 ARIZ. L. REV. 49, 73-74 (1999). However, a dissenting and less common minority view is that of the "New Religionist legal scholars [who] attack the Modern model." These scholars:

Complain about the current secularized, scientific, material state for diminishing the understanding and place of religion in our public sphere. They decry increasing secularity because it has caused a general moral decline. They reject the large role of the secular state in the daily lives of the general population and push to bring religious or moral speech back into legal discourse. . . . Even as

actively proselytized in the public elementary and secondary schools. Any similar proselytizing of Christianity, Buddhism, Hinduism, or any other historic religion would be strictly prohibited in these settings. This seems to be a form of religious discrimination in the public school system in favor of one particular religion over another.⁴¹ In 1963, Supreme Court Justice Potter Stewart dissented from the Court's majority decision in *School District of Abington Township v. Schempp*, which prohibited the reading of the Bible in public schools. Justice Stewart objected on the grounds that the actual effect of the decision would come to be seen "not as the realization of state neutrality, but rather as the [state] establishment of a religion of secularism."⁴² This prediction is seemingly being borne out today in the case of environmental religion.

Some people may nevertheless object that environmentalism is not really a "religion" in the constitutional meaning of the term. However, many prominent contemporary observers choose to describe it this way. As will be discussed below, however,

they adopt these stances, they remain modern – none of the New Religionists want to join the Amish or live in a truly traditional integrated worldview.

Other legal academics with a philosophical and interpretivist bent have attacked the Modern model as well. They have suggested that the core ideas of the secular public sphere have not been sufficiently delineated, that the current liberal stance is itself a sort of 'secular fundamentalism.' . . . Another implicit criticism is the lack of appropriate reproduction of social and cultural forms – including the socialization of children – that takes place through the current secularized system.

Id.

41. See Andrew A. Cheng, *The Inherent Hostility of Secular Public Education Toward Religion: Why Parental Choice Best Serves the Core Values of the Religion Clauses*, 19 HAW. L. REV. 697, 698-99 (1997) (stating that "many religious parents feel that public schools teach their children values that are diametrically opposed to their own."). They are hostile in particular to "the secular values taught in many public schools [that] are foreign to their own, resulting in a school system that they feel is 'deeply ideological and alienating.'" *Id.* at 700. This is not a small group. One national survey showed that sixty-nine percent of Evangelical Christians agreed that "public schools [are] teaching the values of secular humanism." *Id.* Cheng concludes that the American "education system, as presently structured, creates an inherent tendency to be hostile toward traditional religious believers," as in the teaching of environmental religion while traditional religion is excluded. *Id.*

42. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 313 (1963).

environmentalism meets the definitions of religion adopted by leading social scientists and theologians of the twentieth century.⁴³ The Constitution, moreover, does not distinguish between types of religion, nor find that the First Amendment applies to some religions but not to others.⁴⁴ The First Amendment is intended, as legal scholars normally interpret it, to guarantee freedom of belief in fundamental matters of religion and to prevent the government from using its powers to deliberately advance one religion over another.⁴⁵

43. The Supreme Court has offered varying definitions of religion, but in the process has created as much confusion as legal clarity. One of the more specific efforts to define religion came from the Court of Appeals for the Tenth Circuit in 1996. Environmentalism easily qualifies for constitutional purposes as a religion by this definition. The Tenth Circuit proposed to define religion legally as follows, in a manner generally consistent with the twentieth century definitions of religion discussed below:

(1) ultimate beliefs "having to do with deep and imponderable matters;" (2) metaphysical beliefs the content of which transcends the physical and immediately apparent world; (3) a moral or ethical system; (4) comprehensiveness of beliefs; (5) accoutrements of religion which accent (a) a founder, prophet, or teacher; (b) important writings; (c) gathering places; (d) keepers of knowledge; (e) ceremonies and rituals; (f) structure or organization; (g) holy days; (h) diet or fasting; (i) appearance and clothing; and the (j) propagation of beliefs and practices.

United States v. Meyers, 95 F.3d 1475, 1483 (10th Cir. 1996).

44. *Id.*

45. *See* U.S. CONST. amend. I. In setting the stage for much of the First Amendment establishment jurisprudence of the following sixty-five years, the Supreme Court in 1947 declared in unambiguous terms the necessity for a strict separation of church and state, including all religions in whatever forms they might arise, stating:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by

A problem of non-separation of church and state admittedly goes well beyond a large role for environmental (or any other) religion in shaping public opinion and thus in a democracy, influencing public debate and policy. For many people, religion informs their basic worldview and thus their judgments in many policy areas, such as the appropriate circumstances to go to war, the morality of abortion, or the appropriate level of government support for the poor. Indeed, traditional Christian churches are themselves increasingly incorporating environmental themes into their messages and teachings.⁴⁶ No issue of church and state separation is raised when individual religious convictions inform individual policy preferences. A problem arises only when government officially takes actions that amount to the “establishment” of a particular religion, whether a traditional or a secular religion.⁴⁷ This “establishment” might occur by direct legal requirement to accept the religion as it existed in societies of the past, or more frequently, through coercive taxes that are used

law was intended to erect "a wall of separation between church and State."

Everson v. Bd. of Education, 330 U.S. 1, 15-16 (1947).

46. Pope John Paul II in 1990 explained that:

In our day, there is a growing awareness that world peace is threatened . . . by a lack of *due respect for nature*, by the plundering of natural resources and by a progressive decline in the quality of life.

Faced with the widespread destruction of the environment, people everywhere are coming to understand that we cannot continue to use the goods of the earth as we have in the past.

...

A new *ecological awareness* is beginning to emerge which, rather than being downplayed, ought to be encouraged to develop into concrete programmes and initiatives.

Pope John Paul II, Message at the Celebration of the World Day of Peace (Jan. 1, 1990).

47. See Mary Harter Mitchell, *Secularism in Public Education: The Constitutional Issues*, 67 B.U. L. REV. 603, 663 (1987) (“Secularism should be considered a religion for establishment purposes because it is a belief system that offers truly competitive answers to the same ultimate questions that are addressed by traditional religions.”); see also Peter D. Schmid, Comment, *Secular Religion, Secular Humanism and the First Amendment*, 13 S. ILL. U. L.J. 357 (1989).

to fund institutional forms of support for a given religion.⁴⁸ If church and state are to be kept separate, then the use of public resources in any way — for example, for management of public lands — should not intentionally serve a predominantly religious purpose.⁴⁹

48. See generally Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003).

49. Courts thus far have rarely been receptive to claims that government policies or actions can amount to the unconstitutional establishment of a secular religion. In one of the few exceptions, Alabama District Judge Brevard Hand in 1987 prohibited the use of certain public school textbooks which he deemed to be unconstitutionally advancing the establishment of the religion of “secular humanism.” See *Smith v. Bd. of Sch. Comm’rs of Mobile Cnty.*, 655 F. Supp. 939 (S.D. Ala. 1987). The decision was widely criticized and soon overturned by the Eleventh Circuit Court of Appeals, although the court did not resolve the issue of the actual religious or nonreligious character of secular humanism. 827 F.2d 684 (11th Cir. 1987). Judge Hand’s opinion, however, was exhaustively researched and argued; it relied on a body of scholarly research into the definition and role of religion in American life. In developing his argument, Judge Hand adopted a definition of religion similar to that followed by many leading American students of religion today. Hand stated:

The Supreme Court has focused on such factors as a person’s ‘ultimate concern,’ *Seeger-Welsh*, organizational structure and social concern, *Yoder*, and on equivalency to belief in a Supreme Deity, *Seeger-Welsh*. But all religious beliefs may be classified by the questions they raise and issues they address. Some of these matters overlap with non-religious governmental concerns. A religion, however, approaches them on the basis of certain fundamental assumption with which governments are unconcerned. These assumptions may be grouped as about:

- 1) the existence of supernatural and/or transcendent reality;
- 2) the nature of man;
- 3) the ultimate end, or goal or purpose of man’s existence, both individually and collectively;
- 4) the purpose and nature of the universe.

In some systems these assumptions can be implied from less fundamental beliefs; in others they are stated outright. Whenever a belief system deals with fundamental questions of the nature of reality and man’s relationship to reality, it deals with essentially religious questions. A religion need not posit a belief in a deity, or a belief in supernatural existence. A religious person adheres to some position on whether supernatural and/or transcendent reality exists at all, and if so, how, and if not, why.

Id. at 979.

One might suggest that, whatever the merits of his opinion, the church and state issues Judge Hand raised were simply beyond the capacity of the

Although environmentalism as a whole may be a religious movement, it is important to recognize that not every environmental policy or action has a religious motive. Reducing air pollution, lowering the incidence of cancer, improving energy efficiency, and many other environmental goals are not inherently religious. In principle, most Americans of diverse religious origins strongly support such purposes. The presence of religion will thus reflect in part both the character of the specific environmental goal and the manner in which the goal is pursued. The result may become a powerful religious symbol, in addition to any practical benefits realized. Environmentalists may advocate for the goal without any consideration of its costs to society, denying the relevance of differing levels of practical benefits and any need for cost-benefit analysis, potentially turning the goal into a religious absolute. An environmental end may fulfill purposes that are directly analogous to functions performed by traditional institutional religions. For example, the establishment of untouched wilderness areas may serve as a “cathedral,” thereby raising significant church and state separation issues.

Determining the boundaries between constitutionally permissible incidental government advancement of a religion and constitutionally impermissible deliberate government actions to advance a particular religion can involve considerable gray areas. Does public provision of funding to pay for sign language interpreters for a deaf child in a private religious school represent a form of state establishment of religion?⁵⁰ What about government-issued education vouchers used at private religious schools?⁵¹ The Supreme Court has found that neither case constituted the establishment of religion. There have been many other such cases, making the resolution of church and state issues a prominent area of Supreme Court constitutional jurisprudence in recent decades.⁵²

American judiciary (and most American legal scholars) to deal with at the time. The simplest response was to ridicule and dismiss it.

50. See generally *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

51. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

52. See generally Lee J. Strang, *The Meaning of ‘Religion’ in the First Amendment*, 40 DUQ. L. REV. 181 (2002); Richard Collin Mangrum, *Shall We*

IV. DEFINING RELIGION

To say that environmentalism is a religion, as people have increasingly been doing in recent years, raises the question of whether they are using the term in a way that would be accepted by leading scholars of religion. The term “religion” can be used in a manner that does not necessarily implicate the First Amendment. For example, one might say that a person exercises “religiously” or that they root for the Red Sox baseball team “religiously.” It is important to distinguish between a “religion” that is merely something about which a person feels strongly and shows a strong commitment towards, and “religion” as a fundamental belief system that shapes a person’s very concept of his or her purpose and meaning in the world and other core beliefs relating to human existence.

Over time, more has probably been written about religion than any other aspect of human culture; religion is one of the most complicated aspects of human existence. Not surprisingly, different authors do not always mean exactly the same thing when they speak of “religion.” Indeed, the term “religion” does not lend itself to one simple dictionary definition. However, a review of some of the leading efforts by distinguished scholars of the twentieth century to define religion will show that environmentalism qualifies as a religion in the sense that it is a fundamental belief system.

The study of religion in a scientific sense began about 100 years ago. The great French sociologist Emile Durkheim, in 1912, authored *The Elementary Forms of Religious Life*, one of the most influential studies of religion in the modern era.⁵³ The first chapter is devoted to the “Definition of Religious Phenomena and Religion,” which cites Buddhism as an example that religion does not require a god.⁵⁴ Durkheim acknowledges that historically, “a considerable part of religious evolution has

Sing?: Shall We Sing Religious Music in Public Schools? 38 CREIGHTON L. REV. (2005); French, *supra* note 40; John Jeffries & James Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279 (2001).

53. See generally EMILE DURKHEIM, *THE ELEMENTARY FORMS OF RELIGIOUS LIFE* (Karen E. Fields trans., Free Press 1995) (1912).

54. *Id.* at 28 (“In the first place, there are great religions from which the idea of gods and spirits is absent, or plays only a secondary and inconspicuous role.”).

consisted of a gradual movement away from the ideas of spiritual being and divinity” as the defining features of religion.⁵⁵ A religion should have a “definite group” who believe in it, but it does not need any official organizational form.⁵⁶ Rather than the presence of a divinity, religion for Durkheim is better identified by the presence of something “sacred,” as opposed to the ordinary actions of mankind which fall in the category of the “profane.”⁵⁷ One way of distinguishing between the two is that “sacred things are things protected and isolated by prohibitions; profane things are those things to which the prohibitions are applied. . . .”⁵⁸

After exploring the great diversity of religious beliefs and manners of expression, Durkheim proposes the following definition: “[a] religion is a unified system of beliefs and practices relating to sacred things, that is to say, things set apart and forbidden – beliefs and practices which unite into one single moral community called a Church, all those who adhere to them.”⁵⁹ Durkheim does not mean by “unified” or “single moral community” that there is complete agreement among all followers of the faith – even Christianity would not be a religion by this test. Rather, he means that there is a common sense of identity and community among the members of the faith, who recognize people as either fellow believers or as outsiders. Often, there is a body of writings that cumulatively lay out the key principles and beliefs of the faith. This does not need to be centrally organized; a “Church” can consist of loose affiliations of people who recognize their common beliefs in fundamental matters that transcend “the profane.”

By Durkheim’s criteria, environmentalism is a genuine religion. The environmental movement brings together a large community of members who feel a strong sense of kinship with one another,⁶⁰ based on a common set of beliefs about the proper

55. *Id.* at 31.

56. According to Durkheim, sometimes a religion “is led by a body of priests; sometimes it is more or less without any official directing body. But wherever we observe religious life, it has a definite group as its basis.” *Id.* at 41.

57. *Id.* at 34.

58. DURKHEIM, *supra* note 53, at 38.

59. *Id.* at 44.

60. *See generally* PAUL BROOKS, SPEAKING FOR NATURE: HOW LITERARY NATURALISTS FROM HENRY THOREAU TO RACHEL CARSON HAVE SHAPED AMERICA

relationship of human beings to the natural world (a leading concern for many religions, historically).⁶¹ The “sacred,” for environmentalism, is that which is truly natural, that which has not been compromised or corrupted by the “profane” impacts of modern industrial civilization⁶² – as in a wilderness area which, according to the Wilderness Act, must be a place “untrammelled by man.”⁶³ Environmentalism has generated a large body of doctrinal writings that explore what it means to value appropriately the natural environment and to appreciate its “intrinsic value,” beyond any ordinary practical usefulness to human beings.⁶⁴ The many practices associated with “green living” represent a set of rites that Durkheim again finds to be among the important identifying characteristics of religion.⁶⁵

(1980); RICE ODELL, *ENVIRONMENTAL AWAKENING: THE NEW REVOLUTION TO PROTECT THE EARTH* (1980); CAROLYN MERCHANT, *AMERICAN ENVIRONMENTAL HISTORY: AN INTRODUCTION* (2007). In her comprehensive bibliography of environmental history resources, Merchant includes twenty six separate works under the category of “religion and environment.” MERCHANT, *supra*, at 426-28.

61. See generally *ENCYCLOPEDIA OF RELIGION AND NATURE* (Bron Taylor ed., 2005); see also BRON TAYLOR, *DARK GREEN RELIGION: NATURE, SPIRITUALITY, AND THE PLANETARY FUTURE* (2010).

62. See JOHN GATTA, *MAKING NATURE SACRED: LITERATURE, RELIGION AND ENVIRONMENT IN AMERICA FROM THE PURITANS TO THE PRESENT* 76 (2004); THIS SACRED EARTH: *RELIGION, NATURE ENVIRONMENT* (Roger S. Gottlieb ed., 1996).

63. Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 790 (codified as amended at 16 U.S.C. §§ 1131–1136 (2006)); see also MAX OELSCHLAEGAR, *THE IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY* (1st ed. 1991).

64. After interviewing many American conservation biologists, David Takacs found that the idea of “intrinsic value” often played an important part in their thinking: “If God or some other deity or sacred process created the natural world alongside humans, then all creatures are imbued with sacredness: all have intrinsic value.” DAVID TAKACS, *THE IDEA OF BIODIVERSITY: PHILOSOPHIES OF PARADISE* 247-48 (1996); see also ROGER S. GOTTLIEB, *A GREENER FAITH: RELIGIOUS ENVIRONMENTALISM AND OUR PLANET’S FUTURE* (2006); JAY B. MCDANIEL, *EARTH, SKY, GODS & MORTALS: DEVELOPING AN ECOLOGICAL SPIRITUALITY* (1980); DAVID W. ORR, *EARTH IN MIND: ON EDUCATION, ENVIRONMENT AND THE HUMAN PROSPECT* (1994).

65. DURKHEIM, *supra* note 53, at 34. As the New York Times recently reported, it is even possible to hire consultants who provide professional advice in “green living.” Jennifer A. Kingson, *Personal Eco-Concierges Ease Transition to Green*, N.Y. TIMES, Oct. 24, 2011, at A15 (explaining that a main purpose is to “assuage the guilt of those who worry that they are letting the planet down.” One consultant advised a client to avoid driving by using “a hairstylist within walking distance who would color her hair with nature dyes. Instead of using Drano to unclog bathtubs, Herb’n Maid gave her a less harsh product.” The

In addition to Durkheim, William James, a great American pioneer in the development of psychology, was another leading figure in the scientific study of religion. His 1902 book, *The Varieties of Religious Experience*, is probably the best known exploration of religion from a social science perspective ever written.⁶⁶ James also devotes a chapter to laying out what he means by religion, offering a “circumscription of the topic.”⁶⁷ He notes that religion comes in a wide variety of forms. Indeed, “the very fact that they are so many and so different from one another is enough to prove that the word ‘religion’ cannot stand for any single principle or essence. It is rather a collective name.”⁶⁸ As with Durkheim, James does not consider it necessary that a belief system have a god in order to be an actual religion.⁶⁹ Indeed, a religion might be defined, in broad terms, as the set of core beliefs that represent a person’s deepest convictions with respect to the fundamental truths of the world – relating to matters of human origins, purpose, morality, the correct relationship of man and

client and her husband also bought a “solar-powered fan for the attic; the neighbors wanted one too.” Another consultant advised a client to redecorate “her apartment with nontoxic paint, replaced her vinyl shower curtail with linen and switched to more expensive recycled paper for her printer.” One consultant said of herself that “she was pretty ‘hard core’ about minimizing her own carbon footprint and was constantly researching the best ways to go about it.” Despite all the good intentions, however, these are largely symbolic practices having little practical significance for the protection of the world environment. As an economist at the Environmental Defense Fund interviewed for the article explained, “the changes necessary are so large and profound that they are beyond the reach of individual action.”); *see also* ELEANOR AGNEW, *BACK FROM THE LAND: HOW YOUNG AMERICANS WENT TO NATURE IN THE 1970S, AND WHY THEY CAME BACK* (2004); VANESSA FARQUHARSON, *SLEEPING NAKED IS GREEN: HOW AN ECO-CYNIC UNPLUGGED HER FRIDGE, SOLD HER CAR, AND FOUND LOVE IN 366 DAYS* (2009).

66. *See generally* WILLIAM JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE: A STUDY IN HUMAN NATURE* (1982).

67. *Id.* at 26.

68. *Id.*

69. *Id.* at 31 (“[T]here are systems of thought which the world usually calls religious, and yet which do not positively assume a God. . . . Modern transcendental idealism, Emersonianism, for instance, [is a religion but] also seems to let God evaporate into abstract Ideality.”); *see also id.* at 34 (“[W]e must . . . call these godless or quasi-godless creeds ‘religions’; and accordingly when in our definition of religion we speak of the individual’s relation to ‘what he considers the divine,’ we must interpret the ‘divine’ very broadly, as denoting any object that is *godlike*, whether it be a concrete deity or not.”).

nature, and so forth.⁷⁰ Seriousness of purpose is also a key defining feature: “there must be something solemn, serious and tender about any attitude which we denominate religious.”⁷¹ In religion, James also finds a common willingness to make sacrifices for the greater cause: “In the religious life, surrender and sacrifice are positively espoused: even unnecessary givings-up are added in order that the happiness may increase” from a sense of duty fulfilled.⁷²

After examining religion in all its varieties, James concludes that if one were “asked to characterize the life of religion in the broadest and most general terms possible, one might say that it consists of the belief that there is an unseen order, and that our supreme good lies in harmoniously adjusting ourselves thereto.”⁷³ For environmentalism, this “unseen order” relates to the source of the intrinsic value of nature that transcends any ordinary human concerns or benefits.⁷⁴ To live harmoniously in the world is to respect nature and to live according to its dictates – to do or restore that which is “natural,” and to reject the temptations of the “unnatural.”⁷⁵ In short, environmentalism clearly qualifies as

70. *See id.* (“what relates to them [a person’s gods] is the first and last word in the way of truth. Whatever then that were [sic] most primal and enveloping might . . . be treated as godlike, and a man’s religion might thus be identified with his attitude, whatever it might be, towards what he felt to be the primal truth.”).

71. JAMES, *supra* note 66, at 38.

72. *Id.* at 51.

73. *Id.* at 53.

74. Theodore Roszak explains that “those who wish to make some greater philosophical sense of the emerging worldview of our day will have to address questions of a frankly religious character.” THEODORE ROSZAK, *THE VOICE OF THE EARTH: AN EXPLORATION OF ECOPSYCHOLOGY* 101 (1992); HOLMES ROLSTON III, *GENESIS, GENES, AND GOD: VALUES AND THEIR ORIGINS IN NATURAL AND HUMAN HISTORY* (1999).

75. Robert Keiter writes that, under the new concept of ecosystem management, “rather than eradicating wolves and suppressing fires, we have begun an active restoration program to recreate functional ecosystems and natural processes. . . . We are reconceiving public lands as a holistic landscape, not a mere collection of economically exploitable resources.” He adds that “the new ecosystem management regime is not based upon economic principles; . . . it is built upon landscape scale planning and adaptive management strategies designed to promote biodiversity conservation and ecological restoration.” ROBERT B. KEITER, *KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA’S PUBLIC LANDS* 315-16 (2003); *see generally also* ENVIRONMENTAL

a religion by James' broad understanding: it is serious about its commitments;⁷⁶ it sees its core beliefs as basic truths of the world;⁷⁷ it calls for sacrifices from its followers;⁷⁸ it offers a demanding moral code of behavior based on its highest purposes; and it has many other features of a religion as James defines the term.⁷⁹

Durkheim and James were pioneers in introducing social science methodology into the study of religion. Many other social scientists have followed on their path, although none with the same degree of influence. While each has his or her own

RESTORATION: ETHICS THEORY AND PRACTICE (William Throop ed., 2001); MICHAEL FROME, BATTLE FOR THE WILDERNESS (City Univ. of Utah Press rev. ed. 1997) (1984).

76. PAUL HAWKEN, BLESSED UNREST: HOW THE LARGEST SOCIAL MOVEMENT IN HISTORY IS RESTORING GRACE, JUSTICE AND BEAUTY TO THE WORLD (2007); ROTHMAN, *supra* note 5.

77. UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE (William Cronon ed., 1996).

78. Cardinal George Pell, Archbishop of Sydney, recently compared current environmental calls for sacrifice to some of the medieval practices of his own Roman Catholic Church. In a 2011 speech delivered in London, he stated that "the immense financial costs [environmental] true believers would impose on economies can be compared with the sacrifices offered traditionally in religion, and the sale of carbon credits [to offset individual energy use] with the pre-Reformation practice of selling indulgences." Cardinal George Pell, Lecture to the Global Warming Policy Foundation: One Christian Perspective on Climate Change (Oct. 26, 2011), *available at* <http://www.catholicculture.org/culture/library/view.cfm?recnum=9762>.

79. The environmental philosopher Thomas Berry writes that:

Especially in religion the human depends on the natural system. For it is the wonder and majesty of the universe that evokes the sense of the divine and the sensitivity to the sacred. For the universe is a mysterious reality. . . . Once the divine is perceived through the written Scriptures there is then a tendency to exclude the evidences of the natural world of things, for these, it is thought do not communicated the sense of the sacred except in some minor way. Yet we can never replace our need for a resplendent natural world if we are to respond effectively to the exaltation of the divine or our sense of the sacred.

[For environmentalists] this will involve a serious process of adaptation, a new awakening to the divine not only through the awesome qualities of the universe as experienced immediately, but also through the immense story of the universe and its long series of transformation.

Thomas Berry, *Into the Future*, in THIS SACRED EARTH: RELIGION, NATURE, ENVIRONMENT 412 (Roger S. Gottlieb ed., 1996).

individual views, their ways of defining religion broadly follow in the tradition of Durkheim and James. In 1950, Harvard Professor Gordon Allport, for example, undertook to define religion from the perspective of his own profession of psychology.⁸⁰ Belief in a religion did not necessarily correlate with the presence, or absence, of official public affirmations of belief. Some people, as Allport wrote, “live[] [their] religion though [they] rarely affirm[] it explicitly.”⁸¹ For others, “the carrying out of frequent, devotional, ‘actual’ intentions may be the distinguishing mark.”⁸² As do Durkheim and James, Allport recognizes the complexity and diversity of religious experience, making it impossible to provide any one narrow definition.⁸³

Where a traditional Christian would look forward to his or her salvation in the hereafter, Allport generalized the same idea to make it applicable to other forms of religion as well, that the religious believer “is always oriented toward the future.”⁸⁴ Religion reflects a “longing for a better world, for one’s own perfection, for a completely satisfying relation to the universe.”⁸⁵ It also involves “religious acts [that] try in some way to close the gap that exists between one’s values and the possibility of their fuller realization.”⁸⁶ Religion also typically involves “a longing for unity – complete unity of thought, feeling and deed.”⁸⁷ As found by applying the definitions of religion offered by Durkheim and James, and now Allport’s similar criteria, a number of secular systems of belief, including environmentalism, qualify as religions.⁸⁸

80. GORDON W. ALLPORT, *THE INDIVIDUAL AND HIS RELIGION* (1950).

81. *Id.* at 129.

82. *Id.*

83. *Id.* at 131 (“The shortcoming of most definitions of religion . . . is their tendency to center upon one limited type of religious intention. Finding release from self, perfecting one’s social relations, worshipping the ‘wholly other,’ are authentic intentions, but by no means exhaust the forms that occur [in religion].”).

84. *Id.* at 130.

85. *Id.* at 130-31.

86. ALLPORT, *supra* note 80, at 131.

87. *Id.* at 132.

88. *Id.*

A related question is whether a “philosophy” must also be a “religion.” Allport answers this in the negative, that a philosopher commonly seeks to:

achieve what for him is a satisfying conception of truth without finding therein a way of life. His knowledge may not lead to action, nor affect the remainder of his life. It is only when philosophy becomes practical as well as theoretical, when it acquires the power of integrating the individual’s life without remainder — intellectual, emotional, or aspirational — that it turns into religion.⁸⁹

By this standard, again environmentalism qualifies as a religion rather than a mere “philosophy.”

Following Durkheim, the leading sociologist of the second half of the twentieth century to study religion is Robert Bellah, professor of sociology for many years at the University of California at Berkeley, and the author of a recent comprehensive study of the history of religion from the very beginning of human presence on earth.⁹⁰ Bellah is best known for his 1967 essay *Civil Religion in America*, one of the most influential articles of American social science of the past fifty years.⁹¹ Bellah wrote therein of a “civil religion” that for the United States had provided its “national religious self understanding” and played a central role in shaping American history.⁹² The national religion

89. *Id.* at 132.

90. See ROBERT N. BELLAH, RELIGION IN HUMAN EVOLUTION: FROM THE PALEOLITHIC TO THE AXIAL AGE xiv (2011) (reviewing a number of definitions of religion, Bellah comments favorably on Clifford Geertz’s view that, “religion is a system of symbols that, when enacted by human beings, establishes powerful, pervasive, and long-lasting moods and motivations that makes sense in terms of an idea of a general order of existence.” As Bellah notes, it is significant that “there is no mention of ‘belief in supernatural beings’ or ‘belief in Gods (God). . . . It is not that Geertz or I think such beliefs are absent in religion, although in some cases they may be, just that they are not the defining aspect.”). Bellah also views favorably a “simplified Durkheimian definition, . . . [that] religion is a system of beliefs and practices relative to the sacred that unite those who adhere to them in a moral community.” For Bellah, the realm of the sacred is also to be interpreted broadly, “as a realm of nonordinary reality.” BELLAH, *supra*, at 1.

91. Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS: J. OF THE AM. ACAD. OF ARTS & SCI. 1 (1967).

92. *Id.* at 8.

was “a collection of beliefs, symbols, and rituals with respect to sacred things and institutionalized in a collectivity,” the American nation.⁹³ For Bellah, this represented a “religion – there seems no other word for it” in a literal, not merely a metaphorical, sense.⁹⁴

As with most secular religions, the American civil religion borrowed significantly from Christianity, but “is clearly not itself Christianity.”⁹⁵ There are frequent mentions of God in American civil religion but few of “Jesus Christ.”⁹⁶ Thus, the “God of the civil religion is not only rather ‘unitarian,’ he is also on the austere side, much more related to order, law and right than to salvation and love.”⁹⁷ The deity of American civil religion was “actively interested and involved in history, with a special concern for America.”⁹⁸ In such respects, the American civil religion had more of an Old Testament than a New Testament cast. Indeed, for the American civil religion, “Europe is Egypt; America, the promised land,”⁹⁹ and the Atlantic Ocean seen as the Red Sea across which a perilous journey had been taken to build a model kingdom of God in the Massachusetts wilderness.¹⁰⁰

Bellah’s article was important because, while he was not the first to make the argument, it more widely disseminated the idea of secular religion as having a genuinely religious character.¹⁰¹ It

93. *Id.*

94. *Id.*

95. *Id.* at 7.

96. Bellah, *supra* note 91, at 7.

97. *Id.*

98. *Id.*

99. *Id.* at 8.

100. DAVID GELERNTER, *AMERICANISM: THE FOURTH GREAT WESTERN RELIGION* 19 (2007).

101. A growing recognition of the underlying powerful normative visions of “secularism” is also now found in the legal literature. By twentieth century definitions of religion – religion as a set of (sometimes implicit) beliefs that provide a means of framing and understanding the central questions of human existence – secular religions would clearly qualify as religions. As law professors John Jeffries and James Ryan explained in 2001:

[S]ecularism was (and remains) not so much an articulated philosophy as an underlying, pervasive, and almost unconscious means of organizing life and thought. . . . While the overwhelming

also illustrated that the boundaries between secular religion and traditional Jewish and Christian religion were more blurred than many people had realized. Bellah explained that:

[B]ehind the civil religion at every point lie biblical archetypes; Exodus, Chosen People, Promised Land, New Jerusalem, and Sacrificial Death and Rebirth. But it is also genuinely American and genuinely new. It has its own prophets and its own martyrs, its own sacred events and sacred places, its own solemn rituals and symbols. It is concerned that America be as perfectly in accord with the will of God as men can make it, and a light to all nations.¹⁰²

Fitting neatly into these “biblical archetypes,” George Washington became the American Moses, and Abraham Lincoln the Christ figure, sacrificing his life to save the Union. Bellah considered the American civil religion to be adaptable, and remarked that “it is not evident that it is incapable of growth and new insight.”¹⁰³

Indeed, environmental religion might be seen through this light as a new rendering of the American civil religion, with a greater emphasis on the proper relationship of Americans with the natural world. The environmental religion has developed, drawing important elements from Calvinism¹⁰⁴ and other sources. Despite its greater pessimism about the human condition, environmental religion is ultimately in the long American tradition of seeking to create a better world. It is, as Bellah said of American civil religion in general, and is true of environmental religion specifically, an actual form of religion.¹⁰⁵

majority of Americans professed religious belief and claimed membership in one of the three American religions, many also contributed to a pervasive public secularism. As one commentator described, that secularism essentially involved “thinking and living in terms of a framework of reality and value [that originates in secular sources].”

Jeffries & Ryan, *supra* note 52, at 309-10.

102. Bellah, *supra* note 91, at 18.

103. *Id.* at 19.

104. Calvinist elements of environmental religion will be discussed *infra* pages 74-78.

105. The *Dictionary of Christianity in America*, in its entry for “civil religion,” states that:

It is not only social scientists, but theologians too who have had important things to say about the essential features of religion, in some cases even providing formal definitions.¹⁰⁶ Among twentieth century theologians in this category, the most influential was Paul Tillich, who already had an international reputation before fleeing Germany in 1933 at the age of forty-seven.¹⁰⁷ Until his death in 1965, he continued to write voluminously, and eventually came to be regarded as the greatest

Civil religion is a way of thinking which makes sacred a political arrangement or governmental system and provides a religious image of a political society for many, if not most, of its members. . . . Civil religion is the general faith of a state or nation that focuses on widely held beliefs about the history and destiny of that state or nation. It is a religious way of thinking about politics which provides a society with ultimate meaning (thus making it a genuine religion) which, in turn, allows a people to look at their community in a special sense and thus achieve purposeful social integration. In short, it is the social glue which binds a given society together by means of well established ceremonies – rituals, symbols and values – and allegiances which function in the life of the community in such a way as to provide it with an overarching sense of spiritual unity.

DANIEL G. REID & ROBERT D. LINDER ET AL., *DICTIONARY OF CHRISTIANITY IN AMERICA* 281 (1990).

106. The Catholic Church has been among the most resistant of the branches of Christianity to the incursions of secular religion. Indeed, it often sees secular religions explicitly as religious competitors. It also recognizes full well that secular belief systems can be so threatening precisely because they substitute eschatological visions of their own that borrow heavily from original Christian sources. In 1986, Cardinal Joseph Ratzinger (now Pope Benedict XVI) stated that Christianity must be vigilantly “opposed to the false worship of progress, the worship of changes that crush humankind, and the calumny against the human species that destroys the earth and creation.” *CARDINAL JOSEPH RATZINGER, ‘IN THE BEGINNING...’ A CATHOLIC UNDERSTANDING OF THE STORY OF THE CREATION AND THE FALL* 51, 53 (1990). As the future Pope wrote, in place of Notre Dame, Chartres, and other historically inspirational cathedrals of Catholic worship, the economic heresies of the modern age proposed that the new “cathedral of the future will be the [scientific] laboratory, and the Basilicas of San Marco of the new age will be electrical plants.” *Id.* In the heyday of progressive religion in the United States, many people did in fact make pilgrimages to Hoover, Grand Coulee, and other large dams to feel a strong religious inspiration, seeing the dams as virtually miraculous symbols of the newfound human capacity to transform the natural world for immense human benefit, and in this way to help save the world through economic progress. *ROBERT H. NELSON, THE NEW HOLY WARS: ECONOMIC RELIGION VERSUS ENVIRONMENTAL RELIGION IN CONTEMPORARY AMERICA* 94 (2010).

107. See *Paul Johannes Tillich*, UNIV. OF EVANSVILLE FACULTY, <http://faculty.evansville.edu/ck6/bstud/tillich.html> (last visited Oct. 30, 2011).

“American” theologian of the twentieth century.¹⁰⁸ A main theme of Tillich’s writings was that a religion should be defined broadly, as a comprehensive belief system that seeks to answer questions of “ultimate concern” relating to human existence.¹⁰⁹ As early as 1926, he explained that in studying the twentieth century history of religion “it is highly characteristic of our period” that many important elements of religion are found “without touching upon the specifically religious sphere” as found in institutional churches.¹¹⁰ Tillich believed that “the most important religious movements are developing outside of [official] religion,” such as in secular environmentalism today.¹¹¹ Tillich could not have anticipated in 1926 the full horrors that would come of “Nazi religion,” but these tragedies served to prove his point that secular religion had become more important to the history of the twentieth century than anything that took place in the officially-recognized Christian churches of Germany at the time.¹¹²

Tillich in later writings declared that, as a matter of objective historical influence, if not of the predictive accuracy of his economic theories, Karl Marx was “the most successful of all theologians since the [Protestant] Reformation.”¹¹³ Marxism told the story of an originally happy and harmonious world; a terrible fall into sin and depravity arising from the class struggle; a future coming of the apocalypse; and the arrival of a new heaven

108. *Id.* (“Paul Tillich was a prolific writer and one of the foremost theologians of his century.”).

109. See PAUL TILlich, *DYNAMICS OF FAITH* 5 (1957).

110. PAUL TILlich, *THE RELIGIOUS SITUATION* 157 (Richard R. Niebuhr trans., Meridian Books 1956) (1932).

111. *Id.*

112. One contemporary student of Nazi Germany writes that:

The millennial fantasy that provided Hitler, his inner circle, and many Old Guard Nazis with a sense of meaning and direction, not to mention a heightened sense of self-worth, now, through the hell of modern warfare, provided Hitler’s soldiers with the meaning and self-perception needed to withstand and comprehend the constant suffering around them. In other words, faith that they were fighting in a holy war of apocalyptic significance both legitimated their own suffering and justified the suffering they imposed on others.

DAVID REDLESS, *HITLER’S MILLENNIAL REICH: APOCALYPTIC BELIEF AND THE SEARCH FOR SALVATION* 177 (2005).

113. PAUL TILlich, *A HISTORY OF CHRISTIAN THOUGHT: FROM ITS JUDAIC AND HELLENISTIC ORIGINS TO EXISTENTIALISM* 476 (Carl E. Braaten ed., 1967).

to earth as the culminating event in history.¹¹⁴ Indeed, Marxism can well be described as Christian heresy – and no less a religion.¹¹⁵ A leading contemporary philosopher, Alasdair MacIntyre, once declared that “Marxism shares in good measure both the content and the functions of Christianity as an interpretation of human existence, and it does so because it is the historical successor of Christianity.”¹¹⁶ Admittedly, this assessment, offered in 1984, may have to be revised somewhat in light of subsequent events.

Once again, in this leading theologian’s writing, we see that the scholarly understanding of religion has been extended well beyond the conventional popular conception. A student of Tillich’s theology writes that “what is most significant for Tillich is not the encounter of Christianity with other world religions but the encounter of world religions with secular quasi-religions.”¹¹⁷ Quasi-religions, moreover, are not to be excluded from the general category of all religion; as Francis Yip explains, “religion

114. HALFIN, *supra* note 37.

115. As expressed in Marxism, “[d]ialectical materialism brings down the kingdom of heaven on to this earth of ours.” *Dialectical Materialism*, in *ENCYCLOPEDIA OF THE WORLD’S RELIGIONS* 407 (R. C. Zaehner ed., 1988).

116. ALASDAIR MACINTYRE, *MARXISM AND CHRISTIANITY* 6 (Univ. of Notre Dame Press 1984) (1968).

117. FRANCIS CHING-WAH YIP, *CAPITALISM AS RELIGION?: A STUDY OF PAUL TILlich’S INTERPRETATION OF MODERNITY* 54 (2010). According to Yip (a recent Ph.D. in theology from the Harvard Divinity School), a quasi-religion, as an actual form of religion, can encompass: “ideologies,” “systems of life,” or “systems of secular thought and life.” *Id.* Yip continues by stating that:

Tillich mentions several major quasi-religions of his time, nationalism, socialism, and liberal humanism, as well as their radicalization, fascism, communism and scientism. In his view, quasi-religions have developed from the soil of secularism, which destroys old religions and cultural traditions. . . . However, there are religious elements in the depth of the secular mind, such as [according to Tillich] “the desire for liberation from authoritarian bondage, passion for justice, scientific honesty, striving for a more fully developed humanity, and hope in a progressive transformation of society in a positive direction.” Quasi-religions arose out of these [older] religious elements [of Judaism and Christianity] and provide new answers to the meaning of life.

Id. at 54-55.

in the broader sense” extends to include “quasi-religion as a subset.”¹¹⁸

V. THE HISTORICAL ROOTS OF ENVIRONMENTAL RELIGION

Environmentalism not only meets the criteria of the leading definitions of religion among social scientists and theologians of the twentieth century, but it can also be shown to have evolved historically out of Christian religion.¹¹⁹ In Christianity, there long were two main avenues to the thinking of God, the “Book of the Bible” and the “Book of Nature.” Especially in Protestantism, it was a requirement of the Christian faith that both should be studied diligently. It was possible to learn about God through the study of nature because in Christianity until the nineteenth century, it was generally believed that God created the world about 6,000 years ago according to a design in His own mind. It followed that to study nature was to discover a reflection of the mind of God.¹²⁰ For the Christian faithful, to experience nature was thus a source of awe, wonder and spiritual enlightenment.

118. *Id.* at 143.

119. See generally NELSON, *supra* notes 15, 25, 34. The history of American environmentalism in this section is developed more fully in ROBERT H. NELSON, *THE NEW HOLY WARS: ECONOMIC RELIGION VERSUS ENVIRONMENTAL RELIGION IN CONTEMPORARY AMERICA* (2010).

120. John Calvin wrote in his great classic of Christian theology, *Institutes of the Christian Religion*, that:

The final goal of the blessed life, moreover, rests in the knowledge of God [*cf.* John 17:3]. Lest anyone, then, be excluded from access to happiness, he not only sowed in men’s minds that seed of religion of which we have spoken but revealed himself and daily discloses himself in the whole workmanship of the universe. As a consequence, men cannot open their eyes without being compelled to see him. Indeed, his essence is incomprehensible; hence, his divineness far escapes all human perception. But upon his individual works he has engraved unmistakable marks of his glory, so clean and so prominent. . . . Wherever you cast your eyes, there is no spot in the universe wherein you cannot discern at least some sparks of his glory.

JOHN CALVIN, *CALVIN’S INSTITUTES: A NEW COMPEND* 24 (Hugh T. Kerr ed., 1989).

Much of American intellectual history is centered around New England, reflecting in significant part its large Puritan influence.¹²¹ This applies as well for environmentalism, which originates in and continues to exhibit a powerful Calvinist influence.¹²² As environmental philosophers Baird Callicott and Michael Nelson observe, “many of the most notable and most passionate . . . defenders of the wilderness faith have a direct connection to Calvinism.”¹²³ Jonathan Edwards was perhaps the greatest native-born theologian in American history, and certainly the greatest Calvinist theologian. Much like John Calvin two centuries earlier, Edwards explained in the mid-eighteenth century that God is revealed to mankind through the experience of wild nature:¹²⁴

121. See SACVAN BERCOVITCH, *THE PURITAN ORIGINS OF THE AMERICAN SELF* (1975). The Puritans originally settled in, and dominated the culture of, New England:

The very dominance of Puritanism in the American religious heritage . . . The future United States was settled and to a large degree shaped by those who brought with them a very special form of Protestant radicalism which combined a strenuous moral perfectionism, a deep commitment to evangelical experientialism, and a determination to make the state responsible for the support of these moral and religious ideas. The United States became, therefore, the land par excellence of revivalism, moral “legalism,” and a “gospel” of work that was undergirded by the so-called Puritan ethic.

AHLSTROM, *supra* note 1, at 1090.

122. The Puritans were the English branch of Calvinism, and were the ancestors of American Pilgrims.

123. J. Baird Callicott & Michael P. Nelson, *Introduction*, in *THE GREAT NEW WILDERNESS DEBATE* 5 (Callicott & Nelson eds., 1998).

124. The American philosopher Mark Sagoff writes that:

By the third or fourth generation [of Puritans in Massachusetts] . . . the rapidity and rapacity with which eighteenth-century Americans cleared land, cut forests, planted fields, and, in general, applied science and technology to produce wealth caught their ministers off guard. Among other eighteenth century preachers, Jonathan Edwards fully appreciated the secular tendencies implicit in the empiricism of Newton and Boyle. He denounced his contemporaries’ preoccupation with this world – arising from their increasing power over it – and their consequent indifference to the world to come. He found religious meaning in the beauty and sublimity of nature rather than in its mathematical elegance and practical utility. For Edwards, the aesthetic experience, not the scientific investigation, of nature provided the clues, shadows, and

It is very fit and becoming of God who is infinitely wise, so to order things that there should be a voice of His in His works, instructing those that behold Him and painting forth and shewing divine mysteries and things more immediately appertaining to Himself and His spiritual kingdom. The works of God are but a kind of voice or language of God to instruct intelligent human beings in things pertaining to Himself. And why should we not think that he would teach and instruct by His works in this way as well as in others, viz., by representing divine things by His works and so painting them forth, especially since we know that God hath so much delighted in this way of instruction.¹²⁵

In his biography of Edwards, George Marsden explains that in Edwards' "conception of the universe[,] God had created lower things to be signs that pointed to higher spiritual realities. The universe, then, was a complex language of God. Nothing in it was accidental. Everything pointed to higher meaning."¹²⁶ The encounter with nature was not merely educational for Edwards, but also a profoundly moving religious experience of the world's divine wonders as well:

[Edward's] contemplative joys were of a piece with his philosophy and theology. His ineffable experiences as he walked alone in the fields were of the beauties of God's love communicated in nature. That created world was the very language of God. As Psalm 19 said, "The heavens declare the glory of God." The beauty of nature proclaimed the beauty and love of Christ. Indeed, in creation, as the Lord declared to Job, "the morning stars sang together, and all the sons of God shouted for joy." (Job 38:7) Enraptured by the beauties of God's ongoing creation, Jonathan

images of God's majesty. As Perry Miller wrote, Jonathan Edward's philosophy was "nothing less than an assertion of the absolute validity of the sensuous.

Edwards combined (1) the teaching of Calvin that God communicates to us through nature with (2) the doctrine of Locke that perception involves the agreement or correspondence of the ideas in one's mind with their objects the world.

MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* 146-47 (2d ed. 2008).

125. JONATHAN EDWARDS, *IMAGES OR SHADOWS OF DIVINE THINGS* 61 (Perry Miller ed., 1948).

126. GEORGE M. MARSDEN, *JONATHAN EDWARDS: A LIFE* 77 (2003).

recorded, "it was always my manner, at such times, to sing forth my contemplations."¹²⁷

Almost 100 years later, Ralph Waldo Emerson and Henry David Thoreau became the successors to Edwards in New England religion. Although they were pessimistic about some aspects of the newly developing industrial civilization, both offered a more favorable judgment of the human condition than the traditional Calvinist view of basic human depravity. Harvard historian Perry Miller comments that, despite these differences, "certain basic continuities persist in a culture," and this was no less true in New England from the mid-eighteenth to the mid-nineteenth century.¹²⁸ Miller expected that "Jonathan Edwards would have abhorred from the bottom of his soul every proposition Ralph Waldo Emerson blandly put forth in the manifesto of 1836, *Nature*."¹²⁹ An essential religious connection, however, "is persistent, from . . . Edwards and to Emerson [which] is the Puritan's effort to confront, face to face, the image of a blinding divinity in the physical universe, and to look upon that universe without the intermediacy of ritual, of ceremony, of the Mass and the confessional."¹³⁰

127. *Id.* at 77-78.

128. PERRY MILLER, *ERRAND INTO THE WILDERNESS* 184-85 (Harper & Row 1964) (1956).

129. *Id.* at 184.

130. *Id.* at 185. As Emerson wrote in his hallmark 1836 essay "Nature," employing language not so different from Edwards:

[I]f a Man would be alone, let him look at the stars. . . . One might think the atmosphere was made transparent with this design, to give man, in the heavenly bodies, the perpetual presence of the sublime.

. . . .

The stars awaken a certain reverence, because though always present, they are inaccessible; but all natural objects make a kindred impression

. . . .

In the woods too, a man casts off his years, as the snake his slough, and at what period so ever of life is always a child. In the woods, is perpetual youth. Within these plantations of God, . . . we return to reason and faith. There I feel that nothing can befall me in life, -- no disgrace, no calamity, (leaving me my eyes,) which nature cannot repair . . . all mean egotism vanishes. . . . I am nothing; I see all; the

In *Man and Nature in America*, Arthur Ekirch explained that Emerson was a “secular preacher” and that New England “transcendentalism was not a formal philosophy but was rather a faith – one might almost say a religious faith” whose basic tenets provided “substitutes for the teachings of the church.”¹³¹ Invoking a longstanding Calvinist formulation, Emerson agreed that the natural world is “intermediary between God and man” and thus has “carried a portion of the Divinity to each individual.”¹³² The transcendentalists represent the intellectual shift of American environmentalism to a new and more secular form that left its original Calvinist theology behind. Contemporary American environmentalists still look to Thoreau’s statement that “[i]n wildness is the preservation of the world” as one of their foundational messages.¹³³

The next major figure in the evolution of environmentalism was John Muir, who wrote and fought in the political arena for the preservation of wild areas, and founded the Sierra Club in 1892.¹³⁴ Muir approached nature in the spirit of Emerson and Thoreau, transferring their ideas from the domain of New England transcendentalism to a new environmental faith and activism.¹³⁵ Muir was preoccupied with nature, for him the one

currents of the Universal Being circulate through me; I am part or particle of God

There seems to be a necessity in spirit to manifest itself in material forms; and day and night, river and storm, beast and bird, acid and alkali, preexist in necessary Ideas in the mind of God, and are what they are by virtue of preceding affections in the world of spirit . . .

The visible creation is the terminus or the circumference of the invisible world.

RALPH WALDO EMERSON, *Nature*, in RALPH WALDO EMERSON: SELECTED ESSAYS, LECTURES AND POEMS 17-18, 32 (Robert D. Richardson, Jr. ed., 1990).

131. ARTHUR ALPHONSE EKIRCH, JR., *MAN AND NATURE IN AMERICA* 47-49 (1963).

132. *Id.* at 51.

133. See Jack Turner, *In Wildness is the Preservation of the World*, in *THE GREAT NEW WILDERNESS DEBATE* 617 (J. Baird Callicott & Michael P. Nelson eds., 1998).

134. STEPHEN FOX, *THE AMERICAN CONSERVATION MOVEMENT: JOHN MUIR AND HIS LEGACY* 107 (1985).

135. RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* 125 (1973).

remaining portal of direct communication with God. In the mountains, he wrote, “the pure in heart shall see God.”¹³⁶

The Sierra Nevada Mountains for Muir were a source of religious ecstasy to match that felt by any monk, pilgrim, or other traditional faithful of the past.¹³⁷ Describing how he was overcome by religious enthusiasm, losing all sense of earthly concerns, in the experience of the Sierra wilderness Muir wrote: “Mountains holy as Sinai. No mountains I know of are so alluring. None so hospitable, kindly, tenderly inspiring. It seems strange that everybody does not come at their call. They are given, like the Gospel, without money and without price. ‘Tis heaven alone that is given away.”¹³⁸ The leading American historian of wilderness, Roderick Nash, writes that “of the Sierra wilderness as a whole, Muir exulted ‘everything in it seems equally divine – one smooth, pure, wild glow of Heaven’s love.”¹³⁹ Under Muir’s formulation of environmental religion, in the presence of wild nature “life’s inner harmonies, fundamental truths of existence, stood out in bold relief. ‘The clearest way into the Universe,’ Muir wrote, ‘is through a forest wilderness.”¹⁴⁰

In the twentieth century, there was a further evolution in environmental religion. The underlying ideas, the feeling of awe, wonder and spiritual enlightenment in the presence of wild nature, were little changed. Such religious thoughts and feelings, however, became increasingly separated from any direct mention of God or other explicit religious language from Judeo-Christian traditions. Instead, the language of environmental religion

136. LINNIE MARSH WOLFE, *JOHN OF THE MOUNTAINS: THE UNPUBLISHED JOURNALS OF JOHN MUIR* 95 (Univ. of Wisconsin Press 1979) (1938).

137. As Muir wrote in his journals:

The glacier-polish of rounded brows brighter than any mirror, like windows of a housing shining with light from the throne of God – to the very top a pure vision in terrestrial beauty. . . . It is as if the lake, mountain, trees had souls, formed one great soul, which had died and gone before the throne of God, the great First Soul, and by direct creative act of God had all earthly purity deepened, refined, brightness brightened, spirituality spiritualized, countenance, gestures made wholly Godful!

Id. at 83-84.

138. *Id.* at 92.

139. NASH, *supra* note 135, at 125-26.

140. *Id.* at 126.

increasingly changed to that of ecology. This was part of a wider trend, where powerful belief systems – new forms of secular religion – disguised their underlying religious elements and claimed the mantle and authority of science.¹⁴¹

The first major American theorist in the field of ecology was Frederic Clements. In his comprehensive history of the field of ecology, environmental historian Donald Worster says of Clements that in the first four decades of the twentieth century “no individual had a more profound impact on the course of American as well as British ecological thought.”¹⁴² Clements’ great contribution to ecology was his view that natural systems have a tendency towards, and often attain, a “climax community.”¹⁴³ As Worster explains, in Clements’ view “[n]ature’s course . . . is not an aimless wandering to and fro but a steady flow toward stability that can be exactly plotted by the scientist.”¹⁴⁴ For Clements, the initial physical parameters that set the stage for subsequent evolution of the natural system towards the climax state included such matters as temperature, rainfall, wind, elevation, and soil type.¹⁴⁵ Once such environmental factors were in place, the evolution of the natural system “begins with a primitive, inherently unbalanced plant assemblage and ends with a complex formation in relatively permanent equilibrium with the surrounding conditions, capable of perpetuating itself forever.”¹⁴⁶

Clements was vague, however, about why his fundamental laws of natural succession should exist. There was no clear basis in Darwinian evolutionary theory. In fact, the very concept of a “natural system” plays little role in Darwinist thinking, other than perhaps as a descriptive term referring to a setting in which the evolutionary struggles involving individual plant and animal

141. See generally KARL LÖWITH, MEANING IN HISTORY: THE THEOLOGICAL IMPLICATIONS OF THE PHILOSOPHY OF HISTORY (1949).

142. DONALD WORSTER, NATURE’S ECONOMY: A HISTORY OF ECOLOGICAL IDEAS 209 (2d ed. 1994).

143. *Id.* at 210.

144. *Id.*

145. *Id.*

146. *Id.*

species take place.¹⁴⁷ Rather, as Worster comments, Clements had an “underlying, almost metaphysical faith that the development of vegetation must resemble the growth process of an individual plant or animal organism.”¹⁴⁸ Implicitly, Clements was saying that “man’s relation with nature is not only economic and utilitarian but also emotional, mythic, and perhaps sexual, in some deep-working sense.”¹⁴⁹ In Clements’ development of ecology, human beings were left out of his studies of the workings of natural systems – an implicit way of saying that they were indeed “unnatural,” which is a verdict of religious significance, rather than a matter of science. Worster writes that Clements had “faith in nature’s ways,” which he saw as threatened and perhaps incompatible with “human ambitions,” a theme that would continue to be of major importance for environmental religion in the twentieth century.¹⁵⁰

The environmental philosopher, Max Oelschlaeger, regards Henry David Thoreau, John Muir, and Aldo Leopold as the three “giants” of American environmentalism.¹⁵¹ Leopold’s signature work – he wrote less for the general public than did Thoreau or Muir – was *A Sand County Almanac, and Sketches Here and There*, published in 1949 (shortly after his death in 1948).¹⁵² Leopold recast Thoreau’s and Muir’s environmental religion in the language of ecology, borrowing partly from Clements. Law Professor Richard Lazarus explains that “the celebrated ecologist Aldo Leopold long ago warned that ‘there are two spiritual dangers in not owning a farm.’”¹⁵³ Whereas Thoreau and Muir had often spoken of “God,” and although Leopold acknowledged a concern for “spiritual” matters, in *A Sand County Almanac*, any

147. Well before the end of the twentieth century, Clements’ ideas were no longer taken seriously by any reputable ecologists. See DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* 98 (1992).

148. WORSTER, *supra* note 142, at 211.

149. *Id.* at 217.

150. *Id.* at 219-20.

151. See OELSCHLAEGER, *supra* note 63, at 205.

152. See generally ALDO LEOPOLD, *A SAND COUNTY ALMANAC, AND SKETCHES HERE AND THERE* (1949).

153. LAZARUS, *supra* note 2, at 220.

explicit mention of God was largely removed – as was the case for most ecological preachers of the twentieth century.

For Leopold, communism, capitalism, socialism and all the other “competitive apostles of a single creed: salvation by machinery” were alike in their destructive consequences for the natural world.¹⁵⁴ He criticized the “high priests of progress [who] knew nothing of cranes and cared less. What is a species more or less among engineers? What good is an undrained marsh anyhow” for an economist?¹⁵⁵ Leopold thus defined his environmental religion, in part, in opposition to the prevailing economic religion of his time.¹⁵⁶ As Oelschlaeger comments, Leopold concluded that “the human animal was no longer absolute ruler above the web of life but a biotic citizen who recognized that the very endeavour to perpetuate material progress – that shrine built to the unattainable assumption of infinite needs was an illusory and self-defeating goal.”¹⁵⁷

Leopold’s mission in the last part of his life, culminating in the series of essays assembled in *A Sand County Almanac*, was to spread an environmental alternative to the reigning orthodoxies of economic growth and progress.¹⁵⁸ In this effort, he drew on the accepted concept among ecologists of the time that there was a single climax state that could be taken as the natural long-term end result of the workings of an ecological system. As Eugene Cittadino comments, “Leopold, never a sophisticated ecological theorist, offered readers the promise of a ‘land ethic,’ grounded in a belief in the integrity of natural systems.”¹⁵⁹ As Leopold explained, it would be a “land ethic [that] changes the role of *Homo sapiens* from conqueror of the land-community to plain

154. ALDO LEOPOLD, *The Conservation Ethic*, in *THE RIVER OF THE MOTHER GOD AND OTHER ESSAYS BY ALDO LEOPOLD* 181, 188 (Susan L. Flader & J. Baird Callicott eds., 1991).

155. LEOPOLD, *supra* note 152, at 100.

156. See NELSON, *REACHING FOR HEAVEN ON EARTH*, *supra* note 25; see also NELSON, *ECONOMICS AS RELIGION*, *supra* note 25.

157. OELSCHLAEGER, *supra* note 63, at 238.

158. See generally CURT MEINE, *ALDO LEOPOLD: HIS LIFE AND WORK* (1988); JULIANNE LUTZ NEWTON, *ALDO LEOPOLD’S ODYSSEY* (2006).

159. Eugene Cittadino, *Ecology and American Social Thought*, in *RELIGION AND THE NEW ECOLOGY: ENVIRONMENTAL RESPONSIBILITY IN A WORLD OF FLUX* 73, 94 (David M. Lodge & Christopher Hamlin eds., 2006).

member and citizen of it.”¹⁶⁰ Each person must come to realize that he or she “is a member of a community of interdependent parts The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.”¹⁶¹ Leopold lamented that events of the twentieth century had shown that “our tools are better than we are, and grow better and faster than we do. They suffice to crack the atom, to command the tides. But they do not suffice for the oldest task in human history: to live on a piece of land without spoiling it.”¹⁶²

When he spoke of “spoiling,” Leopold showed his debt to ecology and to Clements. To “spoil” here means in effect to become “unnatural” or “unhealthy” – to permanently disrupt the climax state by human action. As a self-professed disciple of Leopold, Oelschlaeger comments that this meant seeing “things steadily, and whole, particularly as this related to viewing the human species and nature as dynamically interrelated, and recognizing that society and land constitute a community of ongoing life – bound into one natural history.”¹⁶³ As Clements had said, even a natural system could have an organic identity, as though it were itself a living thing, and there was one correct

160. LEOPOLD, *supra* note 152, at 204.

161. *Id.* at 203-04. Mark Stoll comments that:

Leopold’s use of ecology to support the concept of the land ethic grew out of the model of “community.” “Pyramids,” energy “flows,” food “chains,” and “webs” have no ethical implications, but “community” certainly does. This is no accident. From the time the field of ecology coalesced in the 1890s, the vocabulary and conceptual framework of its theory was rife with moral implications. Ecology’s creators repeatedly saw moral consequences in either the interrelationships of the natural world or the natural world as a model for human society. Furthermore, that moralistic view of nature took shape within the moralistic Protestant worldview that all of the founders of the field [of ecology] shared.

Mark Stoll, *Creating Ecology: Protestants and the Moral Community of Creation*, in RELIGION AND THE NEW ECOLOGY: ENVIRONMENTAL RESPONSIBILITY IN A WORLD OF FLUX 53, 53-54 (David M. Lodge & Christopher Hamlin eds., 2006).

162. ALDO LEOPOLD, *Engineering and Conservation*, in THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD 249, 254 (Susan L. Flader & J. Baird Callicott eds., 1991).

163. OELSCHLAEGER, *supra* note 63, at 230.

ecological condition for each such system – the state of nature that would be realized if left unaltered by human hand.

Leopold's thinking ultimately belonged to the broad category of religion, as Durkheim, James, Tillich, and other twentieth century theorists had understood it. At the core of his writing is a new moral understanding of the proper relationship of human beings and nature, a longstanding subject of religious interest. The American historian of environmental thought, Thomas Dunlap, commented in 2004 that Leopold:

did not use explicitly religious language, probably would have been skeptical of an environmental 'religion,' and surely would have been horrified at the suggestion he was helping to establish one. Yet his work spoke to the religious dimension of life and to ultimate questions and needs, and the public made him, deservedly, an environmental nature saint.¹⁶⁴

Leopold illustrated a broad historical phenomenon, as Dunlap observes, whereby "[e]ver since Emerson, Americans who failed to find God in church took terms and perspectives from Christian theology into their search for ecstatic experiences in nature" – in the process establishing a secular environmental religion to justify and sustain the rise of the American environmental movement in the twentieth century.¹⁶⁵

Rachel Carson, whose 1962 book *Silent Spring* is often said to be the most important single work in spawning the contemporary environmental movement,¹⁶⁶ exhibited a similar ambivalence with respect to the scientific and religious elements of her work. In part, her writings reflected "the centrality of ecological relationships in Carson's thought, and of her understanding of environmental ontology – the wholeness of nature."¹⁶⁷ Although *Silent Spring* was presented as a work of popular science, it also reflected at many levels the powerful environmental religion that

164. THOMAS DUNLAP, FAITH IN NATURE: ENVIRONMENTALISM AS RELIGIOUS QUEST 65 (2004).

165. *Id.* at 167.

166. See Al Gore, *Introduction*, in RACHEL CARSON, *SILENT SPRING* (Houghton Mifflin Harcourt 1994) (1962).

167. Linda Lear, *Introduction*, in RACHEL CARSON, *LOST WOODS: THE DISCOVERED WRITINGS OF RACHEL CARSON* ix, xiii (Linda Lear ed., 1998).

Carson explicitly described in other writings.¹⁶⁸ More than forty years later, with the perspective of distance, the religious elements of *Silent Spring* have become more recognizable. Indeed, some early twenty-first century environmentalists, such as Ted Nordhaus and Michael Shellenberger, were concerned that Carson's, Leopold's, and other environmental writings that presented a religion in the name of science would pose a threat to the influence and integrity of the environmental cause.¹⁶⁹

168. Carson, like Leopold, was reluctant to speak directly of a God. But she nevertheless often spoke of feelings of awe, wonder, meaning, and spiritual inspiration in encountering the natural world that are closely analogous to traditional Christian descriptions of feeling in the presence of God. For example, in *The Sense of Wonder*, published six years before *Silent Spring*, she wrote that:

If I had influence with the good fairy who is supposed to preside over the christening of all children, I should ask that her gift to each child in the world should be a sense of wonder so indestructible that it would last throughout life, as an unfailing antidote against the boredom and disenchantments of later years, the sterile preoccupation with things that are artificial, the alienation from the sources of our strength.

What is the value of preserving and strengthening this sense of awe and wonder [felt in the presence of nature], this recognition of something beyond the boundaries of human existence? Is the exploration of the natural world just a pleasant way to pass the golden hours of childhood or is there something deeper?

I am sure there is something much deeper, something lasting and significant. Those who dwell, as scientists or laymen, among the beauties and mysteries of the earth are never alone or weary of life. Whatever the vexations or concerns of their personal lives, their thoughts can find paths that lead to inner contentment and to renewed excitement in living. Those who contemplate the beauty of the earth find reserves of strength that will endure as long as life lasts. There is symbolic as well as actual beauty in the migration of the birds, the ebb and flow of the tides, the folded bud ready for the spring. There is something infinitely healing in the repeated refrains of nature – the assurance that dawn comes after night, and spring after the winter.

Rachel Carson, *The Sense of Wonder*, in *THIS SACRED EARTH: RELIGION, NATURE, ENVIRONMENT* 23, 23-24 (Roger S. Gottlieb ed., 1996).

169. Ted Nordhaus and Michael Shellenberger attracted wide attention and generated considerable controversy in 2004 with their argument in *The Death of Environmentalism* that the environmental movement needed a major redirection. They elaborated in a book published in 2007, including a critique of Rachel Carson and *Silent Spring*:

Beginning in the 1980s, ecologists and many other environmentalists increasingly explained their goal as the preservation of “biodiversity.”¹⁷⁰ Yet, even as the outward language of biodiversity was more formally scientific, the underlying religious elements were little diminished. After interviewing many leading conservation biologists, David Takacs commented that “[i]f it seems a priori odd that some scientists believe and preach a concept like intrinsic value that cannot be proven scientifically – indeed, it can barely be expressed at all – it may seem totally bizarre that scientists talk about biodiversity’s

Silent Spring set the template for nearly a half century of environmental writing: wrap the latest scientific research about an ecological calamity in a tragic narrative that conjures nostalgia for Nature while prophesying ever worse disasters to come, unless human societies repent for their sins against Nature and work for a return to a harmonious relationship with the natural world.

....

In primarily crediting books like *Silent Spring* for the antipollution victories of the 1960s, environmentalists continue to speak terrifying stories of eco-apocalypse, expecting them to result in the change we need.

And thus the new millennium brought with it a surge of environmentalist millenarianism. Grounded in a tradition of eco-tragedy begun by Carson, environmental writers have produced a flood of high profile books that take the tragic narrative of humankind’s fall to new heights.

In the environmentalist’s telling of our fall, humans are being punished by Nature with ecological crises like global warming for our original sin of eating from the tree of knowledge – thus acting equal to or superior to Nature. Our fall from Nature was triggered [originally] by our [new] control of fire, the rise of agriculture, the birth of modern civilization, or sometimes, as in the case of *Silent Spring*, by modern science itself – which is ironic, given the privileged role the so-called natural sciences played in inventing the idea of a Nature as separate from humans in the first place.

The eco-tragedy narrative [now] imagines humans as living in a fallen world where wildness no longer exists and a profound sadness pervades a dying earth. The unstated aspiration is to return to a time when humans lived in harmony with their surroundings. That tragic narrative is tied to an apocalyptic vision of the future – an uncanny parallel to humankind’s Fall from Eden in the Book of Genesis and the end of the world in the final Book of Revelation.

TED NORDHAUS & MICHAEL SHELLINGER, BREAK THROUGH: FROM THE DEATH OF ENVIRONMENTALISM TO THE POLITICS OF POSSIBILITY 130-31, 133-34 (2007).

170. See TAKACS, *supra* note 64, at 42.

spiritual value.”¹⁷¹ Conservation biologists were willing to “attach the label *spiritual* to deep, driving feelings they can’t understand, but that give their lives meaning, impel their professional activities, and make them ardent conservationists. Getting to know biodiversity better takes the place of getting to know God better.”¹⁷² Indeed, despite the linguistic confusion, it was apparent to Takacs that “[s]ome biologists have found their own brand of religion, and it’s based on biodiversity.”¹⁷³ Mark Sagoff makes a similar observation based on his close study of the work and writings of conservation biologists and other ecologists.¹⁷⁴

Among the ecologists of the late twentieth and early twenty-first century, the most influential – the one who can best be seen as carrying on in the tradition of Thoreau, Muir, Leopold, and Carson – is Edward O. Wilson, a Harvard biologist and prolific author.¹⁷⁵ Along with displaying a powerful implicit religion throughout his writings on biodiversity and other ecological subjects,¹⁷⁶ Wilson also represents another new trend in environmentalism. His works evince a desire to build bridges with Christianity and other traditional religions, exhibiting a friendlier attitude towards these faiths and a greater willingness to accept the religious character of environmentalism itself, even when it is expressed in a so-called secular form.¹⁷⁷ This shift in environmental thinking is both pragmatic and principled.¹⁷⁸

171. *Id.* at 254.

172. *Id.* at 270 (emphasis added).

173. *Id.*

174. See SAGOFF, *supra* note 124, at 12 (stating that “It is commonplace to observe that environmentalists – including many ecologists and conservation biologists – care about the preservation of nature and the control of pollution for ethical, aesthetic, and spiritual reasons. These environmentalists rightly profess that society has an obligation to preserve nature as an end in itself and for its own sake.”).

175. Wilson has won two Pulitzer prizes for his work on sociobiology.

176. See, e.g., EDWARD O. WILSON, *THE DIVERSITY OF LIFE* (1992); *BIODIVERSITY* (Edward O. Wilson ed., 1988).

177. See Bron Taylor, *A Green Future for Religion?*, 36 *FUTURES J.* 991 (2004); *THE OXFORD HANDBOOK OF RELIGION AND ECOLOGY* (Roger S. Gottlieb ed., 2006).

178. It might also be seen as a further response to Lynn White, Jr. In 1967, White famously criticized traditional Christian thinking about the environment but acknowledged that any solution to environmental problems would have to be grounded in religion. White thus called for the development of a new and better

Pragmatically, American environmentalists have concluded that it would be difficult to build the necessary political support for the large scale changes they hope to achieve in American society if they do not have the support of traditional Christian and other religious groups.¹⁷⁹ On the principled side, it is increasingly evident to environmentalists themselves that even secular environmentalism includes large elements of religion.¹⁸⁰ Indeed, according to the prevailing twentieth century definitions of religion, secular environmentalism itself falls within the broad category of religion.¹⁸¹ Many Christians themselves also have found that environmentalism and Christianity are compatible, and have embraced “green” principles as part of the practice of Christian faith.¹⁸²

These trends are reflected in Wilson’s 2006 book, *The Creation: An Appeal to Save Life on Earth*.¹⁸³ The book is framed as a letter from Wilson to an anonymous “Dear Pastor” of the Southern Baptist denomination, a faith which Wilson himself was a devout follower of as a youth.¹⁸⁴ Wilson’s imaginary correspondent is “a literalist interpreter of Christian Holy Scripture” who rejects “the conclusion of science that mankind

environmental religion by stating that “Christian arrogance toward nature [can offer] no solution for our ecologic crisis. Since the roots of our trouble are so largely religious, the remedy must also be essentially religious, whether we call it that or not.” Lynn White, Jr., *The Historical Roots of our Ecological Crisis*, 155 *SCIENCE* 1203, 1207 (1967).

179. See CHARLENE SPRETNAK, *THE SPIRITUAL DIMENSION OF GREEN POLITICS* (1986).

180. Norwegian Arne Naess was a founder of “deep ecology” and among the most influential environmental philosophers of the late twentieth century. In a basic statement of his environmental perspective, he wrote that “The basic principles within the deep ecology movement are grounded in religion and philosophy.” BILL DEVAL & GEORGE SESSIONS, *DEEP ECOLOGY* 225 (1985).

181. See generally *supra* Parts II – V.

182. See JOHN B. COBB, JR., *IS IT TOO LATE?: A THEOLOGY OF ECOLOGY* (Environmental Ethics Books Corp. rev. ed. 1995) (1972); ROGER S. GOTTLIEB, *A GREENER FAITH: RELIGIOUS ENVIRONMENTALISM AND OUR PLANET’S FUTURE* (2006); JOHN ARTHUR PASSMORE, *MAN’S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS* (2004); FRANCIS A. SCHAEFFER & UDO MIDDELMANN, *POLLUTION AND THE DEATH OF MAN* (2d rev. ed. 1993); ROBERT BOOTH FOWLER, *THE GREENING OF PROTESTANT THOUGHT* (1995).

183. EDWARD O. WILSON, *THE CREATION: AN APPEAL TO SAVE LIFE ON EARTH* (1st ed. 2006).

184. *Id.* at 3.

evolved from lower forms” and is sure that those who are redeemed in Christ will attain to a “second, eternal life.”¹⁸⁵ As an adult, Wilson himself rejected these beliefs and became a “secular humanist,” convinced that “our ancestors were apelike animals” and that “heaven and hell are what we create for ourselves, on this planet,” not a matter of divine reward or punishment.”¹⁸⁶ Wilson’s environmental views are thus a reflection of his own secular perspective.

Nevertheless, Wilson finds that the Christian message and his own long-advocated secular environmentalism have a great deal in common. Indeed, his book is filled with moralistic language; the earth, he says, must be saved from its current “plundering,” based on the power of a “universal moral imperative of saving the Creation.”¹⁸⁷ In considering the possibility of applying technical knowledge to “create artificial organisms and species” through bio-engineering of new plants and animals, Wilson says that “there are words appropriate for [such] artifactual biodiversity: . . . desecration, corruption, abomination.”¹⁸⁸ Protecting wild areas today is so important because “only in what remains of Eden, teeming with life forms independent of us, is it possible to experience the kind of wonder that shaped the human psyche at its birth.”¹⁸⁹

Wilson also relates a secular version of the fall of man. Indeed, Wilson dates this fall to a historical moment surprisingly similar to the pastor – within the past few thousand years, coinciding with the rise of human civilization.¹⁹⁰ Our knowledge in the modern era has progressed to the point that we now have the capacity to remake the world – to literally play God. As such, matters are getting worse by the day: “the human impact on the

185. *Id.*

186. *Id.* at 3-4.

187. *Id.* at 99.

188. WILSON, *supra* note 183, at 92.

189. *Id.* at 12.

190. *Id.* at 10 (“According to archaeological evidence, [the fall occurred when] we strayed from Nature with the beginning of civilization roughly ten thousand years ago. That quantum leap beguiled us with an illusion of freedom from the [natural] world that had given us birth. It nourished the belief that the human spirit can be molded into something new to fit changes in the environment and culture, and as a result the timetables of history desynchronized.”).

natural environment is accelerating and makes a frightening picture.”¹⁹¹ It is a failure of biblical proportions, as human beings “have ignored the command of the Abrahamic God on the fourth day of the world’s birth to ‘let the waters teem with countless living creatures, and let birds fly over the land across the vault of heaven.’”¹⁹² As God commanded of Noah in Genesis, Wilson proclaims that it is now again necessary to protect every living species of the earth, no matter how minor or trivial its practical importance may seem to us: “Each species is a small universe in itself . . . and a self-perpetuating system created during an almost unimaginably complicated evolutionary history. Each species merits careers of scientific study and celebration by historians and poets.”¹⁹³ Like a prophet of old, Wilson exhorts his fellow human beings, Christian and non-Christian alike, to join together to save the world.¹⁹⁴

Some Christians, however, have expressed their doubts about Wilson’s proposed alliance. In a review of *The Creation*, S. M. Hutchens acknowledges that the book is “an evangelistic tract” that reveals Wilson to be “a passionately religious man.”¹⁹⁵ It shows “Wilson’s love of the abundance and intricacy of the creation,” reflecting a deep “appreciation of the Mind of the Creator” as it is encountered there.¹⁹⁶ Nonetheless, Hutchens finds in Wilson only a “vestigial element of traditional [Christian]

191. *Id.*

192. *Id.*

193. WILSON, *supra* note 183, at 123.

194. As Wilson writes, Christians and secularists must work together to:

Save the Creation, save all of it! No lesser goal is defensible. However biodiversity arose, it was not put on this planet to be erased by any one species. . . . All that human beings can imagine, . . . all our games, simulations, epics, myths, and histories, and yes, all our science dwindle to little beside the full productions of the biosphere. . . . It is true that nonhuman life preceded us on this planet. . . . The biosphere into which humanity was born had its Nature-born crises, but it was overall a beautifully balanced and functioning ecosystem. It would have continued to be so in the absence of *Homo sapiens*.

Id. at 89-90.

195. S. M. Hutchens, *The Evangelical Ecologist*, 18 THE NEW ATLANTIS 94, 95 (2007), available at <http://www.thenewatlantis.com/publications/the-evangelical-ecologist>.

196. *Id.* at 96.

faith.”¹⁹⁷ For a good Christian, unlike Wilson, the earth is not “a final thing,” but merely a “*first* creation” to be followed by a future kingdom of God.¹⁹⁸ Yet, there is no question in Hutchens’ mind that, despite his secular language and blunt rejection of Christianity, Wilson is a devout believer in an environmental religion, to which he seeks to convert the world.¹⁹⁹

VI. DISESTABLISH ENVIRONMENTALISM?

Partly because environmentalism has only in recent years been widely viewed as a religion, the constitutionality of government actions establishing environmental religion has gone largely unexamined. No court case has yet addressed this issue seriously. However, in a pioneering 2009 article in *Environmental Law*, a well-respected legal journal, Professor Andrew Morriss of the University of Alabama Law School and Benjamin Cramer, a fellow in the Center for Law and Business at Case Western Reserve University, suggested the need for the courts to confront such issues. They begin by noting that “debate over environmental policy” in the United States “is increasingly conducted in language with strong religious overtones.”²⁰⁰ Hence, as they suggest, the time has come to “engage in a thought experiment, . . . [and] there are valuable lessons to be learned from treating environmentalism as if it were a religion, and therefore subject to the First Amendment’s prohibition on laws ‘respecting an establishment of religion.’”²⁰¹

The first question Morriss and Cramer address is whether it is indeed reasonable to treat environmentalism as an actual religion for United States constitutional purposes. They review a

197. *Id.* at 97.

198. *Id.* at 96.

199. Oxford University Professor Alister McGrath, who holds doctorates in both molecular biology and divinity, comments that in another 1998 book of Wilson’s, “[t]hough showing no signs of being [himself] aware of the fact, Wilson has simply smuggled in a belief system under the cover of legitimate scientific explanations.” ALISTER MCGRATH, *THE REENCHANTMENT OF NATURE: THE DENIAL OF RELIGION AND THE ECOLOGICAL CRISIS* 181 (2002).

200. Andrew P. Morriss & Benjamin D. Cramer, *Disestablishing Environmentalism*, 39 ENVTL. L. 309, 309 (2009).

201. U.S. CONST. amend. I; Morriss & Cramer, *supra* note 200, at 309.

wide range of environmental materials and commentary, in the process developing perhaps the most comprehensive bibliography of writings relating to environmental religion ever assembled. One key criterion for identifying a religion is that it must involve some elements of basic belief that cannot be compromised, as it comes from some higher source that transcends ordinary practical considerations.²⁰² By this standard, Morriss and Cramer find that many environmental beliefs qualify. As they report, one committed environmentalist states, “deep ecology concerns those personal moods, values, aesthetic, and philosophical convictions which serve no necessarily utilitarian, nor rational end. . . . Their sole justification rests upon the goodness, balance, truth and beauty of the natural world,” matters traditionally falling within the realm of religion.²⁰³ While “Deep Ecology” may fall outside the center of environmental thought in its frequent graphic criticisms of the moral and spiritual failings of our current civilization, related ideas are widespread within the environmental mainstream.²⁰⁴ After Catholic theologian Robert Royal’s skeptical review of many environmental writings, he found that “Deep Ecology as an idea has come to dominate much religious thought on the environment, whether the thinkers are aware of the influence and whether they describe themselves as Deep Ecologists or not.”²⁰⁵

As Morriss and Cramer find, “[e]nvironmental thinking today depends on a conception of Nature as a power outside man, which [requires] . . . sacrifices of human material welfare (use less energy, emit less carbon, recycle).”²⁰⁶ They find that many environmentalists “are making claims about the relationship between humans and a nonhuman power that are no different in type than the claims made by some forms of Christianity, Islam or other beliefs more conventionally understood as religions.”²⁰⁷ Hence, although the term “nature,” as employed in environmental

202. *Id.* at 321.

203. *Id.* at 337 n.97.

204. *See* GORE, *supra* note 12.

205. ROBERT ROYAL, THE VIRGIN AND THE DYNAMO: USE AND ABUSE OF RELIGION IN ENVIRONMENTAL DEBATES 147 (1999).

206. Morriss & Cramer, *supra* note 200, at 338.

207. *Id.* at 342.

writings, “may not be exactly analogous to the *personal* god of the three great monotheistic faiths, it is recognized . . . as *a power apart* from man to which human needs must be subordinated.”²⁰⁸ Though explicit mention of a “God” or “Supreme Being” is typically absent in mainstream environmental messages, millions of American children are being taught in their local public schools to accept the authority of a new environmental deity who commands people to live naturally in the world and to protect nature from undue human alteration.²⁰⁹

208. *Id.* (emphasis added).

209. See Stephanie Clifford, *The Plastic School Bag Funks*, N.Y. TIMES, Aug. 26, 2011 (reporting that:

Sales of environmentally friendly back-to-school products are up just about everywhere. At the Container Store, the increase is 30 percent over last year or some items, said Mona Williams, the company’s vice president of buying. “We have seen a huge resurgence,” she said.

The trend makes the schools happy (much less garbage). It makes the stores happy (higher back-to-school spending). It even makes the students happy (green feels good).

Who’s not happy? The parents (what to do when the Tupperware runs out?). “Ziplocs are the biggest misstep,” said Julie Corbett, a mother in Oakland, Calif., whose two girls attend a school with an eco-friendly lunch policy. In school years past, she said, many a morning came unhinged when the girls were sent to school with disposable sandwich bags. “That’s when the kids have meltdowns, because they don’t want to be shamed at school,” Ms. Corbett said. “It’s a big deal.” Brian Greene, the principal of Prairie Crossing Charter School in Grayslake, Ill., has resorted to buying reusable lunchboxes in bulk and selling them at cost to school families to get more of them on board. At the school’s new-parent meeting held last week, parents of returning students did a show and tell for the newcomers. One mother brought a Tupperware container that she had used for years; another brought a Rubbermaid container.

In the past, students performed skits about recycling but the parent-to-parent evangelism seemed more effective, Mr. Greene said. “The kids are all about it,” Mr. Greene said, but with the parents, “you have to build habits.” He added, “We don’t send notes home to parents and say, ‘Listen, this is the third time you’ve brought a Cheeto bag.’ But we help them to understand” why the school has the lunch policy.

Judith Wagner, a professor of education at Whittier College in California who directs its laboratory school for elementary and middle-school children, has also been struggling with how to get parents’ support for less wasteful lunches. “Parents will say things

This environmental indoctrination does not just take place in schools. Morriss and Cramer note that former Secretary of the Interior Stewart Udall wrote of the need for Americans to recover “a sense of reverence for the land” and to apply this in its public management.²¹⁰ They refer approvingly to Linda Graber’s observation that “the traditional concept of Eden and the contemporary purist’s concept of wilderness are identical in one important respect: the original Creation is thought to survive on a select portion of the Earth’s surface” that must therefore be especially protected and preserved as a direct reflection of the mind of God.²¹¹ In other words, nature, left untouched by human hands, is the artwork of God.²¹² Wilderness areas are the new cathedrals of environmental religion in which – like the great temples and cathedrals of the past – the presence and meaning of God are most powerfully felt.²¹³

Morriss and Cramer characterize environmentalism by six key characteristics, including the belief that “human history on Earth is part of an apocalyptic narrative that links disaster to the sin or hubris of an ‘overweening desire to control nature,’”²¹⁴ an idolatrous desire, one might say, to “play God” with the world.

like, ‘Well, I want her to have a choice, and if I put in a peanut butter-and-jelly sandwich and a ham sandwich, she has a choice.’” Professor Wagner said. “And each one comes in its own separate plastic bag.” What comes next, she said, is a hard call. “Do you go back to the parents and say, ‘Gosh, can you rethink the plastic bags and all this food?’ Or do you talk to the children, and you make the children feel guilty because they’re throwing this all away?”

Ms. Corbett, the Oakland parent, said the social pressure her children felt regarding recyclable products was palpable. Still, she says, plasticware can be a pain to clean, and is not cheap. When she thinks it is likely that her daughters will lose the containers — if, for instance, they’re going on a field trip — she uses waxed-paper sleeves, like the kind bakeries use for cookies, to hold sandwiches instead. “It’s still a no-no because you’re still having to throw that away, but it is biodegradable, it does compost, so you’re not as guilty,” she said).

210. Morriss & Cramer, *supra* note 200, at 329 n.88.

211. *Id.* at 331 n.90.

212. *See supra* Part V.

213. William Dennis, *Wilderness Cathedrals and the Public Good*, 37 THE FREEMAN 1, 33 (1987), available at <http://www.thefreemanonline.org/columns/wilderness-cathedrals-and-the-public-good>.

214. Morriss & Cramer, *supra* note 200, at 335.

This environmental religion is at odds with the modern secular worship of “the idea of progress with its ascendant narratives of human victory over nature.”²¹⁵ Overall, Morriss and Cramer conclude that while:

these [characteristics] are not an exhaustive list, . . . they are a fair summary of much of modern Environmental thought and writing. [Moreover], these views are different from the views of people who simply ‘desire to experience outdoor recreation,’ . . . or who desire improved air or water quality because they seek to maximize human welfare.²¹⁶

As Morriss and Cramer carefully and comprehensively note, at a minimum, “[e]nvironmentalism looks like a religion.”²¹⁷ Indeed, any belief system with “these six characteristics[,] meet[s] our definition of a religion”²¹⁸ for all important purposes, including the First Amendment Establishment Clause. They do not attempt to work out the full constitutional implications of this conclusion; this will have to be done on a case-by-case basis, and remains an important legal agenda for the future.

VII. AMERICA AS A PROTESTANT NATION

When the United States Constitution was originally written, the term “religion” had a clear meaning to its authors. It meant, in practice, one of the denominations of Protestant Christianity. At the time, there were about 30,000 Catholics in the United States, barely one percent of the population.²¹⁹ Both Catholics and Jews, who were also few in numbers, had been actively discriminated against in voting rights and other matters throughout the colonial era. The constitutional guarantees of freedom of religion originally applied only to the federal government, and some individual states maintained policies of

215. *Id.*

216. *Id.* at 337.

217. *Id.* at 338.

218. *Id.*

219. AHLSTROM, *supra* note 1, at 342.

official religious (then Protestant) establishment well past the founding era.²²⁰

Even well into the twentieth century, the constitutional principle of no establishment of religion meant, in practice, that no Protestant denomination should be advantaged relative to any other.²²¹ It was constitutionally acceptable, for example, to read from the Bible in public schools until 1963,²²² provided that the King James or another Protestant version of the Bible was used.²²³ It was also permissible, until 1962, to say generic Christian prayers in school²²⁴ – as long as they did not preferentially advance the specific beliefs of any one Protestant denomination over others.²²⁵ A contemporary theologian, William Cavanaugh, explains that for much of American history, “under the de facto Protestant establishment, government was expected to give public recognition to a generic version of the biblical God and otherwise reinforce the conservative cultural values that religion represented” for the nation.²²⁶ Thus, for most of American history there was no real separation of church and state.

As for Catholicism, no establishment of religion also had a clear meaning: no government support for Catholic private schools. In 2001, John Jeffries, then-dean of the University of Virginia Law School, and colleague James Ryan published a short

220. McConnell, *supra* note 48.

221. See e.g., Richard D. Hecht, *Active versus Passive Pluralism: A Changing Style of Civil Religion?*, 612 ANNALS AM. ACAD. POL. & SOC. SCI. 133, 142 (2007) (“In the first period of American history, when much of the American population was located along the Eastern Seaboard and in the South, ‘pluralism’ meant almost exclusively the pluralism of Protestant denominations that had come to North America during the colonial period and sunk their roots into the early Republic.”). See also *id.* at 141 (explaining that in the twentieth century an American “civil religion” increasingly dominated in the public sphere but it also amounted to a “secularized Protestantism” until at least the 1960s).

222. Reading of the bible was not prohibited by the Supreme Court until *Schempp*. See generally *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

223. Jeffries & Ryan, *supra* note 52, at 300.

224. Saying of prayers in public schools was prohibited by the Supreme Court in *Engel v. Vitale*. *Engel v. Vitale*, 370 U.S. 421 (1962).

225. Jeffries & Ryan, *supra* note 52, at 299.

226. WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE: SECULAR IDEOLOGY AND THE ROOTS OF MODERN CONFLICT* 184 (2009).

history of the Constitution's Establishment Clause.²²⁷ Anti-Catholic sentiment was strong in Protestant America throughout the nineteenth century and continued well into the twentieth century.²²⁸ Jeffries and Ryan note that, until the 1960s, private religious schools in the United States were overwhelmingly Catholic.²²⁹ Many Protestants resented this, perceiving these schools as the Catholic Americans' effort to separate themselves from Protestant religion and culture. For them, this was virtually a form of anti-Americanism. If these Catholic immigrants had chosen to come to America, the dominant Protestant majority thought that they should be willing to accept the core American tenets of faith, even as many of them were derived from and significantly influenced by the Protestant origins of the United States.

Jeffries and Ryan comment that "hostility to Roman Catholics and the challenge they posed to the Protestant [religious] hegemony" lay behind much of the prevailing American sentiment about church and state through the 1950s.²³⁰ In practice, given the effective Protestant control over public schools, the constitutional "ban against aid to religious schools aimed not only to prevent an establishment of [a Catholic] religion but also to maintain [a Protestant] one."²³¹ Protestant fundamentalists and evangelicals until the 1970s were "uncompromising opponents of aid to parochial schools."²³² In opposing government aid for religious schools in 1947 – including aid distributed neutrally among all religions – the editor of the leading magazine in mainstream Protestantism, *The Christian Century*, was surprisingly candid in admitting that "preventing Catholics from getting public funds would help preserve America as a Protestant nation."²³³

By the 1960s, the United States had become a more pluralist society, both religiously and in other ways. A century or more of

227. Jeffries & Ryan, *supra* note 52, at 279.

228. *Id.* at 282.

229. *Id.* at 318.

230. *Id.*

231. *Id.*

232. Jeffries & Ryan, *supra* note 52, at 318.

233. *Id.* at 314-15.

heavy Catholic immigration led to a much-increased Roman-Catholic presence in the nation, culminating in the first Roman Catholic president, John F. Kennedy, being elected in 1960. Chinese immigrants had arrived as early as the nineteenth century, and there were now increasing numbers of followers of Buddhism, Hinduism, Islam, and other non-Christian faiths.²³⁴ Equally important, many people were leaving the official Christian churches altogether.²³⁵ They did not necessarily become atheists, however; many fashioned their own brands of religion outside the historic institutional forms and language of Christianity.²³⁶ Environmentalism, as examined in this article, is a leading example.

After long occupying the field for itself, American Protestantism was forced to face a newly pluralist and competitive religious environment.²³⁷ In 1962, the Supreme Court ruled against the recitation of prayers in public schools,²³⁸ and in 1963 against the reading of the Bible in the classroom.²³⁹ In the years that followed, the Court ruled against many other

234. See Randall Balmer, *Religious Diversity in America*, NAT'L HUMANITIES CENTER, <http://nationalhumanitiescenter.org/tserve/twenty/tkeyinfo/reldiv.htm>.

The twentieth century saw the spectrum of religious diversity expand even further, from Protestants, Catholics, and Jews to a wide range of Asian religions: Hinduism, Buddhism, Shintō, Sikhism, Jainism, and many others. At the same time, various indigenous religious gained in popularity: Mormonism, Christian Science, Jehovah's Witnesses, the Nation of Islam, to name only a few. The Hart-Cellar Immigration Act of 1965, coming—significantly—on the heels of the civil rights movement, opened the doors of the United States to new waves of settlement and thereby eliminated the quotas of the Johnson Act of 1924.

235. See THE PEW FORUM ON PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY: RELIGIOUS AFFILIATIONS: DIVERSE AND DYNAMIC 5 (Feb. 2008) (“[T]he number of [American] people who say they are unaffiliated with any particular faith today (16.1%) is more than double the number who say they were not affiliated with any particular religion as children. Among Americans ages 18-29, one-in-four say they are not currently affiliated with any particular religion.”).

236. In the Pew Survey, only 1.6 percent said they were “atheists” and 2.4 percent said they were “agnostic.” *Id.*

237. See AHLSTROM, *supra* note 1, at 1091 (“By the mid-twentieth century . . . the circumstances [in the United States] were such that a pluralistic post-Puritan situation could rapidly develop.”).

238. *Engel v. Vitale*, 370 U.S. 421 (1962).

239. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

religious practices in public settings. With the resignation of Justice John Paul Stevens from the Court in 2010, and the subsequent appointment of Elena Kagan, the Supreme Court now consists of six Catholic members and three Jewish members, which is remarkable in light of the nation's historic Protestant composition.²⁴⁰ Their eighteenth century American forefathers often were barred from holding office, or even exercising the right to vote.²⁴¹

VIII. JUDICIAL CONUNDRUMS

As explained above, for much of American history the real meaning behind the separation of church and state was that one form of Protestantism could not be preferentially favored by the state over other forms. By the 1960s, however, this was no longer acceptable — legally, socially, or theologically. Societal changes and current events were thus driving the Supreme Court to embark on a basic reconception of questions of church and state. The first step in this shift consisted of a wide rejection of government support for all forms of traditional religion, undermining the historic Protestant dominance, and succeeding in putting the government in a more religiously neutral position.

Dealing with a broader definition of religion, however, raised complex constitutional questions.²⁴² As traditional religion was increasingly excluded from the public sphere, this raised the possibility that government might be treating less familiar forms of religious belief more favorably. If secular religions were to be regarded as actual forms of religion, as urged by leading theologians, social scientists, and other scholars, what did this

240. Justices Scalia, Kennedy, Thomas, Roberts, Alito and Sotomayor are Roman Catholic. Justices Breyer, Ginsburg and Kagan are Jewish.

241. See Ralph E. Pyle & James D. Davidson, *The Origins of Religious Stratification in Colonial America*, 42 J. FOR SCI. STUDY OF RELIGION 65, 120 (2003) (providing that "Catholics were denied toleration or otherwise prevented from voting in twelve of the thirteen colonies. . . . Jews were denied the franchise in nine. Restrictions on office-holding were even more widespread. Legislation denying Catholics office-holding privileges . . . was on the books in all of the provinces Jews and other non-Christians were prevented from holding office in eleven of the thirteen colonies.").

242. See *supra* Part III.

mean for the separation of church and state? Examination of environmental religion provides an important case study.

In the 1960s and early 1970s, the Supreme Court made a few tentative — if inconclusive — efforts to address such matters.²⁴³ The Court found one precedential Court of Appeals decision, authored by Judge Learned Hand in 1943, which widened the definition of religion.²⁴⁴ *United States v. Kauten* broadly declared that a valid form of religion is any belief system that “accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.”²⁴⁵

The United States Supreme Court took a major step towards broadening the understanding of religion in cases of church and state separation with its 1961 decision in *Torasco v. Watkins*.²⁴⁶ There, the Court overturned a Maryland requirement that an aspiring notary public must sign an oath declaring belief in God in order to receive a commission from the State.²⁴⁷ In an opinion by Justice Hugo Black, the Court unanimously overturned this rule, and held that neither the federal nor a state government “can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . [and that] [n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”²⁴⁸ Accepting a new pluralism in the definition of religion for constitutional purposes, the Court elaborated that no government could preferentially “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”²⁴⁹

That is to say, as Justice Black further explained, no belief in a God (or a “Supreme Being”) is required to invoke the

243. *See infra* pages 56-66.

244. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

245. *Id.* at 708. Presumably, Judge Hand did not mean that all true religious believers must literally be willing to martyr themselves.

246. *Torasco v. Watkins*, 367 U.S. 488 (1961).

247. *Id.* at 496.

248. *Id.* at 493.

249. *Id.* at 495.

protections of the First Amendment.²⁵⁰ In footnote eleven of the *Torasco* opinion, Black put this in unequivocal terms, explaining that “[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others.”²⁵¹ Believers in these religions must be constitutionally protected from state infringement on their freedoms.

The reverse must of course also hold true – the state may not choose to advance the purpose of any one religion, whether traditional or of this newly-recognized category, over another. Since environmentalism also fits within Justice Black’s definition of religion, an issue arises today that the Court in 1961 probably would have found difficult to imagine: is the government now unconstitutionally discriminating in favor of secular environmental religion, and against the historically dominant Christian religions of the nation’s past?²⁵²

Perhaps the most extreme form of coercive action a government can take over an individual is the draft into military service. Given the importance of personal opinion in such matters, men have been allowed to make a claim of conscientious objection on the basis of religion ever since colonial times.²⁵³ With the Vietnam War raging, the Supreme Court in 1965 issued the first of two important new conscientious objector decisions in *United States v. Seeger*.²⁵⁴ This case involved the meaning of the legal requirement set by Congress that by reason of his “religious training and belief,” a conscientious objector could be excused from participation in the military.²⁵⁵ In defining religion, Congress enacted a 1948 law specifying “an individual’s belief in

250. *Id.*

251. *Id.* at 495 n.11.

252. Summarizing the outcome, “In *Torasco v. Watkins*, the Court broke the theistic mold which had theretofore restricted the American legal definition of religion. . . . This expanded position reflected a recognition of the great diversity of religious beliefs in modern America.” Bruce J. Casino, “*I Know It When I See It*”: *Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113, 132 (1987-1988).

253. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1468-69 (1990).

254. *United States v. Seeger*, 380 U.S. 163 (1965).

255. *Id.* at 164-65.

relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or personal views or a merely personal moral code,” as an acceptable form of religion for the purposes of conscientious objector claims.²⁵⁶

Seeger had declared that he was conscientiously opposed to participation in war but was unsure about the existence of any Supreme Being *per se*.²⁵⁷ Rather, he had a deep “belief in and devotion to goodness and virtue for their own sake, and a religious faith in a purely ethical creed.”²⁵⁸ He cited Plato, Aristotle, and Spinoza, rather than the Bible, as the leading sources for his own religious convictions.²⁵⁹ In upholding his claim, the Supreme Court adopted a broad definition of religion more compatible with the recent trends in twentieth century social science and theological scholarship. In an opinion written by Justice Tom Clark, the Court observed that in matters of religion:

Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning, as its ultimate goal, the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss.²⁶⁰

The Court summarized this new line of thinking with the following practical test for the courts to follow in deciding whether a personal belief system qualified as a “religion” for purposes of conscientious objection: a valid religion must be “a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the [draft] exemption” on the basis of

256. *Id.* at 165.

257. *Id.*

258. *Id.* at 166.

259. *Id.*

260. *Id.* at 174-75.

more traditional religious beliefs.²⁶¹ In other words, no literal belief in a person-like God reigning over the hereafter (no “Supreme Being”) was necessary in the 1965 view of the Court.

By the standards of modern scholarship, the Court was showing a brand new sophistication and openness. Looking back, at its most advanced levels Christian theology had never actually advocated a concept of God as a distinct person (a literal “being”). Keith Ward, a leading contemporary theologian and former professor of religion at Oxford University, writes that “the ultimate character of the universe is mind, and that matter is the appearance or manifestation or creation of cosmic mind.”²⁶² That is to say, a divine intelligence fills the universe, in which we as “individual persons” participate.²⁶³ As many people conceptualize God, He is admittedly an all-powerful anthropomorphic figure in the sky. However, this is not the way that God was historically perceived by any of the leading Jewish or Christian theologians. Ward writes that “it is vitally important that we do not think of God as some sort of human-like being with lots of fairly arbitrary characteristics. That idea has never been supported by a leading theologian of any major monotheistic tradition.”²⁶⁴

In *Seeger*, the Supreme Court referred explicitly to Tillich’s writings. Justice Clark, writing for eight justices,²⁶⁵ observed that the Court’s decision reflected:

the ever-broadening understanding of the modern religious community. The eminent Protestant theologian, Dr. Paul Tillich, whose views the government concedes would come within the statute [and its definition of religion for conscientious objector purposes], identifies God not as a projection “out there” or beyond the skies but as the ground of our very being.²⁶⁶

261. *Id.* at 176.

262. KEITH WARD, WHY THERE ALMOST CERTAINLY IS A GOD: DOUBTING DAWKINS 20 (2008).

263. *Id.*

264. *Id.* at 78.

265. Justice William Douglas filed his own concurring opinion.

266. *Seeger*, 380 U.S. at 180 (*citing* PAUL TILlich, SYSTEMATIC THEOLOGY VOL. II 12 (1957)).

Declaring this to be the appropriate constitutional way of thinking about religion, Justice Clark directly quoted Tillich's own writings to the effect that God was an idea:

in which meaning within meaninglessness is affirmed. The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the 'God above God,' the power of being, which works through those who have no name for it, not even the name God.²⁶⁷

Applying this understanding of religion to the specific circumstances of the case at hand, Justice Clark wrote that "[i]t may be that Seeger did not clearly demonstrate what his beliefs were with regard to the usual understanding of the term 'Supreme Being.' But as we have said Congress did not intend that to be the test" of a valid religious belief for the purposes of the conscientious objector law.²⁶⁸

Five years later, the Supreme Court affirmed these views in another conscientious objector case, *Welsh v. United States*.²⁶⁹ The issues alluded to in *Seeger* were now presented more starkly, as Welsh explicitly denied that his claim for a draft exemption was based on religion.²⁷⁰ The Court, however, declared that a more expansive and sophisticated definition of religion — as the 1965 Court had incorporated by citing Tillich's writings — did not require any declaration of commitment to an institutionally-recognized religion. Indeed, many who were loudest in their proclamations of religious devotion fell short of demonstrating the same in their actions, as compared with many others who outwardly disclaimed any overt "religious" commitment and yet behaved devoutly. Writing for the Court, Justice Black observed that "very few [draft] registrants are fully aware of the broad scope of the word 'religious' as used" in the conscientious objector provisions of the law as interpreted in *Seeger*.²⁷¹ It was enough for Justice Black that although Welsh "originally characterized his beliefs as nonreligious, he later upon reflection wrote a long

267. *Id.*

268. *Id.* at 187.

269. *Welsh v. United States*, 398 U.S. 333 (1970).

270. *Id.* at 341.

271. *Id.*

and thoughtful letter to his [draft] Appeal Board in which he declared that his beliefs were ‘certainly religious in the ethical sense of the word.’²⁷²

Justice Black observed that:

[m]ost of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality — a God — who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and should be shunned.²⁷³

The 1970 Court reaffirmed the 1965 conclusion in *Seeger* that strong religious beliefs arrived at by other routes also qualified: “[b]ecause [Welsh’s] beliefs [apart from any explicit concept of God] function as a religion in his life, such an individual is as much entitled to a ‘religious’ conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.”²⁷⁴

In a separate concurring opinion, Justice John Harlan criticized Justice Black’s opinion as having abandoned “any distinction between religiously acquired beliefs and those deriving from ‘essentially political, sociological, or philosophical views or a merely personal moral code.’”²⁷⁵ The Court, in Justice Harlan’s opinion, was no longer distinguishing between traditional religion and secular religion. Extending the concept of religion as broadly as Tillich’s concept of a belief system dealing with matters of “ultimate concern,” however theologically valid, posed its own dangers which, as Justice Harlan recognized, the Court was ill-equipped to handle.²⁷⁶ Perhaps Tillich’s concept was workable in the context of defending individual rights to the free exercise of religion, but as extended to First Amendment establishment cases, it would create large new avenues of

272. *Id.*

273. *Id.* at 340.

274. *Welsh*, 398 U.S. at 340.

275. *Id.* at 351 (Harlan, J., concurring).

276. *See id.* at 341.

complication.²⁷⁷ Justice Harlan's concurring opinion stated that, while he regarded this definition of religion as correct from a

277. L. Scott Smith is rare among legal commentators in that he also has a strong background in theology (a Ph.D. in philosophy of religion from Columbia University). Smith explains the problems created by *Seeger* (and *Welsh*):

The functional test adopted in *Seeger* appeared driven more by a desire to salvage the constitutionality of a narrowly worded Congressional statute than to understand the essence of religion. Certainly, if there had been establishment issues in *Seeger*, the Court would have thought twice before adopting a functional definition and relying so heavily upon Tillich's notion of "ultimate concern." When religion is conceptualized as "ultimate concern," being "nonreligious" is not an option. That each person possesses some concern that rises to the level of ultimacy in his or her life comprises an implied admission that any attempt to purge religion from public life is an exercise in futility. For Tillich, a political community, just like the human self, is centered around an ultimate concern. The subject-object split is transcended by the act of ultimate concern, such that it constitutes the faith by which one believes (*fides qua creditur*) as well as the content of faith which is believed (*fides quae creditur*). Every person and community, therefore, has a choice about how to be, but not whether to be, religious. In light of such considerations, one must doubt whether the sweeping manner in which the Court construed Section 6(J) of the Universal Military Training and Service Act had anything substantive to do with spelling out a concrete definition of religion. The goal was to re-write a particular section of a Congressional statute so as to accommodate *Seeger* and those like him as conscientious objectors to military service. That objective, but little else, was accomplished.

Functional definitions of religion, by locating the religious impulse in a universal human capacity, superlatively protect free exercise, but they have drawn criticism because they tend to constrict the meaning and scope of establishment concerns. Such definitions tend as well to render the "secular" nothing more than one religious orientation beside others. Separationism and neutrality lose their meaning. But lest one be tempted to subscribe to Professor Tribe's "dual-meaning" suggestion, which even he has recanted, one might keep in mind Justice Rutledge's clarion reminder.

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

theological standpoint, it was implausible to him as an interpretation of the true intent of Congress in 1948 in drafting the language of the conscientious objector law.²⁷⁸ Indeed, for Justice Harlan, the entire conscientious objector law might well be unconstitutional because Congress had in fact actively discriminated in favor of Christianity and other traditional religions and against less familiar religions (a problem of “underinclusion,” as Justice Harlan put it) in the legislation’s plain language.²⁷⁹ Rather than taking the radical step of advocating invalidation of the entire law on these grounds, however, Justice Harlan simply opted to sustain Welsh’s exemption from the draft.²⁸⁰

By 1972, the composition of the Court had changed. Justice Clark, the author of the *Seeger* opinion, left the Court in 1967, and Justices Black and Harlan both departed in 1971. In total, five new Justices had joined the Supreme Court since *Seeger*, including a new Chief Justice, Warren Burger, in 1969. In *Wisconsin v. Yoder*, this new Court confronted the issue of Amish families seeking relief from the Wisconsin requirement that children must attend public schools until the age of sixteen.²⁸¹ The Amish wanted to withdraw their children after the eighth grade on the grounds that further education was not necessary for their lifestyle and that secondary public school education in the formative teenage years tended to undermine Amish religious convictions.²⁸² The Court ruled in favor of the Amish families, but also adopted language that drastically narrowed the definition of religion, effectively repudiating much of the previous decade’s theological sophistication.

The point is that the same entity or phenomenon is regulated by both religion clauses of the Constitution. The founders intended only one meaning for the term “religion,” not two.

L. Scott Smith, *Constitutional Meanings of “Religion” Past and Present: Explorations in Definition and Theory*, 14 TEMP. POL. & CIV. RTS. L. REV. 89, 111-12 (2004).

278. See *Welsh*, 398 U.S. at 345 (Harlan, J., concurring).

279. *Id.* at 366-67.

280. *Id.* at 367.

281. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

282. *Id.* at 208-09.

The Court's 1972 opinion in *Yoder* was authored by Chief Justice Burger, who effectively reverted to the old formulation that a religion, for constitutional purposes, meant Christianity, Judaism, and other equally old and familiar faiths entrenched in history (a test that the Amish could easily meet).²⁸³ Chief Justice Burger declared that "[a] way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief" of a clearly identifiable and more traditional kind.²⁸⁴ To illustrate his point, Chief Justice Burger gave the example of Henry David Thoreau, finding that his outlook on life was "philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses" of the Constitution.²⁸⁵ Yet, Thoreau would almost certainly have qualified for a conscientious objector exemption according to the understanding of religion laid out by the Court in *Seeger* and *Welsh*, the latter decided just two years before.²⁸⁶

Remarkably enough, Chief Justice Burger — never known as an intellectual heavyweight — made no effort to justify, or even acknowledge, the Court's abrupt shift in its church and state jurisprudence. This role fell to Justice Douglas, who filed a partial dissent, sustaining the Amish families' claims but objecting strongly to much of Chief Justice Burger's language.²⁸⁷ As Justice Douglas reminded his fellow Justices, the *Yoder* opinion was "contrary to what we held in *United States v.*

283. *Id.* at 215-16.

284. *Id.* at 215.

285. *Id.* at 216.

286. Summing up the large shift in church and state jurisprudence of the 1960s culminating in *Welsh*, Lee Strang writes that:

[T]he Supreme Court radically changed the content of the religion clauses in the First Amendment. The Court initially determined religion to encompass theistic beliefs that motivated the believer in that instance and has since expanded religion to explicitly include religious and nonreligious [in traditional terms], moral, philosophical and other strongly held beliefs.

Strang, *supra* note 52, at 203-04.

287. *Yoder*, 406 U.S. at 241 (Douglas, J., dissenting in part).

Seeger.”²⁸⁸ Now sharply narrowing the definition of religion, the Court was abandoning its former policy of “equal treatment for those whose opposition to service is grounded in their [equally valid] religious tenets” of nontraditional kinds.²⁸⁹ Justice Douglas instead reaffirmed his commitment to the Court’s previous broad “views of ‘religion’ and [saw] no acceptable alternative . . . now that we have become a Nation of many religions and sects, representing all of the diversities of the human race.”²⁹⁰

Since *Yoder*, there have been many more Supreme Court cases involving the constitutional definition and status of religion, yet not much has been clarified.²⁹¹ Law Professor Rebecca French wrote in 1999 that the “Supreme Court and its commentators have been struggling for over a century to find an adequate definition or characterization of the term ‘religion’ in the First Amendment. It has turned out to be a particularly tricky endeavor, one that has stumped both the Court and its commentators.”²⁹² Is Scientology, for example, with no explicit understanding of God, a religion that must be legally protected in the same way as, say, Methodism? The Internal Revenue Service in 1993 answered this question in the affirmative for purposes of tax-exempt status.²⁹³ After surveying the literature, Morriss and

288. *Id.* at 248.

289. *Id.* (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

290. *Id.* at 249.

291. See Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L. REV. 309, 311-12 (1994) (describing the situation as follows:

The Religion Clauses doctrine of the Supreme Court is clearly in a state of flux. Charitable commentators have described it as being in a state of “great confusion.” Less charitable descriptions include “doctrinal quagmire,” “schizophrenia,” “inconsistent and unprincipled,” “a conceptual disaster area,” “a mess,” “incantation of verbal formulae devoid of explanatory value,” and “words, words, words.” This outpouring of scholarly witticisms is due in part to the Court’s inability, or disinclination, to provide a workable definition of the term “religion” for purposes of First Amendment jurisprudence. Recent cases have done little to clarify the confusion.).

292. French, *supra* note 40, at 49.

293. See Janet Reitman, *Is Scientology a Religion?*, WASH. POST BLOG (July 17, 2011, 5:46 PM), http://www.washingtonpost.com/blogs/guest-voices/post/is-scientology-a-religion/2011/07/17/gIQATEnSKI_blog.html?hpid=z7.

Cramer conclude that “there is no definitive answer in either the historical record or the Court’s jurisprudence as to exactly what constitutes a religion for constitutional purposes.”²⁹⁴

IX. PROBLEMS OF A “BURGER RULE”

It might be suggested that in order to limit the definitional anarchy, and following former Chief Justice Burger’s reasoning, the best solution may be to return to the original judicial — and the continuing popular American — understanding that a religion for constitutional purposes must be one of the old and familiar religions of history. This category in 1787 meant essentially Judaism and Christianity, but in practice applied to Protestantism alone, given that the Catholic Church was regarded by most eighteenth century American Protestants virtually as anathema (for many the pope was the “anti-Christ”).²⁹⁵ Today, this category could readily be extended to include Islam, Hinduism, Buddhism, and perhaps Confucianism.

There are several major problems with this strategy, however. First, it would require that the Court adopt a definition of religion clearly at odds with the prevailing social science and theological scholarship of the twentieth century.²⁹⁶ By any

294. Morriss & Cramer, *supra* note 200, at 316.

295. See Franklin H. Littell, *Church and Sect*, 6 ECUMENICAL REV. 262 (1954).

296. Writing as a theologian as well as a legal commentator, L. Scott Smith explains that the conventional popular idea that religion necessarily involves beliefs such as the presence of a Supreme Being or the existence of the supernatural has little basis in theology:

Certainly, identifying religion only with a belief in the supernatural is not only misguided, but also flies in the face of fact. John Dewey, one of the most influential American naturalists of the twentieth century, possessed what he regarded as a religious vision of reality that he sometimes called “a common faith.” From Friedrich Schleiermacher, as the father of modern Protestant theology, through Christian thinkers like Albrecht Ritschl and Adolf Harnack, to twentieth century ones like Tillich, Reinhold Niebuhr, Rudolf Bultmann, Karl Rahner, and John Cobb, the overwhelming tendency has been a departure from the supernatural. Do the legal commentators who tout the supernatural as the *sine qua non* of religion wish to preclude from its compass the most intellectually rigorous Christian thinkers of the last two centuries? It is hardly a serious and meritorious response to the question for one to state that

reasonable reading of that scholarship, environmentalism, along with a number of other secular belief systems, qualify as actual religions, despite perhaps being heretical by traditional Christian standards. Moreover, defining religion for constitutional and other legal purposes in such a way as to exclude secular religion is not a neutral action. It would effectively give a preferential treatment to environmental and other secular “non-religions” relative to the older and more familiar historic faiths, which would still be required to adhere to a much stricter standard of separation and thus deprived of similar state support.

Moreover, to simply follow popular prejudices in matters of religion would be an abdication of the proper judicial role in American governance. The courts ideally serve as a bulwark against the mass biases and passions of the moment — especially likely to arise in matters of religion — that are often found in American life and against which politicians frequently can offer little defense. The judicial pace is more deliberate. The judges themselves, particularly those of the federal judiciary, are among the better educated and most broadly knowledgeable of Americans. Their lifetime tenure enables them to engage in dispassionate analysis that would be difficult for a political leader facing continual reelections. American democracy is far from perfect, and ideally, the courts represent a barrier to some of the worst excesses. As such, the courts continue to command the highest prestige among the executive, legislative, and judicial branches of American government. If all forms of religion are to be treated equally by the State, active judicial protection of less politically powerful ones may be required. Ironically, despite their large memberships, some traditional Protestant forms of

those beliefs which are not grounded in the supernatural are not religious. Circular reasoning solves nothing.

It may [also] not be correct to make too close a correlation between religion and belief in good and evil. While it is tempting to do that, especially in a society like the United States, profoundly influenced by Puritanism, it is problematic to argue that “the moral” is an essential condition of religion. William P. Alston has noted that there are societies in which there is a disconnection between their ritual system, with its network of beliefs, and their moral code.

Smith, *supra* note 277, at 113.

religion are among the politically weakest in terms of ability to influence government decisions.

Among secular religions, denial of religious status may be an intentional method of discriminating against other religious competitors and working to facilitate the establishment of secular systems of belief as official religions of the State.²⁹⁷ This is the view of William Cavanaugh, a well-regarded contemporary theologian who writes that “[a] growing body of scholarly work explores how the category ‘religion’ has been invented in the modern West . . . according to specific configurations of political power.”²⁹⁸ As part of this political strategy, the domain of “religion” is seen as private and thus distinct from the “secular” domain of the state.²⁹⁹ By drawing this distinction, government is then free to establish “secular” institutions but not “religious” institutions. Hence, the separation of church and state, as Cavanaugh writes, can be seen as “part of a broader Enlightenment narrative that has invented a dichotomy between the religious and the secular and constructed the former as an irrational and dangerous impulse that must give way in public to [other] rational, secular forms of power.”³⁰⁰ In this way, “in what are called ‘Western societies,’ the attempt to create a transhistorical and transcultural concept of religion . . . is one of the foundational legitimating myths of the [secular] liberal nation-state” that seeks to exclude traditional religion from the government halls of power.³⁰¹

In the new Enlightenment narrative, it is taken for granted that the separate “categories of religious-secular . . . are so firmly established as to appear natural.”³⁰² In reality, “their construction is anything but inevitable.”³⁰³ In seeking to distinguish a special category defined as religion, it is common to adopt “a substantivist concept of religion, whereby religion can be separated from secular phenomena based on the nature of

297. CAVANAUGH, *supra* note 226.

298. *Id.* at 3.

299. *See id.* at 6.

300. *Id.* at 4.

301. *Id.*

302. CAVANAUGH, *supra* note 226, at 8.

303. *Id.*

religious beliefs.”³⁰⁴ A more careful analysis, however, reveals “how such distinctions break down.”³⁰⁵ Although many people have sought to define religion as a system of “[b]elief in God or gods,” on closer inspection this proves “too restrictive, because it would exclude some belief systems that generally make lists of world religions, such as Buddhism, Confucianism, and Daoism.”³⁰⁶ To avoid this problem, “[t]he category of the transcendent is sometimes offered in place of God or gods, in such a way that Buddhists talk of nirvana,” for example, “would qualify” as religious.³⁰⁷ But this introduces its own problems. As Cavanaugh comments, according to “Jan Bremmer . . . ‘the gods of the Greeks were not transcendent but directly involved in natural and social processes.’”³⁰⁸

Cavanaugh observes that the prominent historian A. J. P. Taylor proposed that “the *Communist Manifesto* should be ‘counted as a holy book, in the same class as the Bible or the Koran.’”³⁰⁹ Admittedly, “[a]dvocates of liberal democracy tend to be more sympathetic with the idea of Marxism or Nazism as religions. . . . Nevertheless, a wide range of scholars have argued that many liberal democracies rely on a strong civil religion to provide a common meaning and purpose for liberal nation-states.”³¹⁰ Although western civil religion borrows significantly from Christianity, it is in fact a new religious “creation that confers sacred status on democratic institutions and symbols.”³¹¹ “[F]lags, images, ceremonies, and music,” along with other patriotic rituals, were invented in the nineteenth and twentieth centuries “in Europe and the United States to stoke a nascent sense of exclusive national loyalty, supplanting previously diffuse loyalties owed to region, ethnic group, class, and church.”³¹² It is this new form of secular religion, not traditional Christianity,

304. *Id.*

305. *Id.*

306. *Id.* at 102.

307. *Id.* at 102-03.

308. CAVANAUGH, *supra* note 226, at 103.

309. *Id.* at 111.

310. *Id.* at 113.

311. *Id.*

312. *Id.*

which has inspired modern-day crusades in Europe over the past two centuries, including another “30 years war” from 1914 to 1945, reflecting the new power struggles arising from matters of secular religion.³¹³

As part of a strategy of national empowerment, in relegating the churches to the margins of society, the modern nation state must deny the overtly religious character of its own national faith. As Cavanaugh writes, in the United States the “American civil religion must deny that it is religion”³¹⁴ because “[b]y explicitly denying that our national sacred symbols and duties are sacred, we shield them from competition with [traditionally religious] sectarian symbols.”³¹⁵ Cavanaugh observes that the modern state’s assertion of a “religious-secular divide thus [has] facilitated the transfer . . . of the public loyalty of the citizen from Christendom to the emergent nation-state.”³¹⁶ Secular religions, such as secular environmentalism, in short, have now assumed a position of advantage in government circles, relative to older and more traditional religions. The federal government can set aside areas of public land, for example, to establish a “wilderness church,” but cannot similarly donate free public land or otherwise help to erect a Christian church or display other explicitly religious symbols.³¹⁷

X. THE SECULAR AND THE TRADITIONAL: OVERLAPPING FORMS OF RELIGION

Another problem with the attempt to draw a clear distinction between secular and traditional religions is that the two categories significantly overlap. Beliefs that would normally be considered a part of “traditional” religion have incorporated significant elements of modern secular thought over time. One example is the liberation theology that arose within the Catholic

313. REDLESS, *supra* note 112, at 177.

314. CAVANAUGH, *supra* note 226, at 119.

315. *Id.* at 120.

316. *Id.*

317. See, e.g., Dennis Romboy, *U.S. Supreme Court Declines to Hear Utah Highway Crosses Case*, DESERET NEWS, Oct. 31, 2011, <http://www.deseretnews.com/article/705393443/US-Supreme-Court-declines-to-hear-Utah-highway-crosses-case.html>.

Church in Latin America in the 1970s, which borrowed heavily from Marxism.³¹⁸ Similarly, the social gospel movement within American Protestantism in the late nineteenth and early twentieth centuries coincided with the secular progressive “gospel of efficiency” of the same era.³¹⁹ Indeed, Richard Ely, an important figure in the founding of the American Economic Association in 1885 and a leading advocate of progressive economics, was also a prominent Protestant social gospeler who regarded himself as a devout Christian.³²⁰ For Ely, the Kingdom of Heaven was to be achieved in this world, not in the hereafter. As Ely wrote, “Christianity is primarily concerned with this world, and it is the mission of Christianity to bring to pass here a kingdom of righteousness”³²¹ As a “religious subject,” the teachings of economics should provide the expert knowledge base for “a never-ceasing attack on every wrong institution, until the earth becomes a new earth, and all its cities, cities of God.”³²² Ely even argued that social science was a branch of theology and that therefore sociology and economics departments actually belonged within theology schools.³²³

Just as traditional religion can incorporate significant elements of secular religion, the reverse is also true — secular religion can become, in practice, a vehicle for recasting old religious truths in new forms.³²⁴ Indeed, one might argue that

318. Describing the message of liberation theology, George Weigel writes that “the proximate origin of these themes in Marxism was not denied by liberation theologians, but celebrated.” GEORGE WEIGEL, *TRANQUILLITAS ORDINIS: THE PRESENT FAILURE AND FUTURE PROMISE OF AMERICAN CATHOLIC SOCIAL THOUGHT ON WAR AND PEACE* 288 (1987); *see also* LIBERATION SOUTH, LIBERATION NORTH (Michael Novak ed., 1981).

319. SYDNEY FINE, *LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901*, at 381 (1964); *see also* SAMUEL P. HAYS, *CONSERVATIONISM AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920* (1959).

320. *See generally* A. W. Coats, *The First Two Decades of the American Economic Association*, 50 *AM. ECON. REV.* 556 (1960); *see also* CHARLES HOWARD HOPKINS, *THE RISE OF THE SOCIAL GOSPEL IN AMERICAN PROTESTANTISM, 1865-1915*, at 88 (1940).

321. RICHARD T. ELY, *SOCIAL ASPECTS OF CHRISTIANITY AND OTHER ESSAYS* 53 (1889).

322. *Id.* at 73.

323. *Id.* at 17.

324. *See generally* KARL LÖWITZ, *MEANING IN HISTORY* (1949).

over the past fifty years the most influential writers in advancing a Christian ethic and worldview broadly — seeing the world as a battlefield of good and evil, for example — have been J. R. R. Tolkien, C. S. Lewis and J. K. Rowling. Tolkien openly acknowledged that *The Lord of the Rings* and other of his fantasies were meant as Christian parables. Lewis was one of the leading Christian apologists of the twentieth century when not writing children’s stories,³²⁵ and Rowling herself states that her own Christian beliefs have been major influences on the *Harry Potter* series.³²⁶ The 1977 movie *Star Wars* and its sequels may have done more to advance historic elements of Christianity among young people than all the Sunday school classes of the 1980s and 1990s combined.³²⁷

For adults, what is labeled “secular religion” often plays a similar role, including in its messages significant borrowings

325. Lewis’s apologist influence is illustrated in the following sermon contemplating the *Narnia* tale:

God entered Narnia in the person of Aslan, a talking beast to rescue talking beasts, that he might redeem them and rescue them from the darkness of sin.

. . . .

In the Narnia Tales . . . the Lamp Post shines brightly on the person of Jesus Christ, the one who is the true light and Who comes into the world to enlighten all people!

Ron Hammer, *Narnia: The Light of the Lamp-Post*, SERMONCENTRAL.COM (Nov. 28, 2005), <http://www.sermoncentral.com/sermons/narnia-the-light-of-the-lamp-post-ron-hammer-sermon-on-narnia-85612.asp?Page=6>.

326. See Jonathan Petre, *J. K. Rowling: ‘Christianity Inspired Harry Potter,’* THE TELEGRAPH, Oct. 20, 2007, <http://www.telegraph.co.uk/culture/books/fictionreviews/3668658/J-K-Rowling-Christianity-inspired-Harry-Potter.html>.

327. Brian D. Johnson & Susan Oh, *The Second Coming: As the Newest Star Wars Film Illustrates, Pop Culture Has Become a New Religion*, MACLEAN’S, May 24, 1999, <http://business.highbeam.com/4341/article-1G1-54661035/second-coming-newest-star-wars-film-illustrates-pop>.

To hear [George] Lucas talk, it sounds as if nothing less than a holy covenant is at stake. “I put the Force into the movie to try to reawaken a certain kind of spirituality in young people,” he has said. “I see *Star Wars* as taking all the issues that religion represents, and trying to distill them down into a more modern and easily accessible construct.”

Id. See also DICK STAUB, *CHRISTIAN WISDOM OF THE JEDI MASTERS* (2005). On science fiction in general as a religious statement, see DOUGLAS E. COWAN, *SACRED SPACE: THE QUEST FOR TRANSCENDENCE IN SCIENCE FICTION FILM AND TELEVISION* (2010).

from traditional Jewish and Christian sources. Indeed, many skeptics require an outwardly disguised “secular” form of Christianity in order to digest traditional religious ideas. Environmental religion again provides a good example.³²⁸ A leading American historian of environmentalism, Mark Stoll, comments that “natural theology lay much of the groundwork for European natural science in general and ecology in particular, and justified and encouraged the study of nature as a religious activity.”³²⁹ This process was dominated by ecologists with Protestant — and in the United States, mostly Calvinist — backgrounds.³³⁰

Stoll finds major overlap between Calvinism and secular environmentalism; today’s “environmentalists rally in defense of virtuous nature against the amoral forces who let themselves be overcome by greed.”³³¹ This reflects the “Calvinistic moral and activist roots” of the contemporary environmental movement.³³² Indeed, recasting in new language “the doctrines laid down by John Calvin,” one finds today in the environmental movement “moral outrage, activism, and appeal to government intervention [that] draw on the same account. [In this vision] the world has been transformed with new answers that are often only old ones rephrased” from past American religious history.³³³

Most American environmental leaders, including John Muir, Aldo Leopold, Rachel Carson, Edward Abbey, Howard Zahniser,

328. *See supra* Part V.

329. Stoll, *supra* note 161, at 57.

330. *Id.* at 54. Virtually all founding ecologists, the theorists of the communities of nature, had Protestant backgrounds. Prior to the Second World War, American and European Protestants very nearly monopolized ecological theory: first German and Scandinavian Lutherans, then Swiss Reformed, English Anglicans, and American Protestants. American Protestants from only certain denominations participated in developing this new field: ecology as a science crystallized mainly out of the Calvinist Puritan tradition that planted Congregationalism and Presbyterianism in America. Within the general attitudes toward and doctrines of these and their daughter churches, and not within the much larger Catholic, Methodist, and Southern Baptist denominations, lay the taproot of modern American ecological science. *Id.*

331. MARK STOLL, *PROTESTANTISM, CAPITALISM AND NATURE IN AMERICA* 52 (1997).

332. *Id.*

333. *Id.*

David Brower, and Dave Foreman, were brought up as Protestants.³³⁴ In Europe, environmentalism has also exerted a large influence in Germany, Denmark, Sweden, and Norway — all nations with a Lutheran Protestant heritage.³³⁵ Finding that all these Protestant connections are more than a mere coincidence, the distinguished environmental historian Donald Worster identifies four key ways in which environmentalism has followed in a Protestant path. First, present-day American environmentalism exhibits an attitude of profound “moral activism,” in this respect following the legacy of Calvin, Ulrich Zwingli, and John Knox — all major figures in the history of the Protestant Reformation who were “energetic radicals hacking away at obstacles to social change.”³³⁶

This intense desire to purge the world of its evils was combined in early Protestantism with a strong sense of “ascetic discipline.”³³⁷ There was, as Worster explains, “a deep suspicion in the Protestant mind of unrestrained play, extravagant consumption, and self-indulgence, a suspicion that tended to be very skeptical of human nature, to fear that humans were born depraved and were in need of strict management.”³³⁸ Worster finds that the echoes of this pessimistic way of thinking are often prominently featured among current environmentalists for whom “too often for the public they sound like gloomy echoes of Gilbert Burnet’s ringing jeremiad of 1679: ‘The whole Nation is corrupted . . . and we may justly look for unheard of Calamities.’”³³⁹ Worster suggests that in our own time of seemingly ever-expanding devotion to personal pleasures and consumption, “the Protestant ascetic tradition may someday survive only among the

334. Stoll, *supra* note 161, at 65 (“[A] significant wing of the American environmental movement consisted of descendants of Puritans and Presbyterians. . . .” (the latter the Scottish branch of Calvinism)). For the religious backgrounds of Muir, Brower, Carson, and Abbey, *see id.* at 66. For Zahniser and Leopold, *see* STOLL, *supra* note 331, at 176-77.

335. *See* Garreau, *supra* note 22, at 62.

336. DONALD WORSTER, *THE WEALTH OF NATURE: ENVIRONMENTAL HISTORY AND THE ECOLOGICAL IMAGINATION* 196 (1993).

337. *Id.*

338. *Id.* at 197.

339. *Id.* at 198 (*quoting* SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD* 6 (1978)).

nation's environmentalists, who . . . compulsively turn off the lights."³⁴⁰

Yet another large debt owed to Protestantism is found in environmentalism's powerful sense of "egalitarian individualism."³⁴¹ Worster writes that Protestantism "originates in the conviction that God's promise is to the individual, freed from the bonds of tradition and hierarchy" such as were prominent in the Roman Catholic Church.³⁴² This non-hierarchical view of the world was applied in Protestant societies to defend fiercely the individual rights of human beings – John Locke, for example, was reflecting his Puritan roots in his libertarian defense of private property.³⁴³ In environmentalism, it is possible to extend such thinking to protect new "rights of nature."³⁴⁴ Protestant principles, Worster suggests, could "lead not only to elevating the poor and despised in society but also to investing whales, forests, and even rivers with new dignity."³⁴⁵ While many Protestant ministers have joined the environmental crusade, proportionally fewer Catholic bishops and Jewish rabbis have unrestrainedly embraced the environmental cause.³⁴⁶

A final inheritance from Protestantism is labeled by Worster as "aesthetic spirituality."³⁴⁷ This involves a rejection of narrowly utilitarian purposes that suggest an appropriate goal of "using" nature and instead sees the value of nature as lying in its inherent worth. In the Protestantism of old, and now in environmentalism, it is important "to see beyond instrumental values, to find beauty in the unaltered Creation, and to identify

340. *Id.* at 197-98.

341. *Id.* at 198.

342. WORSTER, *supra* note 336, at 198.

343. *See, e.g.*, NELSON, REACHING FOR HEAVEN ON EARTH, *supra* note 25.

344. WORSTER, *supra* note 336, at 198.

345. *Id.*

346. *See* Mark Stoll, *Green versus Green: Religions, Ethics, and the Bookchin-Foreman Dispute*, 6 ENVTL. HIST. 412, 419 (2001) (commenting that the members of the small group of influential "Jewish environmentalists have often bemoaned the apparent absence of prominent Jews in the environmental movement," in large contrast to the disproportionate presence of Jews in many other areas of American intellectual and political life).

347. WORSTER, *supra* note 336, at 196.

that beauty with goodness and truth.”³⁴⁸ In eighteenth century New England, Jonathan Edwards preached that “God’s excellency, his wisdom, his purity and love, seemed to appear in everything, in the sun, moon, and stars; in the clouds and blue sky; in the grass, flowers, trees; in the water, and all nature.”³⁴⁹ Worster finds this Calvinist religious appreciation for nature reappearing in new forms among twentieth century environmental leaders such as Rachel Carson, William Douglass, and David Brower.³⁵⁰ As he explains, it had been “learned in New England pastures or Wisconsin oak openings, [but] this Protestant tendency to go back to nature in search of divine beauty could be exercised in an infinite number of landscapes” across the United States.³⁵¹

Given the large Protestant influence on the development and current state of American environmentalism, the apparent separation of American Protestantism from the state that took place under First Amendment jurisprudence in the last part of the twentieth century may be less distinct than one might assume. The American Protestant tradition may have been reborn in a new environmental guise, even though most current environmentalists disavow – or are unaware of – its strong historic connections to Protestantism. It has been as a secular recasting of Calvinism, the most influential branch of American Protestantism, that environmentalism has had its greatest impact. This carries great potential irony. Environmental religion may today have the same privileged status within America – there is no separation of secular environmental religion from the state – which the American Protestantism of old enjoyed until the second half of the twentieth century. That is to say, if environmentalism is really “Calvinism minus God,” American Protestantism in its secular, disguised form may have succeeded in maintaining its historic religious dominance over

348. *Id.* at 199.

349. *Id.* (internal citation omitted).

350. *Id.* at 200.

351. *Id.* One commentator cited by Morriss and Cramer notes that “[i]t is fascinating to see how closely the jeremiadic structure of [Rachel Carson’s *Silent Spring*] . . . resembles the structure of Jonathan Edward’s late sermon, ‘Sinners in the Hands of an Angry God.’” Morriss & Cramer, *supra* note 200, at 143.

the American state.³⁵² Perhaps state establishment of Protestant religion never truly ended.

XI. SEPARATING ENVIRONMENTAL RELIGION AND THE STATE: CASE STUDIES

Let us assume that in order to escape constitutional confusion and intellectual chaos regarding the appropriate definition of religion, and to treat the full range of all religions neutrally, the Supreme Court takes the radical step of accepting secular religions such as environmentalism as genuine religions for the purposes of First Amendment interpretation. As a constitutionally-recognized religion, environmentalism would receive all the protections afforded by the free exercise language of the First Amendment. It would be illegal, for example, to discriminate in the work place, housing market, and other arenas against a person because of his or her environmental beliefs.³⁵³

More controversially, governments would also be prohibited from taking actions that offer official state support to the establishment of environmental religion. As noted above, this would in no way limit environmentalists from adopting policy positions and advocating points of view that reflect the tenets of environmental religion. There would be nothing to restrict governments in adopting policies that are influenced by environmental religion. Instead, the issue would become when and whether a state was officially and intentionally acting to

352. Robert H. Nelson, *Calvinism minus God*, FORBES, Oct. 5, 1998, at 143.

353. A British judge in 2009 ruled in favor of a complaint that an ex-employee had been fired for his environmental beliefs, thus violating the 2003 Religion and Belief Regulations. See Michael McCarthy, *Tim Nicholson: A Green Martyr*, INDEPENDENT, Mar. 19, 2009, <http://www.independent.co.uk/environment/climate-change/tim-nicholson-a-green-martyr-1648388.html>. In pressing his complaint, Tim Nicholson argued that his expressed environmental convictions were more than simply a policy preference; they shaped his whole life, “including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and my fears.” *Id.* The firm eventually settled with Nicholson out of court for \$150,000 as compensation for lost wages and psychological distress. *Exec Gets \$150,000 Settlement in Eco-Bias Case*, AOL NEWS, <http://www.aolnews.com/2010/04/21/exec-gets-150-000-settlement-in-eco-bias-case> (last visited Nov. 26, 2011).

“establish” environmental religion.³⁵⁴ In some cases, this might involve overt choices, while in other cases it might implicate

354. Professor Lawrence Tribe and others have suggested that the constitutional definition of religion might vary according to whether the issue is one of the free exercise of religion or of the establishment of religion (with a broader and more inclusive definition in the former cases). It seems objectionable in principle that religion should mean one thing societally, and another in matters of constitutional interpretation. The same belief system should either be a religion or not, universally. Indeed, ten years later Professor Tribe abandoned his earlier position in this regard. Moreover, various other objections can be raised:

[A]s critics of the dual definition approach point out . . . “if the free exercise definition *is* broader than the establishment definition, the result might in some sense discriminate in favor of religions included in the former but not the latter.” For example, interpreting religion as having “a dual definition may provide more obscure religions and religious activities with special treatment, by protecting the free exercise of such religions, without placing any [E]stablishment [C]ause limits on the government’s ability to promote and aid such religions.” This is particularly problematic because equality between religions is the governing principle of the First Amendment, and accordingly should be a governing principle in First Amendment interpretation. The First Amendment simply cannot tolerate allowing advantageous treatment for one religious group over another. The Supreme Court has emphasized that it will apply strict scrutiny and reject as unconstitutional state and federal laws that discriminate between religions. A dual definition approach fails even the most basic discrimination test. . . . In this vein, one critic has indicated that a dual definition approach would be “perceived as fundamentally unfair” and noted that no persuasive constitutional explanation has been offered for discriminating against older traditional religions in favor of newer and less conventional faiths. . . . “The rose cannot be had without the thorn.”

Furthermore, although a dual definition is a sensible approach to preventing the problems of inhibiting the free exercise of unorthodox religions and restricting governmental action via the Establishment Clause, critics of the dual definition approach question whether these problems would arise under a unitary definition of religion. . . . The reason this problem “may not exist” is that the Court’s Establishment Clause jurisprudence, if not eliminating, at least reduces the concerns voiced by proponents of a dual definition. The Establishment Clause “does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions.” In other words, the “[Establishment Clause] does not . . . prevent the government from taking any action that is consistent with a particular religion or religious tenet.” For example, simply because the State prohibits murder, which corresponds with the prohibition against killing in the Ten Commandments, it does not render that

actions taken by governments in which the state preference given to environmental religion is less obvious. In the latter types of cases, a factual investigation might be required to determine the actual basis for a specific government action or policy decision.³⁵⁵

As illustrations of the possible character of such judicial fact finding, the following policy areas will be examined below to assess their potential First Amendment establishment implications: (a) organic food; (b) recycling of solid waste; (c) creation of wilderness areas; (d) the Arctic National Wildlife Refuge; (e) ecosystem management of the National Forests; and – perhaps most consequential of all – (f) teaching environmental religion in the public schools. These illustrations are not meant to resolve these complex constitutional questions, but rather to indicate the character of the inquiry that might be required in consideration thereof. If such cases arose, a more detailed legal

law an establishment of religion. Similarly, because a State promotes through the force of law the value of equality, which may be religiously inspired, or adopts social programs advocated for by clerics to aid the financially poor and impoverished in spirit, such as the homeless or drug addicts, these actions do not mean that the State is establishing religion. Quite to the contrary, State actions to prohibit religious leaders, who may continue acting from purely religious motivations, from attaining positions of power and authority in government, are unconstitutional.

Jeffrey Omar Usman, *Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, the Arts, and Anthropology*, 83 N.D. L. REV. 123, 154-57 (2007).

355. See, e.g., Andrew Rotstein, *Good Faith? Religious-Secular Parallelism and the Establishment Clause*, 93 COLUM. L. REV. 1763, 1806 (1993) (suggesting that case-specific factual investigations will often be required:

We are thus left with a paradox: the coexistence of the Constitution's grounding in values profoundly related to religious ideas on the one hand, and its mandate of an operative distinction between religious and secular institutions on the other. Needless to say, the resulting tension supplies no easy guide to decision. Conscious appreciation of this paradox may nevertheless aid the task of adjudication by suggesting the subtle interplay of religious and secular themes which may be at work in relevant cases. It may also hasten a decent burial for the peculiar notion that the constitutional bar to establishment of religion requires government fastidiously to eschew all concern with transcendent goals or the deepest beliefs of its citizens.).

analysis would certainly be necessary, and would be undertaken in the courts of law.

a. Organic food

For many who are dedicated to purchasing and consuming it, organic food is a powerful symbol of commitment to environmental religion.³⁵⁶ Obviously, freedom of religion requires that people should be free to buy, and farmers to grow, organic food as a matter of personal choice. What, then, would be the fate of government actions which advance or favor the use of organic food? The Department of Agriculture, for example, currently establishes standards for growing legitimately “organic” food, and enforces these standards.³⁵⁷ This might be perceived as analogous to a government act which establishes and enforces methods of slaughtering beef in a legitimate Jewish kosher butchery. It could also be seen as similar to the government specifying which food characteristics – which types of meat, fish, dairy products, etc. – must not be eaten during the fasting required on Ash Wednesday and every Friday during the Roman Catholic observance of Lent. Many religions have rituals that involve certain eating practices, and the formal specification of actions that will meet the requirements of the ritual. The consumption of genuinely organic foods in the case of environmental religion is no different.³⁵⁸

356. See, e.g., Crichton, *supra* note 16 (“Sustainability is salvation in the church of the environment. Just as organic food is its communion, that pesticide-free wafer that the right people with the right beliefs, imbibe.”).

357. *Organic Certification*, U.S. DEP’T OF AGR., http://www.usda.gov/wps/portal/usda/usdahome?navid=ORGANIC_CERTIFICATION (last visited Nov. 14, 2011).

358. See Dennis Avery, *Does Eating an Organic Food Diet Increase One’s Health and Spirituality? NO*, CTR. FOR GLOBAL FOOD ISSUES (Apr. 20, 2003), <http://www.cgfi.org/2003/04/does-eating-an-organic-food-diet-increase-ones-health-and-spirituality-no/> (arguing that advocates of consuming organic food have a primarily religious motivation:

According to organic advocates, eating organic food seems to offer many of the benefits of a religion:

It gives a sense of spiritual oneness with all creation.

It offers the food shopper a thankfully expensive forgiveness for humanity’s “original sins” of pushing aside and polluting Nature.

To be sure, it would still be necessary to ask, for purposes of establishment jurisprudence, whether there are any significant nonreligious social benefits to wider consumption and growth of organic food, such as improved individual health, less pesticide contamination of the environment, promotion of local farming, or reduced burdens on the transportation system. Consumption of organic food would also have to be an effective way, environmental religious elements aside, of serving these broader social goals. While this is presently a matter of some controversy, doubts remain as to whether net social benefits exist beyond the greater sense of spiritual satisfaction inspired among the consumers of organic food.³⁵⁹ Where such constitutional questions arise, scientific evidence and other factual materials would have to be marshaled for court review, and a legal determination made, looking to neutral authorities to the greatest extent possible for advice.

Let us say, for example, that a public university or other institution spends money to establish an organic food line in its cafeteria. A key question here would be whether it would do the same for other religiously-based food lines – would it provide subsidies for a kosher line, or a Hindu line (serving no beef products) as well. If so, there would be no issue with investing public funds for an organic food line. If not, the organic food line

....

It offers its own version of hell for eco-sinners – non-believers being riddled by cancers from man-made pesticides.

The real question for most consumers is whether organic food is anything more than mystical Back-to-Nature worship?)

359. In England, the Food Standards Agency (FSA) is “an independent Government department set up by an Act of Parliament in 2000 to protect the public's health and consumer interests in relation to food.” *About Us*, FOOD STANDARDS AGENCY, <http://www.food.gov.uk/aboutus/> (last visited Oct. 18, 2011). In 2009, reporting on its research findings, Gill Fine, the FSA Director of Consumer Choice and Dietary Health, stated that:

Ensuring people have accurate information is absolutely essential in allowing us all to make informed choices about the food we eat. This study does not mean that people should not eat organic food. What it shows is that there is little, if any, nutritional difference between organic and conventionally produced food and that there is no evidence of additional health benefits from eating organic food.

Press Release, Food Standards Agency, Organic Review Published (July 29, 2009), <http://www.food.gov.uk/news/newsarchive/2009/jul/organic>.

would have to be barred on the same religious establishment grounds as any other food lines (again, unless clear nonreligious benefits could be demonstrated).

b. Recycling of Waste

Recycling is another activity that has powerful symbolic significance for environmental religion.³⁶⁰ Recycling exemplifies the religious goal of reducing human impact on the natural environment, an action that is desirable in and of itself – it has intrinsic value aside from any utilitarian human benefits – according to the tenets of environmental religion.³⁶¹

Recycling can have many nonreligious purposes. Many forms of recycling yield an ordinary economic return (such as an automobile junk yard) and have long been routine commercial activities. On a personal level, using worn out clothing to make floor rugs has been done for centuries. Many local governments and other public institutions, however, have acted in recent years

360. A 2010 article in the *New York Times* described a Colorado couple who recently moved to a home where “the renovated stairway is made from reclaimed barn wood. Their furniture is also made from recycled wood and steel; in fact, the coffee table is wood that was reclaimed twice, having been salvaged from reclaimed wood that was being made into flooring.” Joyce Wadler, *Green, but Still Feeling Guilty*, N.Y. TIMES, Sept. 30, 2010, at D1, available at <http://www.nytimes.com/2010/09/30/garden/30guilt.html>. The couple – both in their thirties:

also, use natural cleaning products, and are “constantly” drinking out of their Brita pitcher, so there is no need for disposable water bottles. All their personal-care products are organic, and Mr. Dorfman’s clothes are made from organic cotton and recycled materials — including his Nau blazer, which, he said, is made from recycled soda bottles.

Id. In all this religious correctness, however, “they have one great greenie flaw: they are addicted to disposable diapers,” which they believe are “really environmentally sinful. It’s plastic derived from petroleum. You use them once and then they get tossed in a landfill. It’s a terribly inefficient use of natural resources.” *Id.* As one of the Colorado couple lamented, “Not only do I feel guilt, I feel hypocritical.” *Id.* These actions are the symbols and rituals of the couple’s environmental religion.

361. See FRANK ACKERMAN, WHY DO WE RECYCLE?: MARKETS, VALUES AND PUBLIC POLICY 9 (1997) (“Suppose, then, that we view recycling as akin to a religious practice, an organized expression of widely held ecological values. The language and symbolism of recycling support this view.”).

to subsidize recycling with public funds and resources.³⁶² For establishment constitutional purposes, it would be necessary to ask: What is the objective of these recent government incentives to officially support recycling? Perhaps owing to escalating prices for natural resources, local governments may have found that it is possible to economize on their total waste handling budgets by recycling. They might now be able to sell newspapers and other recycled materials for more than the added costs of collecting these materials separately from other solid waste materials. In such cases, no establishment issue would arise.

But this is not necessarily the case.³⁶³ In practice, the added costs of recycling have often been greater for local governments than the savings incurred in reduced use of other methods of waste handling.³⁶⁴ In some cases recycling may be both economically wasteful and environmentally questionable.³⁶⁵ Government subsidies for recycling in such cases would be serving solely an environmentally religious purpose.

362. According to one study, New York City ranked sixteenth among twenty-seven cities for its “handling of waste.” This was in contrast to other “cutting edge green cities, like San Francisco, [that] offer curbside collection of wood scraps and compostable items at homes, restaurants and offices.” Among “guilt ridden environmentally conscious” New Yorkers, the lack of a more effective recycling program in New York was a source of personal frustration. This failing thus was not simply an economic problem but reflected a moral deficiency, as in the violation of a religious commandment. Mireya Navarro, *Lunch, Landfills and What Is Tossed*, N.Y. TIMES, Oct. 23, 2011, at MB1.

363. See John Tierney, *Recycling is Garbage*, N.Y. TIMES MAGAZINE, June 30, 1996, available at <http://www.nytimes.com/1996/06/30/magazine/recycling-is-garbage.html?pagewanted=all&src=pm>.

364. New York “[C]ity officials say that it is more expensive to recycle than to send trash to landfills and incinerators for disposal, and that they have to weigh those costs against environmental goals” that are not in and of themselves economically justified. See Navarro, *supra* note 362, at MB1.

365. Daniel K. Benjamin, *Eight Great Myths of Recycling*, 28 PERC POLICY SERIES 1, 2 (2003).

Aroused by fear of a garbage crisis, and spurred on by the misleading story of the garbage barge *Mobro*, Americans lost their sense of perspective on rubbish. A new consensus emerged: Reduce, reuse, and—especially—recycle became the only ecologically responsible solutions to America’s perceived crisis. Public rhetoric was increasingly dominated by claims that were either dubious or patently false.

At one time, recycling was advocated as a necessary public policy measure to prevent too much American land from being used for landfills.³⁶⁶ It did not take higher level mathematics, however, to show that the present and prospective space used by landfills represents a very tiny part of the American landscape.³⁶⁷ There may have been short-term transitional problems in increasing landfill capacity, but there is no overall shortage of space.³⁶⁸ Moreover, many poorer rural communities, facing economic hard times, have competed actively to host landfills, and some have already benefitted significantly from increased tax revenues.³⁶⁹ Short of a new factual demonstration to the contrary, it is safe to conclude that many acts of recycling are not meeting a practical social need;³⁷⁰ they are instead a form of religious ritual, pursued for the intrinsic value of reduction of human impacts on nature for its own sake.

Indeed, given a close factual examination, courts might well find that much of the current recycling occurring within the United States is for environmental religious purposes. Where the recycling costs are borne privately, there is of course no church and state problem. Where government funds or other public resources are used to subsidize religious acts of recycling,

366. *Id.* at 9.

367. See Jeff Bailey, *Rumors of a Shortage of Dump Space Were Greatly Exaggerated*, N.Y. TIMES, Aug. 12, 2005, available at <http://www.nytimes.com/2005/08/12/business/12trash.html?ei=5090&en=95bf833f5c00f922&ex=1281499200&partner=rssuserland&emc=rss&pagewanted=print>.

368. See ACKERMAN, *supra* note 361, at 11 (Describing the views of one analyst whose views were published in the *Wall Street Journal*: “[t]he landfill shortage that motivated many recycling programs . . . was always imaginary; there is enough landfill capacity for at least 16 years of disposal; and it is easy to create more when it is needed.”).

369. VIRGINIA WASTE INDUSTRIES ASS’N, ECONOMIC IMPACT OF VIRGINIA’S PRIVATELY-OPERATED LANDFILLS, TRANSFER STATIONS AND WASTE HAULING COMPANIES, <http://vwia.com/issues/economic-impact.php> (last visited Nov. 27, 2011).

370. Two economic analysts at Resources for the Future explain that recycling can have goals “such as conserving resources, increasing secondary materials demand, and addressing life-cycle externalities.” When these are the goals, recycling and other forms of “solid waste policy should not attempt to address these concerns directly,” and the goals should be pursued by means of other more economically appropriate policy instruments. Molly K. Macauley & Margaret A. Walls, *Solid Waste Policy*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 263 (Paul R. Portney & Robert N. Stavins eds., 2d ed. 2000).

however, this would be in violation of the Establishment Clause of the First Amendment.

c. Wilderness areas

A wilderness area is defined, according to the Wilderness Act of 1964, as a place “where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.”³⁷¹ The purpose of wilderness management is to minimize any further human impacts on nature, focusing on those particular wilderness areas that are relatively undisturbed. This reflects an environmental religious purpose. As William Dennis writes, in the second half of the twentieth century, the most common argument for wilderness preservation has been the “frankly theological argument that wilderness brought one closer to God and helped to restore the soul . . . for Americans, wilderness was to be the Temple and the Cathedral for ages to come,” where God’s own handiwork at the Creation is directly visible.³⁷² To be sure, wilderness areas often have other nonreligious purposes, such as public recreation, preservation of a historical and geological record, and the conservation of American landscape features. These purposes, however, could be served with less radical limits on human activity than are currently imposed in wilderness areas – the exclusion of any roads, chain saws, motor bikes, or other such “artificial” mechanical intrusions on the natural wilderness character.

John Copeland Nagle, Associate Dean and Professor of Law at the University of Notre Dame, undertook an investigation in 2005 to discover the true government purposes in creating wilderness areas. His analysis provides a good example of the types of background materials – reviews of the literature, data assembly and other information – needed for resolving religious establishment issues in specific cases relating to environmental religion. Nagle concludes that the core purpose in creating

371. Wilderness Act of 1964, 16 U.S.C. § 1331(c) (2006).

372. William Dennis, *Wilderness Cathedrals and the Public Good*, 37 THE FREEMAN 68 (1987), available at <http://www.thefreemanonline.org/columns/wilderness-cathedrals-and-the-public-good/>.

wilderness areas is religious.³⁷³ Additionally, he provides abundant citations to other works, including many scholarly

373. John Copeland Nagle, *The Spiritual Values of Wilderness*, 35 ENVTL. L. 955, 957-59 (2005) (providing that:

The answers to these questions about the meaning of wilderness have proved difficult to ascertain. In recent years, the explanations have emphasized biodiversity, recreation, or any of a number of general themes that were sounded by the Congress that enacted the Wilderness Act and the proponents of wilderness preservation before or since. But writing two years after the Wilderness Act became law, Michael McCloskey (who later became president of the Sierra Club) argued:

[C]urrent valuations of wilderness are a product of a long evolution in American thinking. The evolution has blended many political, religious, and cultural meanings into deeply held personal convictions. Those who felt those convictions meant to translate them into law in the Wilderness Act. Those who administer the law must look to those convictions to understand why the law exists. The convictions cannot be easily manipulated or refashioned to suit the administrators.

This article focuses upon a particular set of convictions that played a significant role in the drive for wilderness preservation: the spiritual values of wilderness lands. Representative Markey invoked those values in 2005 when he quoted Morris Udall, the namesake of Markey's proposed new Alaskan wilderness area, who once proclaimed that "[t]here ought to be a few places left in the world left the way the Almighty made them." John Muir used similar language over one hundred years before when he first visited Alaska. Muir wrote eloquently of "[t]he great wilderness of Alaska," yet he insisted that words are not "capable of describing the peculiar awe one experiences in entering these virgin mansions of the icy north, notwithstanding they are only the perfectly natural effect of simple and appreciable manifestations of the presence of God." Muir described a glacier whose "[e]very feature glowed with intention, reflecting the plans of God; and he "rejoic[ed] in the possession of so blessed a day, and feeling that in very foundation truth we had been in one of God's own temples and had seen Him and heard Him working and preaching like a man. Indeed, Roderick Nash insists that "the major theme in [Muir's] writings about Alaska was the way that wilderness symbolized divinity."

As Nash has explained in his classic exposition of *Wilderness in the American Mind*, religious themes have played a prominent role in the evolving American attitude toward wilderness. "Wilderness appreciation was a faith," writes Nash. Yet Nash concludes that "[i]n the last several decades the course of American thought on the subject of wilderness and religion has swung away from a direct linking of God and wilderness." . . . [But using less explicit language] the extensive congressional hearings preceding the

writings about wilderness that sustain his conclusion. Wilderness areas are established on lands owned and managed by the federal government,³⁷⁴ thus involving a commitment of public resources to an explicitly religious purpose. A wilderness area is a secular church or cathedral of environmental religion.³⁷⁵ Therefore, the creation of wilderness areas is analogous to government funding for the construction of a conventional Christian church. Both acts are prohibited under the Establishment Clause of the Constitution.

At least two possible resolutions can be imagined. The federal government could dis-establish wilderness areas, opening them up to a wider range of uses and management policies – perhaps emphasizing more general recreational purposes and providing a wider range of facilities and means of access to the lands more suited to full use by ordinary Americans. Alternatively, the government could put the lands up for public auction, allowing environmental organizations and other private groups to buy them and thus create, by private action, a set of environmental churches. Many wilderness areas do not have high economic value, which is one reason they were able to win

enactment of the Wilderness Act contained abundant references to the spiritual values of wilderness, just as religion played a significant role in the more famous congressional enactment in 1964 of the Civil Rights Act. Additionally, the religious voice for wilderness preservation has continued to develop during the forty years since the Wilderness Act became law, a voice whose implications have yet to be explored by Nash and most of the more recent legal scholars to consider wilderness.).

374. *Campaign for America's Wilderness*, PEW ENVT'L WORKING GROUP, <http://www.pewenvironment.org/campaigns/campaign-for-americas-wilderness/id/62078> (last visited Nov. 27, 2011).

375. See MICHAEL POLLAN, *SECOND NATURE: A GARDENER'S EDUCATION* 87-88 (1991):

A people who believe that nature is somehow sacred – God's second book, according to the Puritans; the symbol of spirit according to the transcendentalists – will probably never feel easy bending it to their will, and certainly not for aesthetic reasons. Indeed at least since the time of Thoreau, Americans have seemed more interested in the idea of bending *themselves* to nature's will, which might explain why this country has produced so many more great naturalists than great gardeners. We evidently feel more comfortable taking moral instruction . . . at the feet of trees than arranging plants into pleasing compositions.

Congressional designation, and organizations such as the Nature Conservancy or land trusts, might easily be the highest bidders.

d. The Arctic National Wildlife Refuge (ANWR)

The Arctic National Wildlife Refuge (ANWR) covers about 19.3 million acres in northeast Alaska adjacent to the Beaufort Sea in the Arctic Ocean.³⁷⁶ Located in one of the places most remote from civilization, environmental organizations have long described the ANWR as among the last places on earth still untouched by the human hand.³⁷⁷ One portion of the ANWR contains what is believed to be the largest undeveloped oil reserve in North America. This two million acre area is estimated by the United States Geological Survey to contain about ten billion barrels of recoverable oil and an economic worth of around \$850 billion at current oil prices.³⁷⁸ Congressional approval would be required to develop the oil in the ANWR, an action which has been vigorously opposed by environmental groups for many years.³⁷⁹

The heroic environmental efforts made to keep ANWR oil an untapped resource reflects the tenets of environmental religion. The ANWR is the equivalent of a wilderness area, the protection of which is made doubly religiously significant because the extraordinary value of the oil that underlies it adds powerfully to its symbolic communication of a religious purpose. Religions historically have made large sacrifices to their gods to affirm the

376. U.S. FISH & WILDLIFE SERV., A SENSE OF THE REFUGE 2 (2011), available at <http://arctic.fws.gov/pdf/senseofrefuge.pdf>.

377. The Natural Resources Defense Council (NRDC) states that “if Congress allows oil drilling in the coastal plain, it would set a dangerous precedent. Not only would oil development permanently scar this pristine, fragile wilderness, but it also would open the door to industrializing America’s last remaining untouched wildlands.” *The Arctic National Wildlife Refuge: Protecting Life on the Coastal Plain*, NRDC, <http://www.nrdc.org/land/wilderness/arcticrefuge/facts1.asp> (last visited Dec. 11, 2011).

378. *How Much Oil is Available in ANWR?*, ANWR, <http://www.anwr.org/Background/How-much-oil-is-in-ANWR.php> (last visited Nov. 27, 2011).

379. See generally M. LYNNE CORN ET AL., CONG. RESEARCH SERV., RL 31278, ARCTIC NATIONAL WILDLIFE REFUGE: BACKGROUND AND ISSUES (2003), available at <http://www.policyarchive.org/handle/10207/bitstreams/1346.pdf>.

strength of their commitments to the faith.³⁸⁰ As Morriss and Cramer observe, in the ANWR “we are called to sacrifice for the sake of making the sacrifice [of the near trillion dollars of oil value], making the sacrifice religious” in its motivation.³⁸¹

A factual investigation would be necessary in the case of the ANWR, however, before concluding that the current exclusion of oil development is a religious act. Although the goals for the ANWR clearly fall within the religious category, the government may have other reasons for keeping this area pristine that do not reflect environmental, or any other, religious purposes. The government might want to keep the ANWR undeveloped as insurance against future domestic oil needs that are unknown at this point. The government also might have decided to speculate on the future value of the ANWR oil, expecting future oil prices to rise so rapidly that the discounted present value of the oil is maximized by keeping it untouched. Absent an official statement of economic, rather than religious intent, and an accompanying plausible justification for such a policy of deferred oil development, the government’s setting aside of the ANWR for an environmental religious purpose would be deemed an unconstitutional Establishment Clause violation.

e. Ecosystem Management in the National Forests

The national forests, managed by the United States Forest Service which is a part of Department of Agriculture, cover about eight percent of the land area of the United States.³⁸² In Idaho, almost forty percent of the state’s total land is within national forests;³⁸³ in California, it is twenty percent of all land.³⁸⁴ For

380. See generally JEFFREY CARTER, UNDERSTANDING RELIGIOUS SACRIFICE: A READER (2003).

381. Morriss & Cramer, *supra* note 200, at 46.

382. Robert H. Nelson, *The Public Lands*, in CURRENT ISSUES IN NATURAL RESOURCE POLICY 16-17 table 2-1 (Paul R. Portney ed., 1982). The total area of the United States is 2.3 million acres and national forest lands are equal to 187 million acres.

383. *Id.* (National forest lands in Idaho are 20.4 million acres and the total Idaho land acreage is 52.9 million acres).

384. *Id.* (National forest lands in California are 20.4 million acres and the total California land acreage is 100.2 million acres).

many decades, beginning with the creation of the Forest Service in 1905, the national forests were managed according to the philosophy of “multiple-use” management.³⁸⁵ The goal was to examine the various potential human uses of national forest lands, and then to choose a socially optimal combination, based on the best managerial judgment of the Forest Service.³⁸⁶ The explicit purpose of this procedure was to maximize the contribution of the national forests to human welfare in the United States – the “greatest good of the greatest number for the longest time,” as the founder of the Forest Service, Gifford Pinchot, famously put it.³⁸⁷

In the 1990s, however, this original management goal was abandoned by the Forest Service. The new official goal of the government, “ecosystem management,” seeks to achieve ecologically desirable conditions in the national forests.³⁸⁸ Human welfare might be incidentally advanced in the process, but the fundamental purpose is to achieve a “natural,” “healthy,” “sustainable” or other ecologically appropriate outcome for these lands. As Roger Sedjo, the longtime director of the forest economics and policy program at Resources for the Future writes, the new regulations adopted by the Forest Service in the 1990s to implement the National Forest Management Act “give biological and ecological considerations priority over other goals.”³⁸⁹ For example, the new managerial rules “require the Forest Service to ensure the widespread maintenance of viable plant and animal populations” as an end in itself, even when this effectively proscribes more economically valuable human uses of the lands.³⁹⁰ Under ecosystem management, the large timber harvesting program on national forest lands, once the source of as much as twenty percent of U.S. softwood timber, has been

385. See ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 68 (1995).

386. See *id.* at 47.

387. Gifford Pinchot Quotes, THINKEXIST.COM, http://thinkexist.com/quotes/gifford_pinchot/ (last visited Nov. 27, 2011).

388. ROBERT H. NELSON, A BURNING ISSUE: A CASE FOR ABOLISHING THE U.S. FOREST SERVICE 45 (2000).

389. Roger Sedjo, *Does the Forest Service Have a Future?*, 23 REG. 51, 51 (1998).

390. *Id.*

drastically reduced, except where timber harvesting can be shown to serve other ecological purposes.³⁹¹

The ultimate ecosystem management ideal is to restore national forest lands to some past historic condition that can then be said to represent a “natural” state of the lands, as they existed before pervasive human impacts altered their condition. As Sedjo comments, “major environmental groups . . . oppose timber harvesting of any type, including that necessary to meet other objectives (e.g., wildlife habitat).” Indeed, many favor an essentially hands-off approach to “management,” which results in basically no management at all.³⁹² This is in sharp contrast to the old philosophy of active multiple-use management. Congress never officially mandated or otherwise endorsed this shift, but instead it was imposed on the U.S. Forest Service through the efforts of outside environmental groups through a successful strategy of litigation, and with the aid of a number of sympathetic federal judges.³⁹³

Ecosystem management amounts to the adoption of the normative vision of Aldo Leopold, Rachel Carson, David Brower, and other leading environmentalists of the twentieth century. This vision underlies much of the thinking of the environmental movement which has pushed aggressively for its adoption as a guiding principle for public policy. Moreover, as examined above, this vision evolved from explicitly religious sources, and in the twentieth century continued to express a deeply religious understanding of the proper relationship of human beings and nature (if now more often in an implicitly religious form).³⁹⁴ With the adoption of ecosystem management as the official guiding principle for all land management activities conducted by the Forest Service, national forest management has become a form of national environmental religious management.³⁹⁵ Incidental

391. NELSON, *supra* note 388, at xiii, 56-58.

392. Sedjo, *supra* note 389, at 54.

393. See GEORGE HOBERG, SCIENCE, POLITICS AND U.S. FOREST SERVICE LAW: THE BATTLE OVER THE FOREST SERVICE PLANNING RULE 10 (2003).

394. See *supra* Part V.

395. Under the banner of ecosystem management, the attempt to present religious management of the national forests as scientifically-based has often resulted in intellectual incoherence. Allan Fitzsimmons writes that:

human benefits may follow, but the explicit purpose is to disavow the direct pursuit of human needs, except of a religious kind.³⁹⁶ Remarkably, the judiciary in this case (or at least some of its members) not only failed to maintain religious neutrality, but actually issued many decisions directing the Forest Service, in practical effect, to establish environmental religion as the new faith providing the purposes and guidance for national forest management policies. This would seem to be a clear establishment violation. One possible remedy in the case of the national forests would be to return to the longstanding practice of multiple use management of the national forests to meet human (non-spiritual, or “profane” in the language of Durkheim) needs. An alternative would be to privatize the lands, leaving private landowners free to follow any principles they choose in their land management practices.

f. Environmental Religion in the Public Schools

In their review of the history of the Establishment Clause, Jeffries and Ryan note that a large part of the First Amendment jurisprudence of the Supreme Court has involved the constitutionally appropriate place of religion in public schools.³⁹⁷ In the second half of the twentieth century, the Court has

fog enshrouds the new paradigmists’ interpretation of ecosystem management. This is true even though they write and speak constantly about the need for science and the development of specific, measurable goals. . . . Yet, even staunch advocates of the new approach acknowledge that producing such measures has been difficult. As [Jane] Lubchenko so eloquently understates, the goal of sustaining ecosystems is difficult to translate into specific environmental objectives in practice. Other new paradigm scholars concede that [ecosystem management] is ‘lacking of the discipline and direction of the old paradigm [of multiple-use management].’ Scholars concede that virtually all of the key terms associated with the new paradigm are controversial within the scientific community.

ALLAN K. FITZSIMMONS, *DEFENDING ILLUSIONS: FEDERAL PROTECTION OF ECOSYSTEMS* 15 (1999).

396. *See, e.g.*, U.S. FOREST SERVICE, NATIONAL SUMMARY REPORT: DATE COLLECTED FY 2005 THROUGH FY 2009, at 2 (2010) (stating that those who visit “National Forest lands do so to improve their physical, psychological and/or spiritual sense of well being.”).

397. Jeffries & Ryan, *supra* note 52, at 2.

generally acted to limit the presence of traditional religion in this realm.³⁹⁸ The Court has not, however, applied such constitutional principles to all religions. It has not, in particular, limited the active teaching of environmental religion in public elementary and secondary schools.³⁹⁹ As many parents across the United States are well aware from the experiences and reports of their own children, public schools today actively persuade students to commit to the messages of environmental spirituality. The ultimate result has been a government policy of advocating one form of religion in public schools, secular environmental religion, while at the same time prohibiting the teaching of older Christian, Jewish and other traditional forms of religion. As noted above, secular religion, ironically, is often an implicit method of communicating Calvinist and other much older religious truths. By almost any reasonable understanding of the Establishment Clause of the First Amendment, such overt religious discrimination in favor of secular environmental religion and against traditional religion would be deemed unconstitutional.

What might be the remedy? One possibility is that the courts could require that schools limit their environmental teaching to religiously-neutral environmental science, requiring a significant change in the way environmental subjects are taught in most public schools. The emphasis would necessarily remain on biology and the scientific understanding of ecological systems,

398. *Id.* at 290.

Given the increasing diversity of religious practice in America, the only way to avoid choosing sides was to remain silent. Thus, the Court's second great project in the years 1947-1996 was to make the public schools secular. In ten non-aid cases, the Court struck down laws dealing with primary and secondary education. These decisions directly promoted public secularism as an accommodation to religious pluralism. Specifically, the Court disallowed religion classes in public schools and prohibited officially sponsored student prayer, graduation prayer, Bible reading, and silent meditation. The Court also barred display of the Ten Commandments and struck down laws banning the teaching of evolution and mandating the teaching of creationism. In all these decisions, the Court severed ties between the public schools and particular religious beliefs or practices [of a traditional kind].

399. *See e.g., Clifford, supra* note 209.

rather than the moral virtues of protecting the earth from further adverse human impacts and of restoring natural systems to some original more “healthy” and “sustainable” conditions (as in the Garden of Eden). Environmental policy relating to environmental pollutants would return to its origins as a public health strategy, seeking to protect human beings from harmful consequences to their physical well-being, acting, for example, to curb air and water pollution as a matter of public health.

An alternative possibility would be to recognize that religion is a central element in American history and that it plays a key role in educating children to moral behavior and other desirable standards of good conduct. State support for the establishment of religion thus might be judged to be constitutionally acceptable (admittedly, achieving this result might require amendment of the United States Constitution). While offering support to religion, the government, however, would have to maintain neutrality among the many religions present in American culture. Following a strict rule of religious neutrality, students in the public schools thus might receive lessons in both traditional, historical religion and secular environmental religion on an equal basis.

This might simply lead, however, to a watering down of all forms of religious teaching to a bland set of least common denominator messages. In such a case, the goal of advancing religion in American life – religion in general, not any one religion in particular – would not be served. Another alternative would be to allow parents to send their children to publicly-funded religious schools of their own choosing.⁴⁰⁰ Indeed, this has been the accepted practice in some other nations where church and state principles have been given a more flexible interpretation.⁴⁰¹ There could be both secular environmental

400. See Cheng, *supra* note 41, at 757 (“The ideal solution to an educational system that has an inherent tendency to infringe on the rights of religious parents to direct the education of their own children is to provide them with a meaningful capacity to choose alternate instruction in private (or home) schools.”).

401. In England, for example, the government has long given public funds to support private religious schools. See *Faith Schools*, BRITISH HUMANIST ASS’N, <http://www.humanism.org.uk/campaigns/religion-and-schools/faith-schools> (last visited Oct. 31, 2011).

religious schools and Christian religious schools, for example, where the full curriculum would reflect the specific religious orientation of the public school. There could of course also be other publicly-supported schools that did not teach either of these religions, and perhaps some would teach no religion at all (although close examination might reveal that some implicit religion was being taught, even where religion was outwardly disavowed). Governments would offer support for all schools, religious and nonreligious alike, on a neutral basis.

A system of public vouchers to attend private schools, including private religious schools, would be another way to accomplish this broad purpose. Systems of charter schools, however, are at present much more numerous than voucher systems. Because charter schools are considered public, a charter school may not, at present, be a Catholic, Protestant or other traditional religious school, although it can be a secular environmental religious school. In order to achieve full religious neutrality, the courts would have to rule that the Establishment Clause requires that Christian, Jewish, Muslim and other charter schools be given public support on an equal basis with any environmental or other secular religious charter schools, opening the charter school system to a wide range of faiths and denominations. The principle of religious neutrality would be preserved because parents and their children — not the government — would make the ultimate choice from a range of available religious and non-religious public charter schools.

XII. CONCLUSION

Religion is a much wider phenomenon in contemporary life than expressed by Christianity, Judaism, Islam or any other historically familiar forms of religion.⁴⁰² In the twentieth century, Marxism, democratic socialism, American progressivism and various other forms of economic religion, often borrowing

402. Psychology, for example, is another belief system that may become a secular religion. Grounded in psychology, “humanist selfism is not a science but a popular secular substitute religion, which has nourished and spread today’s widespread cult of self-worship.” PAUL C. VITZ, *PSYCHOLOGY AS RELIGION: THE CULT OF SELF-WORSHIP* 141 (1977); *see also* WILLIAM M. EPSTEIN, *PSYCHOTHERAPY AS RELIGION: THE CIVIL DIVINE IN AMERICA* (2006).

significantly from historic Christian and Jewish sources, became the most influential religions in the public arena.⁴⁰³ Secular environmental religion emerged in the 1960s to become a formidable contender, challenging both traditional Judeo-Christian religious traditions and economic religious ideas.⁴⁰⁴ Secular religions such as economics and environmentalism are valid religions. It is time for the legal profession and the Supreme Court to fundamentally rethink Establishment Clause jurisprudence to reflect this reality.

Some observers might argue that the solution must be a revitalized dedication to complete exclusion of religion from

403. Economic religions in their various forms – their many socialist, capitalist and other “denominations” – teach that economic progress is the path to a new heaven on earth. See NELSON, REACHING FOR HEAVEN ON EARTH, *supra* note 25; see also NELSON, ECONOMICS AS RELIGION, *supra* note 25. This article focuses on environmental religion, but a few words about economic religion and issues of church and state may be appropriate. Economic religion is likely to raise fewer constitutional issues, because the goal of economic progress does not necessarily require a belief in economic progress as the salvation of the world. Simply wanting to have more goods and services – wanting to be richer – does not necessarily require a belief that progress will transform the basic human condition, including its basic moral and spiritual condition, for the better. This is not to say that issues of church and state can never arise with respect to economic religion. A First Amendment establishment concern would be raised by a government policy or action that had no practical purpose and served merely as a symbol of the faith that economic progress will save the world. It is also possible that in the worship of “growth,” religious actions will be taken that are counterproductive of basic human welfare. HERMAN E. DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (1997). This might be treated as a church and state issue but would involve complex factual determinations that might have to be addressed on a national or even global scale, thus greatly complicating matters. Environmental religion is more likely to raise church and state issues because it often seeks to separate human beings and nature. Nature should be protected from human impacts. “Natural” and “unnatural” become environmental substitutes for good and evil, and humans are often seen to fall on the unnatural side of this divide. Environmental policies and actions are thus more likely to be advocated for their own religious sake (their “intrinsic value”), rather than for any practical, ordinary non-religious benefits for human beings. Even in that case, admittedly, there is no church and state problem as long as the policies and actions are simply informed by environmental religion as part of the public debate. Some environmental policies and actions, however, as discussed in this article, go beyond that to support the official establishment of secular environmentalism as a state religion.

404. See NELSON, REACHING FOR HEAVEN ON EARTH, *supra* note 25; see also NELSON, ECONOMICS AS RELIGION, *supra* note 25.

public life. This would prove impossible, however, as religion of one sort or another has pervaded the public policy thinking and preferences of most people. The participants in the democratic process routinely bring religious ideals into their role as voters and advocates. Government, in effect, resolves the many conflicting individual public opinions, religiously based and otherwise, through the normal workings of the political process. When there is a fairly wide consensus, the government becomes the vehicle for expressing this consensus which may or may not be grounded in a set of religious convictions. In any case, there is no problem of state establishment of religion when the role of religion is simply to inform individual preferences as they are expressed through the democratic process.

Religion, in its many forms of expression in American life, is thus often thoroughly and appropriately intertwined with acts of governance. An establishment violation can still occur, however, when government deliberately acts to advance one religion over another as a matter of its institutional status or legitimacy in the public arena. As consideration of environmental religion illustrates, the false distinction for constitutional purposes between traditional religion and secular religion has this consequence. Government offers funding and support for a variety of activities that promote a secular environmental religion. It would deny this same funding and support for these same activities if they similarly worked to advance Christianity or other traditional religions. Teaching religion in public schools is a clear example, deemed to be constitutionally permissible for environmental religion, yet constitutionally impermissible for Christian religion.

The remedy is not to eliminate environmental religion from the school system or as the basis for public action. Removing religion from the public arena is impossible in practice, considering the wider variety of religious forms, and in any case would be undesirable in principle, as a society of religious nihilists might well be dysfunctional. The solution instead is to put secular religions, such as environmentalism and economic religions, and traditional religions, such as Judaism and Christianity, on equal public footing. In some cases, this might result in curtailing the role of religion in government by removal

from certain areas of activity, as in the disestablishment of wilderness churches. In other cases, this might result in wider government support for religion, for example in the form of public funding for both secular and traditionally religious charter schools.

There is no *a priori* answer here. Specific areas of governmental policy and administration will have to be closely examined. If the environmental purpose is determined to be predominantly religious, the issue then would then have to be faced: is government now discriminating in favor of some religions and against others in a manner that serves to establish the favored religion as a body of beliefs and as an institution? If that is the case, what is the best remedy: removing government altogether from this area or expanding government support in the area to include all religions, secular and traditional alike, on a truly equal basis? This is for the government, including the courts, to eventually decide.