

1-15-1994

## Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?

Michael R. O'Neill

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Constitutional Law Commons](#), [Education Law Commons](#), [First Amendment Commons](#), [Religion Law Commons](#), and the [State and Local Government Law Commons](#)

### Recommended Citation

Michael R. O'Neill *Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?*, 21 Pepp. L. Rev. Iss. 2 (1994)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol21/iss2/4>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact [bailey.berry@pepperdine.edu](mailto:bailey.berry@pepperdine.edu).

# Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?

## TABLE OF CONTENTS

I.	INTRODUCTION .....	478
II.	SECULAR HUMANISM—MYTH OR REALITY? .....	482
III.	DEFINING "RELIGION" FOR FIRST AMENDMENT PURPOSES ...	486
	A. <i>The Ramifications of Defining Religion</i> .....	488
	B. <i>Approaching Religion from a Sociological         Perspective</i> .....	489
	C. <i>The Supreme Court's Ever-Changing         Definition of Religion: Substantive vs.         Functional</i> .....	490
	1. The Initial Substantive Approach .....	490
	2. A Move Toward the Center .....	492
	3. The Existing Functional Approach .....	493
IV.	SECULAR HUMANISM IS A RELIGION FOR FIRST AMENDMENT PURPOSES .....	499
	A. <i>Secular Humanism Comports with the         Court's Definition of Religion</i> .....	499
	1. Secular Humanism Is a Non-Theistic Religion .	500
	2. Secular Humanism Is "Parallel" to Theism ...	505
	3. Independent Characterizations Are Irrelevant in Determining the Status of Secular Humanism .....	508
	B. <i>Courts Have Expressly Adopted Secular         Humanism As a Religion for First         Amendment Purposes</i> .....	509
	C. <i>A Response to Some Constructive Scholarly         Criticism</i> .....	512
V.	EVOLUTION IS A FUNDAMENTAL TENET OF SECULAR HUMANISM THAT IS TAUGHT IN PUBLIC SCHOOLS .....	515
	A. <i>Evolution's Tumultuous History in the Courts         and in the Classrooms</i> .....	515
	1. The Infamous "Monkey Trial"—A Fundamentalist Victory .....	517
	2. <i>Epperson</i> —The Fundamentalist's Downfall ...	520

	B. <i>Evolution—The Foundation of Secular Humanism</i> . . . . .	522
VI.	THE PROVERBIAL WALL BETWEEN CHURCH AND STATE—AN HISTORICAL PERSPECTIVE OF THE FIRST AMENDMENT ESTABLISHMENT CLAUSE . . . . .	524
	A. <i>A Trip Through Early American History</i> . . . . .	524
	B. <i>The “Wall” and the Separationist Approach</i> . . . . .	526
	C. <i>Dissent from the Chief Justices</i> . . . . .	528
VII.	THE TEACHING OF EVOLUTION IN PUBLIC SCHOOLS IS ARGUABLY A VIOLATION OF THE FIRST AMENDMENT ESTABLISHMENT CLAUSE . . . . .	531
	A. <i>The Supreme Court’s Role—Keep Religion Out of the Public Schools</i> . . . . .	532
	B. <i>The “Midnight Ghoul”—The Lemon Test</i> . . . . .	535
	C. <i>The Endorsement Test—The Impending Doom of Lemon</i> . . . . .	538
VIII.	PROPOSED SOLUTION TO THE UNSOLVABLE PROBLEM . . . . .	546
	A. <i>Previous Proposals That Have Failed</i> . . . . .	546
	B. <i>A Proposition from the Author—Fact vs. Scientific Hypothesis—Qualified Teaching Practices</i> . . . . .	547
IX.	CONCLUSION . . . . .	551

## I. INTRODUCTION

On an otherwise uneventful Christmas Eve, my niece sought an explanation regarding why our family celebrates Christmas. My niece attends a public middle school, and as I was soon to learn, her curiosity and confusion stemmed from material that she had been taught in school. She informed me that her teacher had affirmatively stated that the theory of evolution is the *only* true explanation of “where we come from.” As my father and I attempted to explain the teachings of the Bible, we were met with vehement protests. After all, didn’t we know that “we all come from monkeys?”<sup>1</sup>

---

1. In 1981, this exact fact pattern presented itself before California Superior Court Judge Irving H. Perluss. Peter Gwynne et al., “*Scopes II*” in California, NEWSWEEK, Mar. 16, 1981, at 67. Kelly Segraves, co-founder of the Creation Science Research Center, “argued that the State of California had violated the religious freedom of his children by teaching evolution as fact.” *Id.* Segraves’ son testified that his public school teacher insisted that he descended from an ape. *Id.* Judge Perluss ruled that school teachers must qualify their discussions of evolution with a statement that evolution is only a scientific hypothesis and not a proven fact. *Id.*; see Segraves v.

The First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."<sup>2</sup> The Supreme Court has consistently interpreted the First Amendment as requiring government to remain completely neutral toward religion.<sup>3</sup> The Court has made it perfectly clear that the First Amendment is violated when government seeks to utilize the public school forum as a means to support or encourage a particular religious belief.<sup>4</sup> It has been stories such as mine,

California Bd. of Educ., No. 278978 (Cal. Super. Ct. June 12, 1981).

2. U.S. CONST. amend. I. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Supreme Court applied the First Amendment to the states via the Fourteenth Amendment. See also *Everson v. Board of Educ.*, 330 U.S. 1, 17-18 (1947) (upholding a statute authorizing the government to reimburse parents for transportation costs incurred in sending their children to Catholic schools); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (ruling that compelling public school students to recite the Pledge of Allegiance is a violation of the First and Fourteenth Amendments); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 414-16 (1986) (providing a history of the incorporation of the religion clauses). For an argument challenging the incorporation of the Establishment Clause, see Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1700 (1992) (asserting that the Framers of the First Amendment intended the Establishment Clause to curb federal intrusions into church-state activity).

3. See *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (ruling that "moment of silence" law endorsed religion in violation of the First Amendment); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963) (declaring Bible reading in public schools unconstitutional).

But see *Widmar v. Vincent*, 454 U.S. 263 (1981). The University of Missouri at Kansas City recognized over 100 student organizations. *Id.* at 265. However, the University refused to allow a Christian student group to conduct its meetings in University facilities on the ground that it would violate the Establishment Clause. *Id.* The Supreme Court refused to decide the case on free exercise grounds, but ruled in favor of the Christian group on free speech grounds. *Id.* at 277.

As one commentator correctly noted, "[O]ne can hardly describe as 'neutral' a state policy that provides meeting rooms to Republicans, communists, musicians, and stamp collectors, but denies similar facilities to religious groups." Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 820 (1984). "Such discrimination seems to imply that religion is a peculiarly disfavored activity." *Id.* (emphasis added).

4. See *Wallace*, 472 U.S. at 60-61 (declaring that a "moment of silence" law violated the First Amendment because the fundamental purpose of the law was to promote religion); see also *Stone v. Graham*, 449 U.S. 39, 40 (1980) (striking down a statute requiring the Ten Commandments to be posted in public school classrooms); *Schempp*, 374 U.S. at 205 (declaring Bible reading in public schools unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (declaring unconstitutional the recitation of a state-composed prayer in the public schools).

however, that have prompted many commentators and religious believers to wonder whether such a one-sided teaching of evolution is also a violation of the alleged neutrality requirement mandated by the First Amendment.<sup>5</sup>

For more than thirty years, the Supreme Court has been plagued with charges of First Amendment violations involving public school curriculums.<sup>6</sup> In fact, various organizations, bombarding local school boards with charges that religious beliefs are unconstitutionally infiltrating the public school curriculum, have seriously affected everyday public life.<sup>7</sup>

The purpose of this Comment is not to take the position that the theory of evolution should be prohibited in public school classrooms. The opposite is the case. As the primary source of education for millions of American school children, public education should be used as a forum to propagate ideas and the vast wealth of knowledge that has accumulated throughout the world. This Comment will, however, emphasize that the teaching of evolution, as fact and as the sole basis of human origin, does raise some very serious First Amendment concerns.

The thrust of this Comment is to emphasize that there is a very fine line between secularism and sectarianism. Just as the First Amendment prohibits public schools from supporting theistic religions,<sup>8</sup> so too should the First Amendment also prohibit public school teachers from (1) supporting non-theistic religions and (2) denigrating the theistic beliefs held by students and their parents.<sup>9</sup> This Comment addresses

---

5. See, e.g., JAMES HITCHCOCK, *WHAT IS SECULAR HUMANISM?* 106 (1982).

6. See *supra* note 4.

7. See, e.g., Carol Masciola, *Judgment Day Approaches for Vista Schools*, L.A. TIMES, Nov. 16, 1992, at B1. San Diego, California residents were allegedly "scared to death" because "Christian fundamentalists" were elected to the local school board. *Id.* This fear, and the labeling of the board members as "Christian fundamentalists," was generated solely on the basis that the new members professed a belief in God and the teachings of the Bible. *Id.* Many parents and teachers feared that such beliefs would prompt the new school board to advocate such things as censorship, school prayer, and the teaching of creation science. *Id.*; see also Maia Davis, *Booklet OK'd Despite Uproar*, L.A. TIMES, Feb. 27, 1993, at A11. The California chapters of the League of Women Voters and the ACLU threatened to sue the Conejo Valley Unified School Board for approving the use of a certain booklet in sex education classes. *Id.* These organizations charged that the booklet, which is published by a Christian organization, violates the First Amendment because it advocates abstinence—a Christian philosophy—as a method of avoiding teenage pregnancy and the transmission of disease. *Id.*

8. See *supra* note 4.

9. The following quotation, issued by United States District Court Judge William B. Hand, exemplifies the purpose of this Comment. Where appropriate, the word "Comment" has been substituted for the word "case."

The purpose of this [Comment] is not about returning prayer to the schools . . . . Neither does this [Comment] represent an attempt of narrow-

the very delicate and controversial issue of whether the teaching of evolution in public schools violates the neutrality requirement mandated by the First Amendment.<sup>10</sup> Particularly, this Comment examines whether the teaching of evolution as fact, rather than as theory, is tantamount to the unconstitutional establishment of the religion of Secular Humanism.

Section II describes the various forms of humanism and identifies Secular Humanism as an established and identifiable belief structure.<sup>11</sup> Section III attempts to establish a working definition of religion for First Amendment purposes.<sup>12</sup> Section IV expands upon the beliefs and tenets of Secular Humanism, compares those beliefs with a line of Supreme Court decisions, and concludes that Secular Humanism can be classified as a religion for First Amendment purposes.<sup>13</sup> Section IV also points out that various courts, including the United States Supreme Court, have explicitly stated that Secular Humanism is a religion for First Amendment purposes.<sup>14</sup> Section V identifies the theory of evolution as a fundamental tenet of Secular Humanism.<sup>15</sup> Section VI provides an historical analysis of the underlying meaning of the Establishment Clause and the Separation of Church and State Doctrine.<sup>16</sup> Section VII examines the various approaches utilized by the Supreme Court in determining whether government action violates the Establishment

---

minded or fanatical proreligionists to force a public school system to teach only those opinions and facts they find digestible. Finally, this [Comment] is not an attempt by anyone to censor materials deemed undesirable, improper, or immoral. What this [Comment] is about is the allegedly improper promotion of certain religious beliefs, thus violating the constitutional prohibitions against the establishment of religion . . . .

*Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 974 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). For a detailed discussion of *Smith* and its ramifications on this Comment, see *infra* notes 257-75 and accompanying text.

10. As one commentator noted, "A textbook that teaches that the human species evolved gradually over millions of years from simple life forms is anything but neutral from the viewpoint of Biblical literists." Johnson, *supra* note 3, at 823. Although our "politically correct" society often tends to persecute rather than commend the "Biblical literist," this Comment assumes that the drafters of the First Amendment intended to protect the religious freedoms and liberties of *everyone*—including the "Biblical literist."

11. See *infra* notes 20-64 and accompanying text.

12. See *infra* notes 65-171 and accompanying text.

13. See *infra* notes 172-299 and accompanying text.

14. See *infra* notes 254-81 and accompanying text.

15. See *infra* notes 300-71 and accompanying text.

16. See *infra* notes 372-416 and accompanying text.

Clause.<sup>17</sup> In light of these approaches, Section VII concludes that the teaching of evolution in the public schools, especially if taught as fact rather than theory, is tantamount to furthering the tenets of a religion, and is therefore arguably a violation of the Establishment Clause.<sup>18</sup> Section VIII provides a possible solution to this seemingly unresolvable dilemma.<sup>19</sup>

## II. SECULAR HUMANISM—MYTH OR REALITY?

The term "Secular Humanism" is often surrounded by confusion and controversy.<sup>20</sup> Much of this confusion stems from the usage of the term by the modern media.<sup>21</sup> The custom in the press is to imply that Secular Humanism is something "which does not really exist."<sup>22</sup> The media often portrays Secular Humanism as a fiction created by extreme fundamentalists as a tool to discredit others who do not share their views.<sup>23</sup>

The term "humanism" also creates confusion because the word has various distinctive meanings.<sup>24</sup> Although the term generally refers to a belief structure that places great emphasis on man and his intrinsic importance,<sup>25</sup> author James Hitchcock<sup>26</sup> identifies four distinct types of

---

17. See *infra* notes 417-528 and accompanying text.

18. See *infra* notes 444-528 and accompanying text.

19. See *infra* notes 529-73 and accompanying text.

20. HITCHCOCK, *supra* note 5, at 7.

21. *Id.*

22. *Id.*

23. *Id.*; see also Kenneth E. Woodward & Eloise Salholz, *The Right's New Bogeyman*, NEWSWEEK, July 6, 1981, at 48. The media also portrays Secular Humanism as an anti-Christian creed created by fundamentalists as a means to attack the government, the media, and public education curriculums. *Id.*

While such portrayals are erroneous, as will be demonstrated in Section II and Section IV(A), it is not surprising that such characterizations exist. Jerry Falwell, president of the Moral Majority, a fundamentalist religious organization, has often attacked Secular Humanism as a belief structure that "advocates abortion on demand, recognition of homosexual[ity], free use of pornography, legalizing of prostitution and gambling, and free use of drugs, among other things." ROBERT E. WEBBER, SECULAR HUMANISM: THREAT AND CHALLENGE 19 (1982) (citing Charles Krauthammer, *The Humanist Phantom*, NEW REPUBLIC, July 25, 1981, at 21).

Members of the judiciary have also greatly misunderstood the term Secular Humanism. For example, Justice Nolan of the Massachusetts Supreme Court stated that Secular Humanism is tantamount to "modern paganism." *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E.2d 626, 640 (Mass. 1986) (Nolan, J., dissenting).

24. HITCHCOCK, *supra* note 5, at 7-8. For a discussion of the different types of humanism, see *infra* notes 29-47 and accompanying text.

25. WEBBER, *supra* note 23, at 20.

26. Hitchcock's credentials include an M.A. and a Ph.D. from Princeton University.

humanism.<sup>27</sup> Despite the fallacies propagated by the media and other commentators, Hitchcock's analysis establishes that Secular Humanism is an identifiable belief structure which does truly exist.<sup>28</sup>

Hitchcock defines the first form of humanism as simply an interest "in those intellectual and academic disciplines called the humanities."<sup>29</sup> The study of the humanities generally refers to the academic pursuit of literature, history, fine art, philosophy, and theology.<sup>30</sup> This form of humanism focuses on what man is able to accomplish and create using his own mind.<sup>31</sup> In this sense, contrary to media labeling,<sup>32</sup> there is nothing derogatory about calling a person a humanist—even from a "fundamentalist" perspective.<sup>33</sup>

The second form of humanism, in comparison to the first form, can almost be classified as "anti-humanism."<sup>34</sup> Hitchcock notes that, contrary to the first form which focuses on the inherent dignity of human beings, the second form regards mankind as being insignificant and "almost a plaything of the gods."<sup>35</sup> This form of humanism is often labeled as a "perverted form of Christianity."<sup>36</sup>

Hitchcock identifies the third classification of humanism as that form which is exemplified by the so-called "back to nature" movement.<sup>37</sup> Modern day environmentalism characterizes this form of humanism as the desire to protect nature from the pollution and destruction caused by mankind.<sup>38</sup> In its extreme form, however, environmentalism also becomes "anti-humanistic" because it places elements of the ecosystem

---

Hitchcock is presently a professor of history at St. Louis University and editor of the quarterly journal *Communio*. For a detailed analysis of Hitchcock's perspectives on Secular Humanism, see generally HITCHCOCK, *supra* note 5. See also *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 963 (S.D. Ala.) (Hitchcock providing expert testimony as to the meaning of Secular Humanism), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

27. HITCHCOCK, *supra* note 5, at 8-10.

28. *Id.* at 11-17.

29. *Id.* at 8.

30. *Id.*; see also WEBBER, *supra* note 23, at 21.

31. WEBBER, *supra* note 23, at 20.

32. See *supra* notes 20-23 and accompanying text.

33. HITCHCOCK, *supra* note 5, at 8; WEBBER, *supra* note 23, at 21.

34. HITCHCOCK, *supra* note 5, at 8.

35. *Id.*

36. *Id.* Hitchcock reasons that this form of humanism appears in some cultures, but it is not based on the Bible.

37. *Id.* at 9.

38. *Id.*



on an equal or greater level than human beings.<sup>39</sup> For example, Hitchcock points out that many environmentalists argue that animals have rights equal to human beings and advocate birth restrictions as a means to protect nature.<sup>40</sup>

Hitchcock identifies the fourth form of humanism as that form which characterizes the modern notion of "Secular Humanism."<sup>41</sup> Just as the third form of humanism distinguishes man from nature, Secular Humanism separates man from God.<sup>42</sup> In this sense, humanism is a way of life which "excludes God and all religion in the traditional sense."<sup>43</sup> Proponents advocate that man "marks the highest point to which nature has yet evolved, and [therefore, man] must rely entirely on his own resources."<sup>44</sup> "[C]onfidence in man, opposition to supernaturalism, faith in science, and humanitarianism" characterize this form of humanism.<sup>45</sup> It is this form that is most often labeled as "Secular Humanism"<sup>46</sup> or "religious humanism."<sup>47</sup> Therefore, it is this form of humanism that this Comment will develop and focus upon.

Although the roots of Secular Humanism can be traced back more than 2000 years to the Greco-Roman world and the Judeo-Christian heritage,<sup>48</sup> it was not until the 1930s that organizations such as the American Humanist Association emerged in the United States to pro-

---

39. *Id.*

40. *Id.*

41. *Id.* at 10.

42. *Id.* It is for this reason that Secular Humanism is also referred to as "nontheistic humanism" or "atheistic humanism." WEBBER, *supra* note 23, at 37. It should be noted, however, that Secular Humanism is not strictly atheism because many Secular Humanists believe that God may exist, but only in the abstract. HITCHCOCK, *supra* note 5, at 11-12.

43. HITCHCOCK, *supra* note 5, at 10.

44. *Id.*

45. WEBBER, *supra* note 23, at 28 (citing PAUL KURTZ, *Humanism and the Moral Revolution*, in THE HUMANIST ALTERNATIVE 49 (1973)). For a more detailed discussion of Secular Humanist beliefs from the perspective of a self-proclaimed Secular Humanist, see generally PAUL KURTZ, IN DEFENSE OF SECULAR HUMANISM (1983).

46. See HITCHCOCK, *supra* note 5, at 10.

47. *Id.* at 11.

48. WEBBER, *supra* note 23, at 21. "In the Greco-Roman world, Protagoras, a Greek philosopher of the fifth century B.C., first articulated humanism when he proclaimed that 'man is the measure of all things.'" *Id.*

The emphasis on man and his importance can also be traced to the Judeo-Christian heritage. *Id.* "At the heart [of the Christian faith] stands the confession that God—the originator of everything right and good—himself became man." *Id.* at 23 (quoting Mark Noll, *Christianity and Humanistic Values in Eighteenth Century America: A Bicentennial Review*, 6 CHRISTIAN SCHOLAR'S REV. 114-15 (1976)). The Christian focus on the importance of humanity has been labeled "Christian Humanism" or "Biblical Humanism." *Id.*

mulgate the beliefs of Secular Humanism.<sup>49</sup> However, traditional religion and conservative moral values characterized a great part of this nation's history up until the 1960s.<sup>50</sup> As a result, Secular Humanist organizations did not attract much attention at the time.<sup>51</sup> It was not until approximately 1965 that the focus of American social and political life gradually shifted away from fundamentalist conservatism toward secularization.<sup>52</sup>

Some commentators have theorized that the Secular Humanist movement gained momentum as a result of the many social changes that occurred during the 1960s.<sup>53</sup> "[R]eligion and traditional morality were closely identified with what [became known as] 'the establishment.'"<sup>54</sup> The anti-establishment movement, which characterized the social climate of the 1960s, attacked traditional religion as being a life-style that was not appropriate or suitable to the changed society.<sup>55</sup>

Hitchcock also suggests that material prosperity, which marked the period between 1945 and 1975, prompted the shift toward secularism.<sup>56</sup> During this period, "most Americans experienced a constantly and perceptibly rising standard of living."<sup>57</sup> This prosperity began to impress upon people a belief in their own powers, a belief which "was ultimately inimical to religion."<sup>58</sup> As the world became viewed more as man's own creation, rather than the creation of God, there was little room left

---

49. HITCHCOCK, *supra* note 5, at 11.

50. WEBBER, *supra* note 23, at 49-56. From the days of the early sixteenth century settlers until the 1960s, religion was generally regarded as a "good thing." James Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3 (1981). There was "a general assumption that civic and private virtue depended upon religious belief." *Id.* In fact, America was generally perceived as "a nation of church-going and God-fearing people." *Id.* For instance, on the date of his assassination, President Kennedy was scheduled to deliver a speech at the Dallas Trade Mart which included "a message extolling the virtues of biblical righteousness for a nation desiring to remain strong." F. LAGARD SMITH, WHEN CHOICE BECOMES GOD 53 (1990).

51. HITCHCOCK, *supra* note 5, at 13.

52. *Id.* at 56-57. "Secularization" is defined as "a movement away from 'an historical order of life that presupposes religious sanctions.'" WEBBER, *supra* note 23, at 11 (citing BERNARD E. MELAND, THE SECULARIZATION OF MODERN CULTURES 3 (1966)).

53. HITCHCOCK, *supra* note 5, at 57.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 58.

for the traditional God in the lives of many people.<sup>59</sup> "People who thought they could obtain anything they wanted through their own efforts . . . experienced little dependence on God."<sup>60</sup> These people, in their own self-worship, became true Secular Humanists.<sup>61</sup>

Despite the origins of the Secular Humanist movement, there can be no doubt that America has undergone a rapid secularization process; a process that some believe is not complete.<sup>62</sup> As a result, contrary to many popular misconceptions,<sup>63</sup> Secular Humanism is an identifiable system of beliefs and values of which there are many proponents.<sup>64</sup>

### III. DEFINING "RELIGION" FOR FIRST AMENDMENT PURPOSES

Before addressing the critical issue of whether Secular Humanism is a religion, it is essential to define the term "religion" in the context of the First Amendment. The First Amendment unequivocally confers a special constitutional status upon religion.<sup>65</sup> However, there has been much conflict in attempting to establish a set definition of religion for First Amendment purposes.<sup>66</sup> Although the constitutional meaning of

---

59. *Id.* at 59. Hence the Old Testament adage that "when men prosper they tend to forget God." *Id.* at 57.

60. *Id.* at 59.

61. *Id.*

62. *Id.* at 60. Paul Kurtz, a leading proponent of Secular Humanism, editor of *The Humanist* magazine, and drafter of *The Humanist Manifesto II*, argues that many of the world's major religions are losing ground. PAUL KURTZ, IN DEFENSE OF SECULAR HUMANISM 6, 194 (1983). Although Kurtz does not believe that Secular Humanism will completely replace theism in American culture, he is encouraged by the developments that Secular Humanism has made in the modern world. *Id.* at 190-98.

63. See *supra* notes 20-23 and accompanying text.

64. Kurtz argues that in 1983, there were only ten thousand members of humanist organizations throughout the United States. KURTZ, *supra* note 62, at 6. Kurtz admits, however, that the number of actual humanists in the United States may range in the millions. *Id.* In fact, at least one commentator has argued that society's shift toward Secular Humanism has become so broad and pervasive that members of Christianity and other orthodox religions have been forced to "gradually retreat from the political, economic, legal, and scientific realms of life." WEBBER, *supra* note 23, at 16.

For a detailed analysis of the meaning of both "humanism" and "Secular Humanism," see *Smith v. Board of School Comm'rs*, 655 F. Supp. 939, 960-71 (S.D. Ala.) (examining expert testimony as to the meaning of humanism and Secular Humanism), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

65. See *supra* note 2 and accompanying text; see also M. Elisabeth Bergeron, Note, "New Age" or New Testament?: Toward a More Faithful Interpretation of "Religion," 65 ST. JOHN'S L. REV. 365 *passim* (1991) (advocating a flexible, unitary approach to defining religion to protect minority religious groups).

66. Note, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1606, 1622 (1987).

religion has been discussed at great length,<sup>67</sup> the Supreme Court has never provided an absolute definition under the First Amendment.<sup>68</sup> In addition to judicial avoidance, commentators also strongly disagree on how to define religion for First Amendment purposes.<sup>69</sup>

---

67. See, e.g., Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753 (1984) (noting that religion should include all beliefs which are analogous to traditional religious beliefs); Johnson, *supra* note 3 (positing that no satisfactory definition of religion is likely to be developed); George C. Freeman III, *The Misguided Search for the Constitutional Definition of 'Religion'*, 71 GEO. L.J. 1519 (1983) (arguing that a definition of religion cannot be established); Jesse H. Chopper, *Defining 'Religion' in the First Amendment*, 1982 U. ILL. L. REV. 579 (1982) (proposing a narrow functional definition of religion); Paul J. Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177 (1979) (asserting that religion should be broadly defined to include any belief system that an individual can call religious); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978) (arguing that any belief system that an individual sincerely asserts as religious in nature should be considered religious); *Developments in the Law—Religion and the State*, *supra* note 66, at 1622 n.54 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6 (1978) (suggesting that beliefs which are arguably religious should be considered religious for Free Exercise purposes and beliefs which are arguably non-religious should not be considered religious for Establishment purposes)); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978) (exploring the Supreme Court's definition of religion under both the Establishment Clause and the Free Exercise Clause).

68. Bergeron, *supra* note 65, at 366 (citations omitted). Bergeron notes that "[m]ost judicial opinions even approaching the question have scrupulously avoided the 'delicate task.'" *Id.* (citing *Thomas v. Review Bd.*, 450 U.S. 707, 714 (1981)).

69. *Developments in the Law—Religion and the State*, *supra* note 66, at 1622. At one end of the spectrum, some commentators argue that there can be no satisfactory definition of religion for constitutional purposes. *Id.* at 1622 n.54 (citing Johnson, *supra* note 3, at 832). At the other end, other commentators argue that the definition of religion should be broad enough to include any meaningful belief structure. *Id.* (citing Toscano, *supra* note 67, at 207).

Still other commentators have conveniently sought to define religion in such a way as to accommodate their own purposes and beliefs. Such attempts, however, often operate to the detriment of others who share varied ideologies. For example, Laurence Tribe, a distinguished legal scholar, suggests that beliefs which are arguably religious should be considered religious for Free Exercise purposes, but beliefs that are arguably non-religious should not be considered religious for Establishment purposes. TRIBE, *supra* note 67, at 823-33.

This dual definition approach has the effect of permitting those groups who possess beliefs that are arguably both religious and non-religious "to claim the benefits of the Free Exercise Clause without incurring the burdens of the Establishment Clause." Johnson, *supra* note 3, at 835.

Members of traditional, "indisputably religious" churches could hardly be ex-

### A. *The Ramifications of Defining Religion*

Much of the conflict and reluctance associated with establishing a working definition of religion stems from the important ramifications such a definition would have on First Amendment jurisprudence.<sup>70</sup> Defining religion would unavoidably determine "what the First Amendment will prohibit and what it will protect."<sup>71</sup> On one hand, a set definition "by defining what a religion must be, may violate [the First Amendment] by establishing a distinctive notion of religion that excludes some legitimate forms of religion."<sup>72</sup> On the other hand, "a truly comprehensive definition may be so broad as to be unhelpful."<sup>73</sup>

Nonetheless, some commentators stress that formulating a set definition of religion is critical due to the constant and rapid expansion of religious beliefs and perspectives in this country.<sup>74</sup> In support of this position, it is worth noting that in 1987 more than 1300 recognized religions existed in the United States.<sup>75</sup> "As the commonality of our beliefs has declined, the sacred and the secular have increasingly merged."<sup>76</sup> At least one author argues that because of this expansion, the Supreme

---

pected to see the dual definition as anything but legalistic flim-flam in the service of non-theistic religious ideology. Indeed, if the Supreme Court were to endorse Tribe's reasoning, it would lend support to the claim of some religious fundamentalists that the public schools and other governmental agencies are currently establishing a form of secular religion.

*Id.*

This Comment does not attempt to create or suggest a working definition of religion. The purpose of this Comment is to analyze the structure and beliefs of Secular Humanism in light of previous Supreme Court rulings and to objectively argue that the tenets of Secular Humanism are analogous to a traditional religion, and should therefore be treated as such for First Amendment purposes.

70. *Developments in the Law—Religion and the State*, *supra* note 66, at 1623.

71. *Id.* at 1622.

72. *Id.* at 1623.

73. *Id.*

74. *See, e.g.*, Bergeron, *supra* note 65, at 366-67. Bergeron notes that the upsurge in religious fervor is not only reflected "in the burgeoning fundamentalist right, but also in an explosion of 'New Age' beliefs and practices." *Id.* at 366 (footnotes omitted). As an extreme example of the growth of divergent perspectives of religion, Bergeron notes, "Now is a great time for new religions to pop up. There are people who get religious about jogging, they get religious about sex, . . . health foods, . . . ESP, of course, flying saucers, anything is fertile ground now. There's a messiah born every day." *Id.* at 365 (quoting TOM WOLFE, TWENTY YEARS OF ROLLING STONE: WHAT A LONG STRANGE TRIP ITS BEEN 340 (J.S. Wenner ed., 1987)); *see also* *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1069-72 (commenting on the wide disparity among religious beliefs in the United States).

75. *See generally* ENCYCLOPEDIA OF AMERICAN RELIGION (2d ed. 1987) (listing 1347 religions in the United States).

76. Bergeron, *supra* note 65, at 367.

Court must set forth a workable definition of religion that would enable the lower courts to distinguish "between the religious, and non-religious, without imposing ethnocentric and majoritarian values."<sup>77</sup>

### *B. Approaching Religion from a Sociological Perspective*

In formulating a definition of religion for First Amendment purposes, some commentators have looked to developments in the social sciences for assistance.<sup>78</sup> Social scientists have made the distinction between a substantive and a functional definition of religion.<sup>79</sup> A substantive, or content-based, definition identifies an individual's beliefs as religious or non-religious based on the substance of his beliefs.<sup>80</sup> A substantive definition of religion would primarily include traditional theistic beliefs such as Christianity and Judaism.<sup>81</sup>

On the other hand, a functional definition is not based upon the content of one's beliefs, but declares a person's beliefs as "religious or non-religious based on either how a person behaves or how the putatively religious beliefs function in a person's life."<sup>82</sup> A functional definition provides a much broader definition, and therefore, would recognize both theistic *and* non-theistic beliefs as religion.<sup>83</sup> Examples of religions based upon a functional definition include Confucianism, Buddhism, and arguably certain forms of humanism.<sup>84</sup>

Despite the Supreme Court's reluctance to articulate a clear definition of religion, the Court's past decisions provide a very helpful guide in determining what the Court will and will not consider to be religion for

---

77. *Id.*

78. *Developments in the Law—Religion and the State*, *supra* note 66, at 1623-24.

79. *Id.* at 1623.

80. *Id.*

81. *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 967 (S.D. Ala.) (analyzing expert testimony as to the meaning of religion), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

82. *Developments in the Law—Religion and the State*, *supra* note 66, at 1624. For a detailed analysis of the numerous sociological and philosophical definitions of religion, see *Smith*, 655 F. Supp. at 965-68 (analyzing expert testimony as to the meaning of religion). Some commentators assert that religion refers to the worship of, and belief in, a deity. *Id.* at 966. Other commentators argue that religion is a very broad concept that should encompass "one's ultimate concerns in life." *Id.*

83. *Smith*, 655 F. Supp. at 967-68.

84. *Id.*; *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961). For a more detailed analysis of the functional approach, see generally Ben Clements, Comment, *Defining 'Religion' in the First Amendment: A Functional Approach*, 74 CORNELL L. REV. 532 (1989).

First Amendment purposes. As Sections III(C)(1) through III(C)(3) detail,<sup>85</sup> the Supreme Court has moved from a more substantive definition to a more functional definition of religion over the past century.<sup>86</sup>

C. *The Supreme Court's Ever-Changing Definition of Religion: Substantive vs. Functional*

1. The Initial Substantive Approach

Prior to the twentieth century, the term religion was assumed to mean theism.<sup>87</sup> In 1878, the Supreme Court first attempted to define religion in *Reynolds v. United States*.<sup>88</sup> Pursuant to existing federal law, the acts of bigamy and polygamy were criminal offenses.<sup>89</sup> The defendant, Reynolds, was a member of the Mormon faith which practiced polygamy.<sup>90</sup> Reynolds argued that his practice of polygamy was consistent with the tenets of his religion and, therefore, the federal law banning polygamy violated his freedom of religion under the First Amendment.<sup>91</sup>

The Supreme Court upheld the constitutionality of the federal law, and in doing so, provided "some general theistic guidelines by which the religion clauses would be interpreted."<sup>92</sup> The basis of the Court's decision was an assumption "that the United States was a Christian nation that supported traditional theistic tenets."<sup>93</sup>

In 1890, the Supreme Court elaborated upon the definition of religion in *Davis v. Beason*.<sup>94</sup> Pursuant to existing voter registration laws, Idaho citizens were required to attest that they were not members of any organization that encouraged bigamy or polygamy.<sup>95</sup> The defendant,

---

85. See *infra* notes 87-171 and accompanying text.

86. See *Developments in the Law—Religion and the State*, *supra* note 66, at 1625.

87. John W. Whitehead & John Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1, 2 (1978) (postulating that the American religious base has shifted from traditional theism to Secular Humanism).

88. 98 U.S. 145 (1878).

89. *Id.* at 146.

90. *Id.* at 161.

91. *Id.* at 165-67. For a brief history of the events leading up to Reynold's conviction, see Laycock, *supra* note 2, at 416-17.

92. Whitehead & Conlan, *supra* note 87, at 5 (providing an analysis of *Reynolds*).

93. *Id.* at 6. In *Zorach v. Clauson*, Justice Douglas reiterated this sentiment by stating, "We are a religious people whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952) (Douglas, J., concurring).

94. 133 U.S. 333 (1890); see *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1060 (providing background and a further analysis of *Davis*).

95. *Davis*, 133 U.S. at 333. Section 501 of the Idaho Revised Statutes provided that:

[N]o person who is a bigamist or a polygamist, or who teaches, advises,

Davis, swore to such an oath when actually he was a member of the Mormon Church, which advocated bigamy and polygamy.<sup>96</sup> Davis was tried and convicted for obstruction of justice.<sup>97</sup> On appeal, Davis argued that the Idaho law violated his freedom of religion under the First Amendment.<sup>98</sup>

In a unanimous decision, the Supreme Court affirmed the conviction.<sup>99</sup> The Court adopted a true substantive definition of religion by requiring that "religion refer to the belief in and worship of a *deity*."<sup>100</sup> The Court ruled that "[t]he term 'religion' has reference to one's views of his relations to his *Creator*, and the obligations they impose of reverence for his being and character, and obedience to his will."<sup>101</sup> The Court's decision clearly reaffirmed the *Reynolds* substantive approach by concluding that the scope of religion was limited to traditional theism.<sup>102</sup>

The *Davis* Court differentiated between valid religious beliefs and what it termed the tenets of a "sect."<sup>103</sup> As to valid religious beliefs, the Court emphasized that the First Amendment was adopted to grant the absolute freedom to entertain and express beliefs respecting man's relations to and with *God*.<sup>104</sup> The Court continued, however, by stating that the First Amendment was not adopted "to prohibit legislation for the support of any religious tenets, or the modes of worship of any

---

counsels, or encourages any person or persons to become bigamists or polygamists, . . . or who is a member of any order, organization, or association which teaches, advises, counsels, or encourages its members or devotees . . . to commit the crime of bigamy or polygamy . . . is permitted to vote at any election . . . within this Territory.

IDAHO CODE § 501.

96. *Davis*, 133 U.S. at 334-35 & n.1.

97. *Id.* at 334.

98. *Id.* at 336-37.

99. *Id.* at 341-48.

100. *Id.* at 342 (emphasis added).

101. *Id.* (emphasis added).

102. Whitehead & Conlan, *supra* note 87, at 7. Later, in the same term as *Davis*, the Court stated that polygamy was a "barbarous practice" and "is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world." *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890).

103. *Davis*, 133 U.S. at 342.

104. *Id.* (emphasis added). "With man's relations to his Maker, and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted . . ." *Id.*



sect."<sup>105</sup> The Court noted that, despite the First Amendment protections, prosecution would follow criminal conduct performed under the guise of alleged religious beliefs.<sup>106</sup>

## 2. A Move Toward the Center

In 1931, the Supreme Court gradually moved away from its substantive/theistic approach in *United States v. Macintosh*.<sup>107</sup> Macintosh was denied naturalization because he refused to swear that he would bear arms to defend the United States.<sup>108</sup> Macintosh argued that his refusal was based upon religious grounds.<sup>109</sup> The Court affirmed its existing theistic approach by stating that "[t]he essence of religion is belief in a relation to *God* involving duties superior to those arising from any human relation."<sup>110</sup> The Court, however, hinted that it was prepared to back away from its strict theistic approach by noting that "[w]hat constitutes free exercise of religion cannot perhaps be dogmatically determined."<sup>111</sup>

---

105. *Id.* at 342. In defining religion, the Court clearly looked to the traditional teachings of Christianity to determine which beliefs would be afforded First Amendment protections. The Court stated:

Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the *Christian* world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.

*Id.* at 343 (emphasis added).

106. *Id.* at 342-43. As examples, the Court noted that extramarital sexual intercourse and human sacrifices would be punishable regardless of whether one's "religion" condoned or encouraged such acts. *Id.* at 343.

The Court reiterated similar sentiments in *Employment Division v. Smith*, 494 U.S. 872 (1990). Pursuant to state law, peyote, a hallucinogenic drug, was classified as an illegal narcotic. *Id.* at 874-75. Respondents, upon being fired from their employment for ingesting the drug, argued that the drug was used for sacramental purposes at a religious ceremony, and therefore, the state law banning its use infringed upon their free exercise rights. *Id.* at 874. Justice Scalia, writing for the Court, ruled that the state law, which prohibited all uses of the drug, was constitutional under the First Amendment. *Id.* at 890.

107. 283 U.S. 605 (1931). For additional analysis of *Macintosh*, see Bergeron, *supra* note 65, at 370.

108. *Macintosh*, 283 U.S. at 626. For a further discussion of *Macintosh*, see Whitehead & Conlan, *supra* note 87, at 9.

109. *Macintosh*, 283 U.S. at 625-26.

110. *Id.* at 626 (emphasis added). For additional analysis of *Macintosh*, see *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1060-61.

111. *Macintosh*, 283 U.S. at 612.

In 1961, the Supreme Court reevaluated its substantive/ theistic definition of religion in the landmark case of *Torcaso v. Watkins*.<sup>112</sup> Pursuant to existing Maryland state law, state officials were required to declare a belief in the existence of God.<sup>113</sup> The plaintiff, Torcaso, was not allowed to serve as a Notary Public because he refused to declare such a belief.<sup>114</sup> On appeal, Torcaso argued that the Maryland state law violated the First Amendment.<sup>115</sup>

The Supreme Court ruled that the Maryland law did unconstitutionally violate Torcaso's freedom of religion under the First Amendment.<sup>116</sup> In its decision, the Court abandoned the *Davis* substantive approach and moved toward a functional definition of religion.<sup>117</sup> The Court ruled that the term religion did *not* solely apply to those beliefs which were based upon the existence of a deity.<sup>118</sup> The Court stated that neither the state, nor the Federal government, "can aid those religions based upon a belief in the existence of God as against those religions founded on different beliefs."<sup>119</sup>

### 3. The Existing Functional Approach

In 1965, the Supreme Court abandoned its earlier substantive/theistic approach entirely and formulated a true functional definition of religion

112. 367 U.S. 488 (1961). Justice Black delivered the opinion of the Court in which Justices Frankfurter and Harlan concurred. *Id.* at 489-96. For additional analysis of *Torcaso* in light of previous Supreme Court decisions, see Allen L. Burreson, Note, *Constitutionality of State Requirement That Public Officers Declare Belief in the Existence of God*, 31 U. CIN. L. REV. 88 (1962).

113. *Torcaso*, 367 U.S. at 489 (citing Article 37 of the Declaration of Rights of the Maryland Constitution which provided in relevant part, "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.").

114. *Id.*

115. *Id.*

116. *Id.* at 496.

117. *Developments in the Law—Religion and the State*, *supra* note 66, at 1624; see also *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1063 (providing additional analysis of *Torcaso* and noting that Torcaso himself was a Secular Humanist).

118. *Torcaso*, 367 U.S. at 495 & n.11 (emphasis added). The Court emphasized that there are many widely accepted religions in this country that do not advocate the existence of God. *Id.* at 495 n.11. The Court gave examples of such religions which include "Buddhism, Taoism, Ethical Culture, [and] *Secular Humanism*." *Id.* (emphasis added).

119. *Id.* at 495 & n.11.

in *United States v. Seeger*.<sup>120</sup> Pursuant to section 6(j) of the Universal Military Training and Service Act,<sup>121</sup> an individual was exempt from the existing military draft if he conscientiously objected to participation in war by reason of his “religious training and beliefs.”<sup>122</sup> The Act defined the term “religious training and belief” as “an individual’s belief in relation to a *Supreme Being* involving duties superior to those arising from any human relation, but not including essentially political, sociological, or philosophical views or a merely personal moral code.”<sup>123</sup> Such a definition “arguably gave a preference to those who believed in a traditional God over those who did not.”<sup>124</sup>

In *Seeger*, three defendants, Seeger, Jakobson, and Peter, petitioned their local draft board for conscientious objector status.<sup>125</sup> Seeger declared that he was opposed to war by reason of his religious beliefs.<sup>126</sup> As to his belief in a Supreme Being, however, Seeger stated that he wished to leave that question open.<sup>127</sup> Seeger declared “that his was a belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed.”<sup>128</sup>

Jakobson also declared that he was opposed to war by reason of his religious beliefs.<sup>129</sup> “[H]e defined religion as the ‘sum and essence of one’s basic attitudes to the fundamental problems of human existence.’”<sup>130</sup> Jakobson stated that “he believed in a ‘Supreme Being’ who was ‘Creator of Man’ in the sense of being ‘ultimately responsible for

---

120. 380 U.S. 163 (1965). Justice Clark delivered the opinion of the Court. *Id.* at 164-88. Justice Douglas filed a separate concurring opinion. *Id.* at 188-93. For additional analysis of *Seeger*, see *Developments in the Law—Religion and the State*, *supra* note 66, at 1625-31 (discussing case law relevant to *Seeger*); Gail W. Sweeney, Comment, *Conscientious Objection and the First Amendment*, 14 AKRON L. REV. 71, 74-75 (1980) (discussing the *Seeger* decision); Robert L. Rabin, *When Is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L. Q. 231, 231-46 (1966) (arguing that the constitutional definition of religion must be construed in accordance with *Seeger* so as to avoid infringing the rights of those professing a belief in unorthodox faiths); Whitehead & Conlan, *supra* note 87, at 13-15 (analyzing *Seeger*’s impact on conscientious objector status applications).

121. 50 U.S.C. app. § 456 (1958).

122. *Seeger*, 380 U.S. at 164-65 (citing 50 U.S.C. app. § 456(j)) (emphasis added).

123. *Id.* at 165 (citing 50 U.S.C. app. § 456(j)) (emphasis added). The term “Supreme Being,” which was the center of the controversy in *Seeger*, was deleted in an amendment to the Act in 1967. *Welsh v. United States*, 398 U.S. 333, 336 n.2 (1970).

124. *Welsh*, 398 U.S. at 338.

125. *Seeger*, 380 U.S. at 166-69.

126. *Id.* at 166.

127. *Id.*

128. *Id.*

129. *Id.* at 167.

130. *Id.* at 168.

the existence of man' and who was 'the Supreme Reality' of which 'the existence of man is the result.'<sup>131</sup>

Although Peter also declared that he was opposed to war by reason of his "religious" beliefs, he affirmatively stated that he was not a member of a recognized religious sect or organization.<sup>132</sup> He decided to define religion as "the consciousness of some power manifest in nature which helps man in the ordering of his life in harmony with its demands."<sup>133</sup>

The district court denied all three petitions solely on the basis that their alleged religious convictions were not based upon a belief in a Supreme Being.<sup>134</sup> Subsequently, all three defendants were convicted of refusing to submit to induction into the armed forces.<sup>135</sup> In a consolidated appeal, the defendants argued that the Act violated their First Amendment rights because it failed to exempt "nonreligious conscientious objectors."<sup>136</sup>

The Supreme Court ruled that all three defendants "clearly" qualified as conscientious objectors under the Act.<sup>137</sup> In its decision, the Court refused to interpret the term "Supreme Being," as required by the Act, to mean a theistic belief or a belief in an orthodox God.<sup>138</sup> Instead, the Court interpreted the term as requiring a belief in a "broader concept of a power or being, upon a faith, to which all else is subordinate or upon which all else is ultimately dependent."<sup>139</sup> The logical conclusion drawn from *Seeger* is that a disbelief in God "is irrelevant to First Amendment considerations."<sup>140</sup> Such a definition of religion marked a significant "break with early Supreme Court cases that defined religion as man's relationship to his Creator."<sup>141</sup>

131. *Id.* at 167. Jakobson might be classified as a deist. A deist is a person who believes in a God sufficiently powerful and intelligent to bring the world into existence, but who no longer intervenes in the affairs of humankind. See SMITH, *supra* note 50, at 99 (analyzing nonbiblical views of creation). Smith suggests that some of the most influential founding fathers of this country, including Thomas Jefferson and Thomas Paine, were deists. *Id.*

132. *Seeger*, 380 U.S. at 169.

133. *Id.*

134. *Id.* at 166-69.

135. *Id.*

136. *Id.* at 165.

137. *Id.* at 185-88.

138. *Id.* at 174-76.

139. *Id.* at 176.

140. Whitehead & Conlan, *supra* note 87, at 15.

141. *Id.* (providing a comparative analysis of *Seeger* and *Davis v. Beason*, 133 U.S.

In *Seeger*, the Court set forth what can be classified as a subjective or functional approach for determining the requisite "religious belief."<sup>142</sup> The Court determined that a person's belief can be classified as religious if such belief is "sincere and meaningful . . . which occupies in the life of its possessor, a place parallel to that filled by the God of those admittedly qualifying for the exemption."<sup>143</sup> The Court restated its position by adding that the requisite "religious belief" required that the registrant profess a sincere and meaningful belief which is religious "in his own scheme of things."<sup>144</sup> Therefore, one could argue that "a 'belief' is constitutionally protected if it is in a 'parallel position' to that of a belief in the traditional theistic concept of God."<sup>145</sup>

The *Seeger* Court's broad approach took into account the expanding religious beliefs and perspectives in this country.<sup>146</sup> The Court noted that a broad construction of religion would avoid the problems of classifying varying religious beliefs differently, thus resulting in the acceptance of some beliefs and the exclusion of others.<sup>147</sup> In an attempt to embrace the "ever-broadening understanding of the modern religious community,"<sup>148</sup> the Court stated that the term "religious belief" included "'intensely personal' convictions which some might find 'incomprehensible' or 'incorrect.'"<sup>149</sup>

In 1970, the Supreme Court expanded upon the *Seeger* functional approach in *Welsh v. United States*.<sup>150</sup> Similar to the facts of *Seeger*,<sup>151</sup> the defendant, Welsh, petitioned his local draft board for conscientious objector status on the basis of his religious beliefs.<sup>152</sup> Welsh stressed that his beliefs were *not* religious.<sup>153</sup> However, Welsh

---

333, 341 (1890)).

142. See *Developments in the Law—Religion and the State*, *supra* note 66, at 1625.

143. *Seeger*, 380 U.S. at 176.

144. *Id.* at 185.

145. Whitehead & Conlan, *supra* note 87, at 14.

146. See *supra* notes 74-76 and accompanying text.

147. *Seeger*, 380 U.S. at 180.

148. *Id.*

149. *Welsh v. United States*, 398 U.S. 333, 339 (1970) (citing *Seeger*, 380 U.S. at 184-85). In support of its extremely broad view of the term "religious," the Court quoted Dr. David Saville Muzzey, a leader of the Ethical Culture Movement, who stated that a belief in God "is anthropocentric, not theocentric. Religion, for all the various definitions that have been given of it, must surely mean the devotion of man to the highest ideal that he can conceive." *Seeger*, 380 U.S. at 183 (quoting DAVID S. MUZZEY, *ETHICS AS A RELIGION* 95 (1951)).

150. 398 U.S. 333 (1970). For additional analysis of *Welsh*, see Sweeney, *supra* note 120, at 75-77; Jay R. Dingley, Note, *Welsh v. United States: A New Substantive Definition for Conscientious Objectors*, 32 OHIO ST. L. J. 653 (1971).

151. See *supra* text accompanying notes 120-36.

152. *Welsh*, 398 U.S. at 336.

153. *Id.* at 341 (emphasis added).

refused to submit to the draft because he believed that the taking of another's life was "immoral and totally repugnant."<sup>154</sup> Welsh's petition was denied and he was subsequently convicted for refusing to submit to induction into the armed forces.<sup>155</sup> On appeal, Welsh argued that section 6(j) of the Universal Military Training and Service Act exempted him from combat service.<sup>156</sup>

In a plurality decision,<sup>157</sup> the Court ruled that Welsh was entitled to conscientious objector status.<sup>158</sup> In its decision, the Court revisited and expanded upon the *Seeger* approach.<sup>159</sup> The Court emphasized that in order to determine whether Welsh qualified for the exception, the Court must "decide whether the beliefs professed by [Welsh] are sincerely held and whether they are, in his own scheme of things, religious."<sup>160</sup> The Court ruled that the "reference to the registrant's 'own scheme of things' was intended to indicate that the central consideration in determining whether the registrant's beliefs are religious is whether these beliefs play the role of a religion and function as a religion in the registrant's life."<sup>161</sup>

The Court further ruled that purely ethical and moral considerations can be religious.<sup>162</sup> The Court stated that Welsh would be denied the exception only if his system of beliefs did "not rest at all upon moral, ethical, or religious principles but instead rests solely upon considerations of policy, pragmatism, or expediency."<sup>163</sup>

154. *Id.* at 343.

155. *Id.* at 335. Refusal to submit to induction into the Armed Forces was classified as a felony pursuant to 50 U.S.C. app. § 462(a). *Id.*

156. *Id.*; see also *supra* notes 121-23 and accompanying text.

157. Justice Black delivered the opinion of the Court in which Justices Douglas, Brennan, and Marshall joined. *Welsh*, 398 U.S. at 335-44. Justice Harlan issued a separate concurring opinion. *Id.* at 344-67. Justice White authored a dissenting opinion which was joined by Chief Justice Warren and Justice Stewart. *Id.* at 367-74. Justice Blackmun took no part in the consideration of the case. *Id.* at 344.

158. *Id.* at 343.

159. See *supra* notes 137-49 and accompanying text.

160. *Welsh*, 398 U.S. at 339 (quoting *United States v. Seeger*, 380 U.S. 163, 185 (1965)).

161. *Id.* at 339.

162. *Id.* at 342-43; see also *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1065.

163. *Welsh*, 398 U.S. at 342-43; see also *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1065 (providing additional analysis of the *Welsh* decision). But see Eric C. Freed, Comment, *Secular Humanism, the Establishment Clause, and Public Education*, 61 N.Y.U. L. REV. 1149, 1161 (1986) (citing *Wisconsin v. Yoder*, 406

The Court's rulings in both *Seeger* and *Welsh* lead one to believe that the Court has adopted an extremely broad interpretation of the concept of religion.<sup>164</sup> The Court's decision in *Welsh*, which stressed that even the claimant's own characterization of his beliefs is not determinative in assessing whether those beliefs are religious, evidences such a conclusion.<sup>165</sup> The Court ruled that *Welsh's* beliefs were religious despite *Welsh* himself being very explicit in insisting that his beliefs were *not* religious.<sup>166</sup>

It should be noted that both *Seeger* and *Welsh* addressed the meaning of religion in terms of statutory construction rather than directly addressing the meaning of religion as used in the First Amendment.<sup>167</sup> However, these cases indirectly support a subjective, functional approach to the definition of religion for First Amendment purposes.<sup>168</sup> In fact, the concurring opinions in both *Seeger* and *Welsh* support the conclusion that the analysis set forth in both cases applies equally to the meaning of religion in the First Amendment context.<sup>169</sup> In *Seeger*, Justice Douglas concurred in the Court's opinion and noted that the Act would have violated the First Amendment if the Court had not construed the term religion as broadly as it did.<sup>170</sup> In *Welsh*, Justice Harlan concurred in the Court's ruling because he believed that the Act, "limiting [the] draft exception to those opposed to war . . . because of theistic beliefs, runs afoul of the religious clauses of the First Amendment."<sup>171</sup>

---

U.S. 205 (1972)) (arguing that the *Yoder* Court implied that "moral and ethical principals, in and of themselves, are [not] protected by the religion clauses of the First Amendment").

164. See *Developments in the Law—Religion and the State*, *supra* note 66, at 1625.

165. *Welsh*, 398 U.S. at 341. In support of its position, the Court noted that few people "are fully aware of the broad scope of the word 'religious.'" *Id.*

166. *Id.* *Welsh* went as far as to strike out the word "religious" from his petition and "characterized his beliefs as having been formed 'by reading in the fields of history and sociology.'" *Id.*

167. *Developments in the Law—Religion and the State*, *supra* note 66, at 1625. *But see* Rabin, *supra* note 120 (arguing that the constitutional definition of religion must be construed in accordance with *Seeger* so as to avoid infringing the rights of those professing a belief in unorthodox faiths).

168. *Developments in the Law—Religion and the State*, *supra* note 66, at 1625; see also *supra* notes 82-84 and accompanying text.

169. See *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1064.

170. *United States v. Seeger*, 380 U.S. 163, 188 (1965). (Douglas, J., concurring). Justice Douglas also stated that a narrow definition of religion "would also result in a denial of equal protection by preferring some religions over others." *Id.* (Douglas, J., concurring).

171. *Welsh*, 398 U.S. at 345. (Harlan, J., concurring). For additional analysis of conscientious objection and its impact on First Amendment interpretation, see generally Sweeney, *supra* note 120.

## IV. SECULAR HUMANISM IS A RELIGION FOR FIRST AMENDMENT PURPOSES

A. *Secular Humanism Comports with the Court's Definition of Religion*

In *Seeger* and *Welsh*, the Supreme Court established an informal definition of religion for First Amendment purposes.<sup>172</sup> At the same time, the Court developed several guidelines for determining whether a given set of beliefs should be classified as either religious or non-religious. First, in determining whether beliefs can be classified as religious in nature, theism is essentially irrelevant.<sup>173</sup> A religion can be based upon either theistic or non-theistic beliefs.<sup>174</sup> Those beliefs, however, must be based upon moral or ethical considerations.<sup>175</sup> Second, a set of beliefs can be classified as religious if they are (1) sincere and meaningful to the individual and (2) occupy a place parallel to that filled by a traditional theistic religion in an individual's life.<sup>176</sup> Third, the Court gives great weight to the declarant's own subjective characterization of his beliefs as being religious.<sup>177</sup> However, the declarant's characterization

172. See *Toscano*, *supra* note 67, at 178-82, 200-02 (arguing that religion should be broadly defined so as to encompass both theistic and non-theistic beliefs).

173. *Seeger*, 380 U.S. at 176. Pursuant to the Universal Military Training and Service Act, an individual was exempt from the existing draft if he conscientiously objected to participation in war by reason of his religious training and beliefs. *Id.* at 164 (citing 50 U.S.C. app. § 456(j)). The Act specifically defined "religious training and belief" as "an individual's belief in a relationship to a Supreme Being." *Id.* (citing 50 U.S.C. app. § 456(j)). Three individual defendants, *Seeger*, *Jakobsen*, and *Peter*, petitioned their local draft board for conscientious objector status on the basis of their "religious beliefs." *Id.* at 166-69. *Seeger* and *Peter* affirmatively stated that they did not believe in the existence of a "Supreme Being." Nonetheless, the Supreme Court ruled that all three defendants qualified as conscientious objectors under the Act. *Id.* at 163. The Court refused to interpret the term "Supreme Being" as requiring a belief in an orthodox God. *Id.* at 140. For a more detailed discussion of *Seeger*, see *Whitehead & Conlan*, *supra* note 87, at 14-15; *supra* notes 120-49 and accompanying text.

174. *Seeger*, 380 U.S. at 176. The Court held that a person's beliefs can be classified as religious if those beliefs are "sincere and meaningful . . . which occup[y] in the life of its possessor, a place parallel to that filled by the God of those [who profess a belief in a Supreme Being]." *Id.*

175. *Welsh*, 398 U.S. at 342-43. The Court ruled that in order for a person's beliefs to be classified as religious, the individual's beliefs must rest upon "moral, ethical, or religious principles," rather than upon "policy, pragmatism, or expediency." *Id.* For a more detailed discussion of *Welsh*, see *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1065; *supra* notes 150-63 and accompanying text.

176. *Seeger*, 380 U.S. at 176, 187; see also *Whitehead & Conlan*, *supra* note 87, at 14 (providing additional analysis of *Seeger*).

177. *Seeger*, 380 U.S. at 184.



of his own beliefs, alone, will not be determinative.<sup>178</sup> If the declarant's beliefs occupy the requisite parallel position, those beliefs can be classified as religious in nature despite the declarant's own characterization that his beliefs are not religious.<sup>179</sup>

In expanding upon the beliefs and tenets of Secular Humanism as set forth in Section II,<sup>180</sup> it is apparent that Secular Humanism is a religion which should be subject to the same First Amendment protections and prohibitions as are afforded and imposed upon traditional or theistic religions.

### 1. Secular Humanism is a Non-Theistic Religion

In contrast to most orthodox religions, Secular Humanism is non-theistic in nature.<sup>181</sup> "However, while Secular Humanism is non-theistic, it is *religious* because it directs itself toward religious beliefs and practices . . . ."<sup>182</sup> "Both humanism and theism worship their own 'god.'"<sup>183</sup> Whereas theism worships a Deity or Creator as the source of all knowledge and truth, Secular Humanism worships Man as the source of all knowledge and truth.<sup>184</sup>

In 1933, the American Humanist Association<sup>185</sup> drafted *The Humanist Manifesto* (hereinafter *Manifesto I*).<sup>186</sup> This document sets forth

---

178. *Welsh*, 398 U.S. at 341. The Court ruled that an individual's characterization of his own beliefs would not be determinative in assessing whether those beliefs are religious. *Id.* In support of its position, the Court noted that few "are aware of the broad scope of the word 'religious.'" *Id.*

179. *Id.* In *Welsh*, Welsh petitioned his local draft board for conscientious objector status on the basis of his religious beliefs. *Id.* at 336. However, Welsh stressed that his beliefs were *not* religious, going so far as to strike the word "religious" from his petition. *Id.* at 341 (emphasis added). Nonetheless, the Court ruled that Welsh's beliefs were religious despite Welsh's express insistence to the contrary. *Id.*

180. See *supra* notes 20-64 and accompanying text.

181. Whitehead & Conlan, *supra* note 87, at 30. The term "non-theistic" refers to a religious belief which is not founded upon a belief in a deity. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 30-31.

185. The American Humanist Association has been labeled as "the church of Secular Humanism in this country today [which] recognizes [Secular Humanism] as a kind of religion." *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 961 (S.D. Ala.) (examining expert testimony as to the precise meaning of Secular Humanism), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

186. HITCHCOCK, *supra* note 5, at 11. Thirty-five members of the American Humanist Association, including Columbia University professor John Dewey, one of the most influential philosophers in American history, and Lester Mondale, half-brother of Walter Mondale, Vice President of the United States under President Jimmy Carter, signed *Manifesto I*. *Id.* at 13. Dewey insisted that the purpose of the Secular Humanist movement and *Manifesto I* was "to found a new religion, a religion to supplant

the beliefs, or the official creed, of Secular Humanism.<sup>187</sup> *Manifesto I* expressly identifies Secular Humanism as "religious."<sup>188</sup> The religious nature of the document is evident in its preface which reads:

In order that *religious humanism* may better be understood we, the undersigned, desire to make certain affirmations which we believe the facts of our contemporary life demonstrate.

Today man's larger understanding of the universe, his scientific achievements, and his deeper appreciation of brotherhood, have created a situation which requires a new statement of the means and purposes of religion . . . . [I]t is . . . obvious that any religion that can hope to be a synthesizing and dynamic force today must be shaped for the needs of this age. *To establish such a religion is a major necessity of the present.*<sup>189</sup>

*Manifesto I* sets forth the major tenets of the religion of Secular Humanism. These tenets include:

Religious humanists regard the universe as self-existing and not created.

Humanism asserts that the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values.

Religious humanism considers the complete realization of human personality to be the end of man's life and seeks its development and fulfillment in the here and now.

In the place of the old attitudes involved in worship and prayer the humanist finds his religious emotions expressed in the heightened sense of personal life and in a cooperative effort to promote social well-being.<sup>190</sup>

*Manifesto I* clearly rejects any form of theism and denies the existence of a supernatural deity.<sup>191</sup> *Manifesto I* further states that "[t]he distinction between the sacred and the secular can no longer be maintained."<sup>192</sup> "This synthesis of the sacred and the secular produces the religion of Secular Humanism."<sup>193</sup>

In 1973, the Association issued *The Humanist Manifesto II* (hereinafter *Manifesto II*).<sup>194</sup> This document reasserts many of the claims set

earlier religions." *Smith*, 655 F. Supp. at 969 (analyzing the issue of whether Secular Humanism is a religion).

187. HITCHCOCK, *supra* note 5, at 11.

188. *Id.* Hence, the reason why Secular Humanism is also referred to as "religious humanism." *Id.*

189. Whitehead & Conlan, *supra* note 87, at 34 (quoting HUMANIST MANIFESTO I AND HUMANIST MANIFESTO II 7-8 (1973)) (alterations in original) (emphasis added).

190. HITCHCOCK, *supra* note 5, at 11 (quoting HUMANIST MANIFESTO I).

191. Whitehead & Conlan, *supra* note 87, at 34.

192. *Id.* (quoting HUMANIST MANIFESTO I AND HUMANIST MANIFESTO II 8 (1973)).

193. *Id.*

194. HITCHCOCK, *supra* note 5, at 13-14.

forth in *Manifesto I* and notes that, while religious in nature, Secular Humanism is in opposition to traditional theism.<sup>195</sup> *Manifesto II* “emphasizes the Man-centeredness of Secular Humanism as opposed to the God-centeredness of traditional theism” by stating “that as ‘non-theists, we begin with humans, not God, nature not deity.’”<sup>196</sup>

*Manifesto II* also expounds that Secular Humanism is a moral creed. *Manifesto II* advocates a program of moral education as a means of developing moral and social awareness and the capacity for free choice.<sup>197</sup> Paul Kurtz,<sup>198</sup> one of the drafters of *Manifesto II*, stated that Secular Humanism represents “a dominant, moral, and religious point of view in the scientific age among the intellectuals and educated classes.”<sup>199</sup>

The great significance of *Manifesto II* is the considerably longer and more influential list of signers.<sup>200</sup> This list includes, among others, noted author Isaac Asimov, prominent Soviet scientist Andrei Sakharov, Edd Doerr, director of the organization Americans United For Separation of Church and State, influential psychologist B.F. Skinner, Lawrence Lader, chairman of the National Association for Repeal of Abortion Laws, Betty Friedan, founder of the National Organization of Women, and A. Philip Randolph, a longtime labor and civil rights leader.<sup>201</sup> In addition, “[t]he religious nature of . . . *Manifesto II* is affirmed by the fact that one hundred and seventy of its signatories were ministers of the Unitarian-Universalist Church and many were members of the Fellowship of Religious Humanists.”<sup>202</sup>

The list of signers is critical in two respects. First, the length of the list indicates that the number of individuals who subscribe to the creed had greatly increased, especially during the 1960s.<sup>203</sup> Second, a number of those who subscribe to the creed are in highly sensitive areas of life with “tremendous personal and intellectual influence . . . [and] the means to influence public opinion.”<sup>204</sup>

---

195. Whitehead & Conlan, *supra* note 87, at 34-35.

196. *Id.* at 36 (citing HUMANIST MANIFESTO I AND HUMANIST MANIFESTO II 16 (1973)).

197. See HUMANIST MANIFESTO I AND HUMANIST MANIFESTO II 19 (1973); see also, WEBBER, *supra* note 23, at 43.

198. See *supra* note 62.

199. Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, 965 (S.D. Ala.) (Kurtz providing expert testimony as to whether Secular Humanism is a religion), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

200. HITCHCOCK, *supra* note 5, at 14-15.

201. *Id.*

202. Whitehead & Conlan, *supra* note 87, at 35 n.184.

203. HITCHCOCK, *supra* note 5, at 15; see *supra* notes 48-61 and accompanying text (discussing the development of the Secular Humanist movement).

204. HITCHCOCK, *supra* note 5, at 15.

On the bases of *Manifesto I* and *Manifesto II*, and the stated beliefs of those who profess to be Secular Humanists, Secular Humanism can be classified as a non-theistic religion. Although the courts and commentators have provided little support for such a conclusion,<sup>205</sup> this position seems viable, especially in light of the expansive approach the Supreme Court has taken in defining the term religion.<sup>206</sup>

In *Seeger*, the Court ruled that Seeger's beliefs were sufficiently religious to qualify him for a conscientious objector exemption.<sup>207</sup> Seeger himself stated that his beliefs were (1) religious in nature, (2) based upon a "devotion to goodness and virtue for their own sakes and a religious faith in a purely *ethical* creed," and (3) based upon an "ethical belief in intellectual and moral integrity *without* belief in God."<sup>208</sup>

There are striking similarities between Seeger's beliefs and the stated beliefs of Secular Humanism as set forth in *Manifesto I* and *Manifesto II*. First, *Manifesto I* emphasizes that Secular Humanism is a religion.<sup>209</sup> The preface and the body of *Manifesto I* are replete with references to the religious nature of Secular Humanism.<sup>210</sup> In addition, John Dewey,<sup>211</sup> one of *Manifesto I*'s signatories, stressed that the purpose of

205. See generally Toscano, *supra* note 67 (arguing that Secular Humanism is a religion for First Amendment purposes); Whitehead & Conlan, *supra* note 87 (postulating the theory that the American religious base has shifted from traditional theism to Secular Humanism). But see Freed, *supra* note 163, at 1173-89 (arguing that whether Secular Humanism can be classified as a religion may be irrelevant for First Amendment analysis).

206. See *supra* note 164 and accompanying text.

207. *United States v. Seeger*, 380 U.S. 163 (1965). For a detailed discussion of *Seeger*, see *supra* notes 120-49 and accompanying text.

208. *Seeger*, 380 U.S. at 166 (emphasis added).

209. *Manifesto I* expressly identifies Secular Humanism as "religious." *Manifesto I* states in pertinent part:

"In order that *religious humanism* may better be understood, we, the undersigned, desire to make certain affirmations which we believe the facts of our contemporary life demonstrate.

Today man's larger understanding of the universe, his scientific achievements, and his deeper appreciation of brotherhood, have created a situation which requires a new statement of the means and purposes of *religion* . . . . [I]t is . . . obvious that any *religion* that can hope to be a synthesizing and dynamic force today must be shaped for the needs of this age. *To establish such a religion is a major necessity of the present.*"

Whitehead & Conlan, *supra* note 87, at 34 (quoting HUMANIST MANIFESTO I AND HUMANIST MANIFESTO II 7-8 (1973)) (emphasis added).

210. *Id.*

211. See *supra* note 186.

*Manifesto I* was to establish a new religion.<sup>212</sup> These characterizations deserve a substantial amount of consideration because the Court in *Seeger* stated that an individual's "characterization of his own belief as 'religious' should be given great weight."<sup>213</sup> Second, *Manifesto I* sets forth an ethical creed by proclaiming that the purpose of Secular Humanism is to establish "a cooperative effort to promote social well-being."<sup>214</sup> Third, *Manifesto I* clearly states that Secular Humanism is not based upon a belief in God.<sup>215</sup>

In *Welsh*, Welsh argued that his convictions were based upon a sense of ethics and morality.<sup>216</sup> The Court ruled that these convictions were sufficiently religious in nature to qualify Welsh for a conscientious objector exemption.<sup>217</sup>

There are also marked similarities between the beliefs held by Welsh and the stated beliefs of Secular Humanism. *Manifesto II* clearly asserts that Secular Humanism is a creed based upon ethical and moral considerations. First, the very language of *Manifesto II* emphasizes the moral and ethical nature of Secular Humanism. *Manifesto II* states:

We affirm that moral values derive their source from human experiences. Ethics is autonomous and situational needing no theological or ideological sanction . . . . The principle of moral equality must be furthered through elimination of all discrimination based upon race, religion, sex, age, or national origin . . . . We are

---

212. *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 969 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987) (emphasis added). Dewey insisted that the purpose of the Secular Humanist movement and *Manifesto I* was "to found a new religion, a religion to supplant earlier religions." *Id.*

213. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

214. *Whitehead & Conlan*, *supra* note 87, at 34 (citing HUMANIST MANIFESTO I AND HUMANIST MANIFESTO II (1973)).

215. *Manifesto I* states in pertinent part:

Religious humanists regard the universe as self-existing and *not created*.

Humanism asserts that the nature of the universe depicted by modern science makes *unacceptable any supernatural or cosmic guarantees of human values*.

Religious humanism considers the complete realization of human personality to be the end of man's life and seeks its development and fulfillment in the here and now.

In the place of the old attitudes involved in worship and prayer the humanist finds his religious emotions expressed in the heightened sense of personal life and in a cooperative effort to promote social well-being.

HITCHCOCK, *supra* note 5, at 11 (quoting HUMANIST MANIFESTO I) (emphasis added); *see also Whitehead & Conlan*, *supra* note 87, at 11.

216. *Welsh v. United States*, 398 U.S. 333, 343-44 (1970). Welsh emphasized that his beliefs were not religious. *Id.* at 336. Instead, he "characterized his beliefs as having been formed 'by reading in the fields of history and sociology.'" *Id.* at 341. On this basis, Welsh refused to submit to the draft because he believed that the taking of another's life was "immoral and totally repugnant." *Id.* at 343.

217. *Id.* at 343-44.

concerned for the welfare of the aged, infirm, the disadvantaged, and also for the outcasts—the mentally retarded, abandoned or abused children, the handicapped, prisoners, and addicts—for *all* who are neglected or ignored by society.<sup>218</sup>

*Manifesto II* further emphasizes “moral education” as a means of achieving social awareness and harmony.<sup>219</sup> This very language clearly establishes that Secular Humanism is intended as a creed based upon morality. Second, Paul Kurtz,<sup>220</sup> one of the drafters of *Manifesto II*, admitted that Secular Humanism is based upon doctrines of religion and morality.<sup>221</sup> Therefore, based upon these analogies and the Court’s rulings in both *Seeger* and *Welsh*, Secular Humanism is arguably a non-theistic religion for First Amendment purposes.

## 2. Secular Humanism is “Parallel” to Theism

In *Seeger* and *Welsh*, the Supreme Court ruled that beliefs can be classified as religious in nature if those beliefs are (1) sincere and meaningful to the individual and (2) occupy a place parallel to that filled by a traditional theistic religion in the individual’s life.<sup>222</sup> The first prong, the sincere and meaningful requirement, is a subjective test.<sup>223</sup> There is every indication that those who profess to be Secular Humanists are sincere in their beliefs. This sincerity is evidenced by several factors. First, Secular Humanists have established an official creed in the form of *Manifesto I* and *Manifesto II*.<sup>224</sup> This creed sets forth a world view and a way of life.<sup>225</sup> Second, Secular Humanists have established organizations which promulgate and proselytize the Secular Humanist faith.<sup>226</sup> Third,

218. KURTZ, *supra* note 62, at 42-44 (quoting HUMANIST MANIFESTO II).

219. *See supra* notes 197-99 and accompanying text.

220. *See supra* note 62.

221. *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 965 (S.D. Ala.) (Kurtz providing expert testimony as to whether Secular Humanism is a religion), *rev'd*, 827 F.2d 684 (11th Cir. 1987). Kurtz stated that Secular Humanism represents a “dominant, moral, and religious point of view in the scientific age among the intellectuals and educated classes.” *Id.*

222. *See supra* notes 143-45 and 160-61 and accompanying text.

223. *See United States v. Seeger*, 380 U.S. 163, 166-67 (1965). The Court inferred that the determination of whether a declarant’s beliefs are sincere and meaningful is a question for the trier of fact to answer based upon the declarant’s demeanor. *Id.*

224. *See supra* notes 186-202 and accompanying text.

225. *See generally* KURTZ, *supra* note 62 (examining the tenets of Secular Humanism from the perspective of a self-proclaimed Secular Humanist). *See also* Freed, *supra* note 163, at 1168-69 (stating that Secular Humanism answers many ultimate and fundamental questions of life, such as the purpose and meaning of life).

226. *See infra* notes 234-35 and accompanying text.

the number of self-proclaimed Secular Humanists has been steadily rising.<sup>227</sup> In the United States, approximately ten thousand people officially belong to humanist organizations.<sup>228</sup> However, the actual number of humanists throughout America may range in the millions.<sup>229</sup>

The second prong, the parallel position requirement, can be summarily dismissed. In *Welsh*, the Court ruled that “[i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content, . . . those beliefs certainly occupy in the life of that individual ‘a place parallel to that filled by . . . God’ in traditionally religious persons.”<sup>230</sup> As indicated above, Secular Humanism is based upon ethical and moral beliefs, and those beliefs are sincerely held by its followers.<sup>231</sup>

The second prong need not be so readily dismissed, however, because there is great evidence which indicates that Secular Humanism does hold such a parallel position in the lives of those who proclaim to be Secular Humanists. Dr. Russell Kirk<sup>232</sup> argues that the tenets of Secular Humanism, as set forth in *Manifesto I* and *Manifesto II*, fall within the limits of a modern definition of religion which recognizes both theistic and non-theistic beliefs.<sup>233</sup> Kirk notes that there are many similarities between Secular Humanism and Christianity “insofar as [Secular Humanism] is organized as a body of belief, as a body of doctrine, preaches an ethical creed, and proselytizes.”<sup>234</sup> Kirk further analogizes Secular Humanism and Christianity by stating:

Christians immanentize symbols of transcendence by claiming that one enters upon immortality through perfection in grace in death. Secularists immanentize this by bringing the issue down to this world, and . . . instead of salvation through grace in death, the secularists achieve the perfection of society here in this world.<sup>235</sup>

---

227. See *supra* notes 200-04 and accompanying text.

228. See KURTZ, *supra* note 62, at 6.

229. *Id.*

230. *Welsh v. United States*, 398 U.S. 333, 340 (1970).

231. See *supra* notes 218-21 and accompanying text.

232. Dr. Kirk's credentials include an M.A. degree from Duke University. Kirk holds honorary doctoral degrees from Boston College, St. John's University, Park College, Lemoyne College, Loyola College, Niagara University, Gannon University, Albion College, Olivet College, Central Michigan University, Pepperdine University, and Grand Valley State College.

233. *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 968 (S.D. Ala.) (analyzing testimony on the issue of whether Secular Humanism is a religion), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

234. *Id.*

235. *Id.* at 968-69.

Author Paul Kurtz,<sup>236</sup> a leading figure in the Secular Humanist movement, has written numerous works expanding upon the declarations and beliefs of Secular Humanism.<sup>237</sup> Kurtz characterizes Secular Humanism as an outlook on man and nature, a method of inquiry, and a set of moral values.<sup>238</sup> Contrary to popular misconceptions, Kurtz stresses that Secular Humanism is *not* simply a political ideology.<sup>239</sup>

Kurtz describes the American Humanist Association in a manner which suggests that the philosophy and function of the Association is similar to that of a traditional theological organization.<sup>240</sup> Kurtz asserts that:

[T]he function of the Association is to extend its principles and operate educationally. This association publishes books, magazines, and pamphlets; engages lecturers; selects, trains, and accredits humanistic counselors as its ordained ministry of the movement; forms and charters local or area chapters as an integral part of the association; holds seminars, institutes, and conferences; utilizes the mass media; and affiliates and cooperates for mutual and increased service with other associations, churches and societies.<sup>241</sup>

Kurtz also states that the Association has "undertaken efforts to obtain First Amendment constitutional immunities and the protections afforded theistic religions."<sup>242</sup> Kurtz also notes that the Association "certifies humanist counselors who enjoy the legal status of ordained priests, pastors, and rabbis."<sup>243</sup> In addition, Kurtz cites an article appearing in the 1983 Humanist Magazine that stated:

"I am convinced that the battle for human kind's future must be waged and won in the *public school classroom* by teachers who correctly perceive their role as *proselytizers of a new faith, a religion of humanity* . . . . These teachers must be ministers of another sort, utilizing a classroom instead of a pulpit to convey humanist values in whatever subject they teach regardless of the grade level . . . ."<sup>244</sup>

---

236. See *supra* note 62. Dr. Kurtz's credentials include an M.A. degree and a Ph.D. degree from Columbia University. Kurtz is presently working in the Department of Philosophy at the State University of New York, Buffalo.

237. Kurtz's works include *IN DEFENSE OF SECULAR HUMANISM* (1983), *EXUBERANCE* (1977), *THE FULLNESS OF LIFE* (1974), and *DECISION AND THE CONDITION OF MAN* (1968). Kurtz has also been the editor of *FREE INQUIRY* and *THE HUMANIST*. See also *Smith*, 655 F. Supp. at 964-70 (Kurtz testifying as to the meaning of Secular Humanism).

238. KURTZ, *supra* note 62, at 8-9.

239. *Id.* at 9 (emphasis added).

240. See *Smith*, 655 F. Supp. at 970 (Kurtz providing expert testimony as to the meaning of Secular Humanism).

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 969 (citation omitted by the court) (emphasis added). It is the author's



Based on the above commentaries, there can be no doubt that the followers of the Secular Humanist faith hold their religious beliefs in a sincere and meaningful manner. Further, a strong argument can be made that the Secular Humanist faith parallels traditional theistic religion in the lives of those who proclaim to be Secular Humanists. Therefore, in terms of First Amendment analysis, Secular Humanism arguably satisfies the *Seeger* and *Welsh* "parallel position" requirement.<sup>245</sup>

### 3. Independent Characterizations are Irrelevant in Determining the Status of Secular Humanism

There is great divisiveness among Secular Humanists as to whether Secular Humanism is a religion. Members of the American Humanist Association are apparently split as to whether Secular Humanism espouses principles which can be labeled as religious.<sup>246</sup> On one hand, many members argue that Secular Humanism is only a scientific method "without preconceptions of a religious nature."<sup>247</sup> Other members, however, including John Dewey,<sup>248</sup> have stressed that Secular Humanism *is* religious in nature.<sup>249</sup> In fact, Charles Reams, president of the Washington, D.C. chapter of the Humanist Association, "applauded the United States Commission on Civil Rights for its finding that the Association of Humanists was a *religious* minority."<sup>250</sup>

This ongoing debate, however, is practically irrelevant in the determination of whether Secular Humanism is a religion for First Amendment purposes. In *Seeger*, the Supreme Court ruled that an individual's "characterization of his own beliefs as 'religious' should carry great

---

opinion that this excerpt exemplifies a major hypocrisy within the Secular Humanist movement. Proponents of Secular Humanism portray their faith as accommodating and tolerant. Kurtz has stated that Secular Humanism is based upon a belief that "individual freedom is basic: The right of the individual to make up his own mind, to develop his own conscience and to lead his own life without undue influence from others." KURTZ, *supra* note 62, at 8. Kurtz has further stated that Secular Humanists "believe in democracy and freedom, which requires toleration of different points of view, as well as criticism of sectarian doctrines." *Id.* At the same time, Kurtz has asserted that the "fundamentalist right is *radical* for attempting to change the political, social, and moral structure of American Democracy." *Id.* at 4. This excerpt, however, which calls for the wholesale indoctrination of public school children, evidences a totalitarian philosophy which is far from accommodating and tolerant. In fact, the concepts embodied within this excerpt are analogous to the beliefs and strategies of those who Secular Humanists would classify as "radical" or extreme fundamentalists.

245. See *supra* notes 143-45 and 160-61 and accompanying text.

246. *Smith*, 655 F. Supp. at 969.

247. *Id.*

248. See *supra* note 186.

249. See *Smith*, 655 F. Supp. at 969-70.

250. *Id.* at 971 (emphasis added).

weight.<sup>251</sup> In *Welsh*, however, the Court ruled that an individual's characterization of his own beliefs as non-religious in nature is not determinative.<sup>252</sup> The Court added that an individual is often not "aware of the broad scope of the word 'religious,'" and therefore, an individual's statement "that his beliefs are non-religious is a highly unreliable guide."<sup>253</sup> Therefore, the opinions of those members of the Association who believe that Secular Humanism is not a religion, cannot turn that which can otherwise be classified as a religion, into a non-religion.

*B. Courts Have Expressly Defined Secular Humanism as a Religion for First Amendment Purposes*

It is possible to argue that the analysis set forth in Section IV(A) is untenable because neither *Seeger* nor *Welsh* addressed the definition of religion in a First Amendment context.<sup>254</sup> In fact, the Supreme Court has been extremely reluctant to establish a set definition of religion for First Amendment purposes.<sup>255</sup> Despite this general reluctance, however, various courts, including the United States Supreme Court, have either expressly stated or inferred that Secular Humanism is a religion for First Amendment purposes.<sup>256</sup>

In *Smith v. Board of School Commissioners*,<sup>257</sup> District Court Judge

251. *United States v. Seeger*, 380 U.S. 163, 184 (1965).

252. *United States v. Welsh*, 398 U.S. 333, 341 (1970). In *Welsh*, Welsh petitioned his local draft board for conscientious objector status on the basis of his religious beliefs. *Id.* at 336. However, Welsh stressed that his beliefs were not religious. *Id.* at 341. In fact, Welsh went as far as to strike the word "religious" from his petition. *Id.* Nonetheless, the Court ruled that Welsh's beliefs were religious despite Welsh's insistence to the contrary. *Id.*

253. *Id.*

254. See *supra* notes 167-71 and accompanying text.

255. See *supra* notes 66-68 and accompanying text.

256. See *infra* notes 257-81 and accompanying text.

257. 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). In *Smith*, Judge William B. Hand concluded that Secular Humanism is a religion under the First Amendment. *Smith*, 655 F. Supp. at 982-83. On that basis, Judge Hand banned the use of 35 public school textbooks that he believed promoted the religion of Secular Humanism. *Id.* at 988-90; see *infra* notes 258-71 and accompanying text. The Court of Appeals reversed the lower court's decision, but not with respect to Judge Hand's finding that Secular Humanism is a religion. *Smith*, 827 F.2d 684. The Court of Appeals ruled that, assuming Secular Humanism is a religion, the materials contained in the banned textbooks did not violate the First Amendment. *Id.* at 689; see *infra* notes 272-75. For a critical analysis of the lower court's decision, see ARVAL A. MORRIS, *THE CONSTITUTION AND PUBLIC EDUCATION*, 202 (1989).

William B. Hand set forth a very detailed analysis of Secular Humanism and concluded that Secular Humanism is a religion under the First Amendment.<sup>258</sup> The plaintiff, a father of three children attending public school, filed an action against the Board of School Commissioners of Mobile County, Alabama, seeking to enjoin the practice of mandatory prayers in the public schools.<sup>259</sup> The plaintiff argued that this practice violated the First Amendment.<sup>260</sup> Numerous defendant-intervenors, including Smith, requested that the court expand the requested injunction to include all religious activity in the public schools, including those that fostered Secular Humanism.<sup>261</sup>

Numerous experts from the fields of religion, philosophy, and sociology testified as to the meaning of religion and Secular Humanism.<sup>262</sup> After analyzing the testimony, Judge Hand concluded, "For purposes of the First Amendment, Secular Humanism is a religious belief system, entitled to the protections of, and subject to the prohibitions of, the religion clauses."<sup>263</sup> Judge Hand further ruled that Secular Humanism "is not a mere scientific methodology that may be promoted and advanced in the public schools."<sup>264</sup> In support of this position, Judge Hand stated that:

All of the experts, and the class representatives, agreed that this belief system is a religion which makes a statement about supernatural existence a central pillar of its logic; defines the nature of man; sets forth a goal or purpose for individual and collective human existence; and defines the nature of the universe, and thereby delimits its purpose . . . . In addition, humanism, as a belief system, erects a moral code and identifies the source of morality.<sup>265</sup>

Judge Hand also noted the institutional character of Secular Humanism, namely the structure and hierarchy of Secular Humanist organizations, including the American Humanist Association, the Council for Democratic and Secular Humanism, and the Fellowship of Religious Humanists.<sup>266</sup> Judge Hand stated that "[t]hese organizations proselytize and preach their theories with the avowed purpose of persuading non-adherents to believe as they do."<sup>267</sup> Judge Hand concluded that the activities and publications of these organizations provide "evidence that

---

258. *Smith*, 655 F. Supp. at 982-83. *But see* Freed, *supra* note 163, at 1159 n.82 (commenting that Judge Hand's predisposition towards defending prayer in public schools may diminish the weight of the opinion).

259. *Smith*, 655 F. Supp. at 942.

260. *Id.*

261. *Id.*

262. *Id.* at 960-71.

263. *Id.* at 982.

264. *Id.* at 982-83.

265. *Id.* at 980-81.

266. *Id.* at 981.

267. *Id.*

this belief system is similar to groups traditionally afforded protection by the First Amendment religion clauses.<sup>268</sup>

Judge Hand rebuked the argument that Secular Humanism is only a scientific methodology and not a religion.<sup>269</sup> Judge Hand reasoned:

For First Amendment purposes, the commitment of humanists to a non-supernatural and non-transcendent analysis . . . prevents them from maintaining the fiction that this is a non-religious discipline . . . . Secular Humanism is religion for First Amendment purposes because it makes statements based upon faith-assumptions . . . .

[T]o claim that there is nothing real beyond observable data is to make an assumption based not on science, but on faith, faith that observable data is all that is real. A statement that there is no transcendent or supernatural reality is a religious statement. A statement that there is no scientific proof of supernatural or transcendent reality is irrelevant and nonsensical, because inquiry into the fundamental nature of man and reality itself may not be confined solely within the sphere of physical, tangible, observable science. To demand that there be physical proof of the supernatural, and to claim that an apparent lack of proof means the supernatural cannot be accepted, is to create a religious creed.<sup>270</sup>

Having concluded that Secular Humanism is a religion, Judge Hand enjoined the use of thirty-five public school textbooks that he believed promoted the religion of Secular Humanism.<sup>271</sup>

The Court of Appeals reversed the lower court's decision,<sup>272</sup> but not with respect to Judge Hand's finding that Secular Humanism is a religion. The Court of Appeals assumed that Secular Humanism is a religion, but ruled that the materials contained within the banned textbooks did not violate the First Amendment.<sup>273</sup> The appellate court ruled that the textbooks did not endorse Secular Humanism, but merely instilled such values as "independent thought, tolerance of diverse views, self-respect, maturity, self-reliance, and logical decision-making."<sup>274</sup> The Court of Ap-

268. *Id.*

269. *Id.*

270. *Id.* at 982 (footnote omitted).

271. *Id.* at 988-90. The list of books banned from the schoolroom included: HELEN MCGINLEY, *CARING, DECIDING AND GROWING* (1983); VERDENE RYDER, *CONTEMPORARY LIVING* (1981); JOAN KELLY, *TODAY'S TEEN* (1981); LEW SMITH, *THE AMERICAN DREAM* (1980), HERBERT J. BASS, *OUR AMERICAN HERITAGE* (1979), and FRANK FREIDEL, *AMERICA IS* (1978). *Id.* at 988.

272. *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684 (11th Cir. 1987).

273. *Id.* at 689.

274. *Id.* at 692. As will be seen, it is of critical importance to note that not one of the 35 textbooks contained information on the theory of evolution. See *Smith*, 655 F. Supp. at 998-1013.

peals noted that the endorsement of such values established an appropriate secular effect.<sup>275</sup>

Judge Hand was not the first member of the judiciary to rule that Secular Humanism is a religion for First Amendment purposes. In *Torcaso v. Watkins*,<sup>276</sup> the Supreme Court expressly identified Secular Humanism as a religion.<sup>277</sup> The Court reasoned that the term religion does *not* solely apply to those beliefs based upon the existence of a deity.<sup>278</sup> The Court emphasized that there are many widely accepted religions in this country which do not advocate the existence of God.<sup>279</sup> The Court stated that such recognized non-theistic religions include "Buddhism, Taoism, Ethical Culture, [and] *Secular Humanism*."<sup>280</sup> The Court ruled that government cannot "aid theistic religions against non-theistic faiths."<sup>281</sup> Therefore, it is clear that Secular Humanism is a religious belief system which should be subject to First Amendment protections and prohibitions.

### C. A Response to Some Constructive Scholarly Criticism

Some commentators have argued that Secular Humanism cannot, and should not, be classified as a religion under the First Amendment.<sup>282</sup>

---

275. *Smith*, 827 F.2d at 692; see also *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir.) (ruling that a text which questioned the validity of certain religious beliefs did not establish the religion of Secular Humanism), *cert. denied*, 474 U.S. 826 (1985).

276. 367 U.S. 488 (1961). Pursuant to existing Maryland state law, state officials were required to declare a belief in the existence of God. *Id.* at 488. Torcaso was not allowed to serve as a Notary Public because he refused to declare such a belief. *Id.* In fact, it has been suggested that Torcaso, himself, was a Secular Humanist. *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1063. Torcaso argued that the Maryland law violated the First Amendment. *Torcaso*, 367 U.S. at 488. The Supreme Court ruled that the state law violated Torcaso's freedom of religion under the First Amendment. *Id.* at 496.

277. *Torcaso*, 367 U.S. at 495 n.11.

278. *Id.* at 495 & n.11 (emphasis added).

279. *Id.* at 495 n.11.

280. *Id.* (emphasis added). *But see Freed*, *supra* note 163, at 1153-57 (arguing that the Court's reference to Secular Humanism is not dispositive because (1) the Supreme Court has not established a set definition of Secular Humanism and (2) the Court's reference to Secular Humanism was only dicta).

281. *Torcaso*, 367 U.S. at 495. For additional analysis of *Torcaso*, see *Toward a Constitutional Definition of Religion*, *supra* note 67, at 1063.

282. See, e.g., *Developments in the Law—Religion and the State*, *supra* note 66, at 1668-74 (noting that it is difficult to sustain a claim that Secular Humanism is a religion); *Freed*, *supra* note 163, at 1170 (arguing that Secular Humanism cannot be classified as religious in nature when focussing on its external characteristics).

Such conclusions, however, are usually based upon a wholly inadequate discussion of the meaning and beliefs of Secular Humanism. For example, one commentator defined Secular Humanism as "a receptacle for grouping, with greater or lesser breadth, those values considered unacceptable to fundamentalist Christianity."<sup>283</sup> Other commentators define Secular Humanism as "a term of political polemic, depicting a range of views on political or social issues, ranging from wealth distribution and disarmament to homosexual rights and abortion."<sup>284</sup> As discussed earlier,<sup>285</sup> these overbroad, if not completely false, characterizations are a product of erroneous portrayals espoused by the media and many commentators. These common misperceptions provide a wholly inadequate basis for any meaningful First Amendment analysis.

At least one other commentator has taken the position that Secular Humanism cannot be classified as a religion because the external characteristics of Secular Humanism are not analogous to the characteristics of other, more traditional, religious organizations.<sup>286</sup> This argument has several premises. First, unlike traditional religions, it is argued that Secular Humanism is without a "sacred text defining [S]ecular [H]umanism in the sense that the Bible informs Christianity or that the Koran informs Islam."<sup>287</sup> Second, it is maintained that no one philosopher has had a dominant influence in developing the beliefs of Secular Humanism.<sup>288</sup> Lastly, it is asserted that Secular Humanism has no "ceremonies, holidays, clergy, or formal structure" as do other more traditional religions.<sup>289</sup>

Beyond the lack of clear judicial authority, this argument is untenable in light of a detailed analysis and description of Secular Humanism and the Secular Humanist movement. As for the first proposition, Secular Humanism does have a "sacred text" in the form of *Manifesto I*,<sup>290</sup> *Man-*

283. *Developments in the Law—Religion and the State*, *supra* note 66, at 1669 n.150 (citations omitted).

284. *Id.* Paul Kurtz, a major figure in the Secular Humanist movement, reveals the fallacy of this statement by stressing that Secular Humanism is *not* simply a political ideology. KURTZ, *supra* note 62, at 8-9.

285. *See supra* notes 20-23 and accompanying text.

286. Freed, *supra* note 163, at 1170 (citing Freeman, *supra* note 67, at 1553).

287. *Id.* at 1153.

288. *Id.*

289. *Id.* at 1170.

290. *See supra* notes 186-93 and accompanying text.

*ifesto II*,<sup>291</sup> and the Secular Humanist Declaration.<sup>292</sup> These documents set forth “the official creed” of Secular Humanism.<sup>293</sup>

As for the second position, there are several leading individuals who have been noted for their work in developing and influencing the Secular Humanist movement. Included among those individuals are author Paul Kurtz<sup>294</sup> and philosopher John Dewey.<sup>295</sup> Furthermore, the notion that a system of beliefs must have *one* dominant philosopher to be classified as a religion is completely unfounded. For example, the Old Testament reveals that Judaism is based upon the teachings of numerous prophets.

As for the final premise, although Secular Humanism may not conduct official ceremonies in the traditional sense, or recognize any set holidays, Secular Humanism does employ clergy and does utilize a formal structure. As noted earlier,<sup>296</sup> Secular Humanist organizations, including the American Humanist Association, the Council for Democratic and Secular Humanism, and the Fellowship for Religious Humanities, are similar to traditional theological organizations in philosophy and function.<sup>297</sup> These organizations proselytize their beliefs through certified counselors “who enjoy the legal status of ordained priests, pastors, and rabbis.”<sup>298</sup> These organizations also form local chapters as a means of disseminating their views throughout the country.<sup>299</sup> Upon a detailed analysis of the Secular Humanist movement, therefore, the position that Secular Humanism is not a religion because its external characteristics are not analogous to traditional religious organizations, is simply erroneous.

---

291. See *supra* notes 194-204 and accompanying text.

292. See KURTZ, *supra* note 62, at 14-24.

293. HITCHCOCK, *supra* note 5, at 11, 14.

294. See *supra* notes 62, 236-44 and accompanying text.

295. See *supra* notes 186, 211-12 and accompanying text.

296. See *supra* notes 232-44 and accompanying text.

297. Kurtz has stated that:

[O]ne of the functions of the [American Humanist Association] is to extend its principles and operate educationally. This association publishes books, magazines, and pamphlets; engages lecturers; selects, trains, and accredits humanistic counselors as its ordained ministry of the movement; forms and charts local or area chapters as an integral part of the association; holds seminars, institutes, and conferences; utilizes the mass media; and affiliates and cooperates for mutual and increased service with other associations, churches, and societies.

Smith v. Board of Sch. Comm'rs, 655 F. Supp. 939, 970 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

298. *Id.*

299. See *supra* notes 265-68 and accompanying text.

V. EVOLUTION IS A FUNDAMENTAL TENET OF SECULAR HUMANISM THAT IS  
TAUGHT IN PUBLIC SCHOOLSA. *Evolution's Tumultuous History in the Courts and in the  
Classrooms*

In 1859, Charles Darwin published his controversial book entitled *On the Origin of Species by Means of Natural Selection; or, The Preservation of Favoured Races in the Struggle for Life*.<sup>300</sup> In this work, Darwin attempted to explain the origins of mankind.<sup>301</sup> Darwin called his theory "descent with modification"—a theory that was later labeled as evolution.<sup>302</sup> Darwin's theory advances the presumption that all living things arose from a single source that developed from inorganic materials.<sup>303</sup> The general theory involves large-scale changes, or mutations, in organisms "from single-cell bacteria to complex plants and animals, from fish to mammals, and from apes to men."<sup>304</sup>

At this juncture, it is worth noting that many individuals adhere to religious beliefs that affirm the theory of divine creation.<sup>305</sup> The theory of

300. See MICHAEL RUSE, *THE DARWINIAN REVOLUTION* ix (1979).

301. *Id.*

302. *Id.* at x. Despite modern misperceptions, Darwin was not the first to posit the theory of evolution. See ERNAN McMULLIN, *EVOLUTION AND CREATION* 3 (1985). The actual theory can be traced back to early Greek philosophers in the 6th century B.C.

*Id.*

303. Whitehead & Conlan, *supra* note 87, at 47 (quoting G. KERKUT, *IMPLICATIONS OF EVOLUTION* 157 (1960)). It is understood that such a broad characterization represents a gross understatement of the evolutionary theory. A detailed analysis of the theory of evolution, however, is beyond the scope of this Comment. For more detail, see generally CHARLES DARWIN, *THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS* (1872); CHARLES DARWIN, *DESCENT OF MAN* (1871); CHARLES DARWIN, *ORIGIN OF SPECIES* (1859); PHILLIP E. JOHNSON, *DARWIN ON TRIAL* (1991); McMULLIN, *supra* note 302; *EVOLUTION VERSUS CREATIONISM: THE PUBLIC EDUCATION CONTROVERSY* (J. Peter Zetterberg ed., 1983); RUSE, *supra* note 300.

304. JOHNSON, *supra* note 303, at 12. It is vital to distinguish between the general theory of evolution, referred to as macroevolution, and the limited theory of evolution, or microevolution. Macroevolution is a very speculative theory which posits that entire levels of higher species have mutated, or "evolved," from lower species. KERKUT, *supra* note 303, at 157. Microevolution, on the other hand, advances the theory "that many living animals can be observed over the course of time to undergo changes' through genetic variation and limited mutation." *Id.*; see also SMITH, *supra* note 50, at 98 (examining the conflict between creationism and evolution).

The term "evolution" hereinafter refers to the general theory of evolution, or macroevolution.

305. Wendel R. Bird, Note, *Freedom of Religion and Science Instruction in Public*



creationism derives from a literal interpretation of the Old Testament book of *Genesis*, which asserts that God supernaturally created the earth and life.<sup>306</sup> Religions founded upon creationism primarily include those faiths stemming from the Judeo-Christian heritage.<sup>307</sup>

Depending upon the way one chooses to characterize the theory of evolution, Darwin's theory may be in direct conflict with creationism.<sup>308</sup> If evolution is simply defined as a gradual process by which one form of living creature transforms into another form, no such conflict need arise.<sup>309</sup> In this sense, there have been efforts to reconcile evolution with creationism by asserting that God may have "employed such a gradual process as a means of creation."<sup>310</sup> However, a conflict ultimately arises if evolution is defined in such a way that excludes the possibility of any supernatural influence.<sup>311</sup> In this sense, Secular Humanism does exclude any possibility of supernatural intervention,<sup>312</sup> and therefore, Secular Humanists must employ this latter definition. It is on this basis that the theory of evolution becomes antithetical to the theory of creationism.

---

*Schools*, 87 YALE L. J. 515, 519 (1978) (arguing that exclusive instruction on the general theory of evolution violates the Free Exercise Clause).

306. *Id.* at 520. See generally *Genesis* 1-2 (New American Standard Version).

307. Bird, *supra* note 305, at 519-20.

308. Whitehead & Conlan, *supra* note 87, at 47. There is an important distinction between the theory of creationism and creation science. Creationism relies on a literal interpretation of the book of *Genesis*. *Id.* at 47 n.228 (citing Bird, *supra* note 305, at 517, 520). For example, creation theory posits that God created Adam and Eve and that a worldwide flood destroyed all mankind except Noah, his family, and the animals Noah was able to save. *Id.* Creation science, although relying on the assertion that a Creator designed the universe, is a theory of the origin of life "that employs scientific argument and not a sacred text." *Id.* (citing Bird, *supra* note 305, at 517). For a more detailed analysis of creationism and creation science, see generally EVOLUTION VERSUS CREATIONISM: THE PUBLIC EDUCATION CONTROVERSY, *supra* note 303, at 113-357; McMULLIN, *supra* note 302, at 153-302; Gary C. Leedes, *Monkeying Around With the Establishment Clause and Bashing Creation-Science*, 22 U. RICH. L. REV. 149 (1987) (examining the educational value of scientific creationism).

309. JOHNSON, *supra* note 303, at 3-4.

310. *Id.* at 4; see also SMITH, *supra* note 50, at 97. Smith asks, "Couldn't God have created man through a gradual, evolutionary process?" *Id.* But see *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1259-60 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (8th Cir. 1983). Henry M. Morris, director of the Institute for Creation Research (ICR), has stated that "[i]t is impossible to devise a legitimate means of harmonizing the Bible with evolution." *Id.* (citing Henry M. Morris, *Evolution and the Bible*, in ICR IMPACT SERIES NUMBER 5 (undated, unpaginated)).

311. JOHNSON, *supra* note 303, at 4.

312. *Manifesto I* clearly asserts that "Religious humanists regard the universe as self-existing and *not created*. Humanism asserts that the nature of the universe depicted by modern science makes *unacceptable any supernatural or cosmic guarantees of human value*." HITCHCOCK, *supra* note 5, at 11 (emphasis added); see also Whitehead & Conlan, *supra* note 87, at 29-37 (defining Secular Humanism).

From nearly the moment Darwin announced his theory of evolution to this very day, great debates have raged over the propriety of teaching evolution in the public schools.<sup>313</sup> Some commentators have argued that late nineteenth and early twentieth century "Christian fundamentalists," who perceived the theory of evolution as the prime cause of a decline in traditional moral values, fueled the early debates.<sup>314</sup> Driven by the fear of this perception, it has been asserted that fundamentalists<sup>315</sup> waged an anti-evolution war in the courts and in the state legislatures.<sup>316</sup>

### 1. The Infamous "Monkey Trial"—A Fundamentalist Victory

The fundamentalists scored an early victory in 1925 when the Tennessee legislature passed a statute which prohibited the teaching of evolution in public schools.<sup>317</sup> The statute, known as the Tennessee Anti-Evolution Act, stated:

[I]t shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of di-

---

313. See Arval A. Morris, *Fundamentalism, Creationism and the First Amendment*, 41.1 WEST'S EDUC. L. REPORTER 4 (1987), reprinted in ARVAL A. MORRIS, *THE CONSTITUTION AND AMERICAN EDUCATION* 205 (1989). Notably, in California, debates over evolution in public schools continue to rage to this very day. Democrats and Republicans alike attacked Rob Hurtt, a California Senate candidate, because he openly believes that creationism should be taught alongside evolution in public schools. Eric Bailey, *Hurtt Gets Closer Scrutiny in 32nd Senate Race*, L.A. TIMES, Jan. 25, 1993, at A5.

California Superintendent of Schools Bill Honig was convicted on four counts of conflict of interest for diverting public funds to a consulting firm headed by his wife. Jean Merl, *Honig Conviction Derails a Reform-Minded Career*, L.A. TIMES, Jan. 31, 1993, at A5. Honig posited the feeble argument that the prosecution was a right-wing conspiracy to remove him from office because he advocated the teaching of evolution in public schools. *Id.* For a detailed history and analysis of the debates over evolution in the public schools, see generally EVOLUTION VERSUS CREATIONISM: THE PUBLIC EDUCATION CONTROVERSY, *supra* note 303; Bird, *supra* note 305 (arguing that exclusive instruction in the general theory of evolution violates the Free Exercise Clause).

314. See Morris, *supra* note 313, at 205.

315. The term "fundamentalist" is broadly defined as one who believes in "a literal interpretation of the Bible and . . . the inerrancy of the Scriptures." *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1259 (E.D. Ark. 1982), *aff'd*, 723 F.2d 45 (8th Cir. 1983). However, the term "fundamentalist" may attach an unfair and negative connotation to those individuals who have chosen to live their lives in strict adherence to their religious beliefs. It is for this reason that hereinafter, although adhering to its usage by commentators, the term is used with great hesitancy.

316. Morris, *supra* note 313, at 205-09.

317. *Id.* at 205.

vine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.<sup>318</sup>

Another fundamentalist victory came in 1927 when the Tennessee Supreme Court upheld the constitutionality of the Tennessee Anti-Evolution Act in the landmark case of *Scopes v. State*.<sup>319</sup> The *Scopes* case, also known as the “monkey trial,” was a media circus which pitted three-time presidential candidate and Bible-believer, William Jennings Bryan, against the famous criminal attorney and agnostic lecturer, Clarence Darrow.<sup>320</sup> Despite the in-court drama which ensued between the two attorneys,<sup>321</sup> the defendant, Scopes, was found guilty of teaching evolution in the public schools and fined \$100.<sup>322</sup> On appeal to the Tennessee Supreme Court, Scopes argued that the Anti-Evolution Act violated the education and religion clauses of the Tennessee Constitution and the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>323</sup>

The Tennessee Supreme Court reversed the conviction on a technicality<sup>324</sup> but upheld the Act on constitutional grounds.<sup>325</sup> The court ruled that the Act was a valid exercise of the state’s authority to legislate and control the public schools and the activities of state employees.<sup>326</sup> The Tennessee Constitution provided “that no preference shall ever be given, by law, to any religious establishment or mode of worship.”<sup>327</sup> In re-

---

318. 1925 Tenn. Pub. Acts 27. At least one commentator has argued that the governor of Tennessee only signed the legislation on “the explicit understanding that the ban would not be enforced.” JOHNSON, *supra* note 303, at 4-5.

319. 289 S.W. 363 (Tenn. 1927); see Neil Brooks, Note, *Constitutional Law—Validity of the Tennessee Anti-Evolution Law*, 5 TENN. L. REV. 242 (1927) (providing additional analysis of the *Scopes* decision). For a detailed account and history of the *Scopes* trial, see EDWARD J. LARSON, *TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION* (rev. ed. 1989); KEVIN TIERNEY, *DARROW: A BIOGRAPHY* (1979); L. SPRAGUE DE CAMP, *THE GREAT MONKEY TRIAL* (1968).

320. JOHNSON, *supra* note 303, at 4-5. Johnson suggests that *Scopes* was a test case engineered by opponents of the law. *Id.* at 5. Johnson asserts that Scopes, a former substitute teacher, was not even sure whether he had ever taught evolution, but nonetheless volunteered to be the defendant. *Id.*

321. *Id.*

322. *Scopes*, 289 S.W. at 363.

323. *Id.* at 364-66. It is critical to note that Scopes could not appeal on the ground that the Tennessee law violated the First Amendment of the U.S. Constitution because the First Amendment had not yet been incorporated to the states through the Fourteenth Amendment. See *supra* note 2.

324. *Scopes*, 289 S.W. at 367. At the trial level, the jury found Scopes guilty, but the judge imposed the fine of \$100. *Id.* This violated the Tennessee Constitution which mandated that juries assess all fines above \$50. *Id.*

325. *Id.* at 364-67.

326. *Id.* at 365.

327. *Id.* at 366 (citing TENN. CONST. art. IV, § 3).

sponse to the claim that the Act violated the religion clause of the state constitution, the court stated that:

We are not able to see how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship. So far as we know, there is no religious establishment or organized body that has in its creed or confession of faith any article denying or affirming such a theory. So far as we know, the denial or affirmation of such a theory does not enter into any recognized mode of worship.<sup>328</sup>

These early fundamentalist victories had a definite influence on the public school curriculums throughout the early and mid 1900s.<sup>329</sup> This influence was primarily seen in the area of textbook selection.<sup>330</sup> "Generally, textbooks avoided the topic of evolution and did not mention the name of Darwin."<sup>331</sup>

The fundamentalists, however, were forced to go on the defensive in the 1960s.<sup>332</sup> Two factors prompted this shift. First, the Secular Humanist movement gained momentum as a result of the many social changes which occurred during the 1960s.<sup>333</sup> Secondly, in 1957, the United States experienced a profound and renewed interest in science after the Soviet

328. *Id.* at 367.

329. Morris, *supra* note 313, at 205-06.

330. *Id.* at 206.

331. *Id.* Although many of the early anti-evolution statutes were not enforced, textbook publishers avoided the topic of evolution to escape the controversy. JOHNSON, *supra* note 303, at 6. For a statistical analysis of the coverage received by the theory of evolution in biology textbooks, see GERALD SKOOG, *The Topic of Evolution in Secondary School Biology Textbooks: 1900-1977*, in *EVOLUTION VERSUS CREATIONISM: THE PUBLIC EDUCATION CONTROVERSY* 65-89 (J. Peter Zetterberg ed., 1983).

332. Morris, *supra* note 313, at 206.

333. Throughout most of American history, the United States was generally viewed as a predominantly religious nation. Hitchcock, *supra* note 50, at 3. Through the latter portion of the 1950s, religious belief and observance were honored. *Id.* In fact, "[b]illboards urged citizens to 'Attend church this week,' as though church-attendance were a self-evidently good thing." *Id.* However, the 1960s and 1970s saw a dramatic decline in this nation's "religiosity." *Id.* at 4.

Some commentators have theorized that the Secular Humanist movement gained momentum during that time period as a result of the many social changes which occurred during the 1960s. HITCHCOCK, *supra* note 5, at 57. "[R]eligion and traditional morality were closely identified with what [became known as] 'the establishment.'" *Id.* The anti-establishment movement, which characterized the social climate of the 1960s, attacked traditional religion as being a lifestyle that was not appropriate or suitable to the changed society. *Id.* Today, a "secularist stance enjoys a prestige equal to that of religious belief." Hitchcock, *supra* note 50, at 4. For a more detailed discussion, see *supra* notes 48-61 and accompanying text.

Union launched the Sputnik satellite.<sup>334</sup> At approximately that time, the Biological Sciences Curriculum Study ("BSCS"), a non-profit organization consisting of scientists and school teachers, was formed.<sup>335</sup> The BSCS published a series of books which "incorporated evolution as a major theme."<sup>336</sup> A 1977 study of secondary school biology textbooks revealed that eighty-seven of the ninety-three textbooks surveyed defined or explained the theory of evolution.<sup>337</sup> By 1982, the BSCS curriculum had been incorporated into almost every biology text.<sup>338</sup>

## 2. *Epperson*—The Fundamentalists's Downfall

In 1968, the Supreme Court dealt the fundamentalists a severe blow. In *Epperson v. Arkansas*,<sup>339</sup> the Court ruled that an Arkansas anti-evolution statute, modeled after the Tennessee statute upheld in *Scopes*, violated the First Amendment.<sup>340</sup> The Arkansas statute prohibited any public school teacher from teaching the theory of evolution.<sup>341</sup> The statute stated in relevant part:

It shall be unlawful for any teacher or other instructor in any . . . Public School . . . to teach the theory or doctrine that mankind ascended or descended from a lower order of animals and also it shall be unlawful for any teacher . . . to adopt or use in any such institution a textbook that teaches the theory that mankind descended or ascended from a lower order of animals.<sup>342</sup>

Violators of the law were subject to criminal misdemeanor charges and dismissal from their employment in the state public school system.<sup>343</sup>

*Epperson*, a tenth-grade biology teacher, instituted an action in the state Chancery Court seeking a declaration that the statute was void.<sup>344</sup>

---

334. Morris, *supra* note 313, at 206.

335. *Id.*

336. *Id.*

337. SKOOG, *supra* note 331, at 67. Skoog argues, however, that the percentage of total words devoted to the theory of evolution decreased between 1969 and 1977. *Id.* at 69. Skoog attributes this decrease to a lack of acceptance among biologists, pressures exerted by anti-evolutionists, creationists, and religious groups, apprehension among publishers, threatened teachers, and numerous other forces. *Id.* at 83-84.

338. Morris, *supra* note 313, at 206.

339. 393 U.S. 97 (1968). Justice Fortas delivered the opinion of the Court. *Id.* at 98-109. Justices Black, Harlan, and Stewart authored separate concurring opinions. *Id.* at 109-16. See Lucien J. Dhooze, *From Scopes to Edwards: The Sixty-Year Evolution of Biblical Creationism in the Public School Classroom*, 22 U. RICH. L. REV. 187 (1988) (providing a history of statutes aimed at eliminating the theory of evolution from the public school classrooms).

340. *Epperson*, 393 U.S. at 109.

341. *Id.* at 98-99.

342. ARK. STAT. ANN. § 80-1627 (1960).

343. *Epperson*, 393 U.S. at 98-99.

344. *Id.* at 100.

The Chancery Court ruled that the statute violated the First and Fourteenth Amendments by interfering with the freedom of speech and thought.<sup>345</sup> The Arkansas Supreme Court reversed the Chancery Court's decision on the basis that the law was "a valid exercise of the state's power to specify the curriculum in its public schools."<sup>346</sup>

On appeal, the Supreme Court reversed the Arkansas Supreme Court's decision and held that the statute violated the First and Fourteenth Amendments.<sup>347</sup> The Court did not invalidate the statute on the grounds that it infringed upon the First Amendment right to freedom of speech, as did the Arkansas Chancery Court.<sup>348</sup> Instead, the Court ruled that the statute conflicted "with the constitutional prohibition of state laws respecting an establishment of religion."<sup>349</sup>

The Court stated that government "must be neutral in matters of religious theory, doctrine, and practice."<sup>350</sup> The Court further stated that government "may not be hostile to any religion or to the advocacy of non-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite."<sup>351</sup> The Court added that "[t]he First Amendment mandates government neutrality . . . between religion and non-religion."<sup>352</sup>

In analyzing the legislative history of the statute, the Court reasoned that the law was enacted solely to prevent the teaching of a theory that conflicted with creationism.<sup>353</sup> The Court concluded that such a purpose was an obvious violation of religious neutrality, contrary to the mandate of the First and Fourteenth Amendments.<sup>354</sup>

Justice Black, however, recognized that the Court's decision had opened the proverbial Pandora's box. Justice Black realized that there

---

345. *Id.*

346. *Id.* at 101 & n.7.

347. *Id.* at 109; *see also* Dhooge, *supra* note 339, at 189-94 (providing additional analysis of *Scopes* and *Epperson*).

348. *Epperson*, 393 U.S. at 100.

349. *Id.* at 103.

350. *Id.* at 103-04.

351. *Id.* at 104.

352. *Id.* (citations omitted).

353. *Id.* at 109. Supporters of the law published various advertisements during the campaign to adopt the statute. *Id.* at 108 n.16. A typical advertisement read: "Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolsheviks laughed at Tennessee. True, and that sort will laugh at Arkansas." *Id.*

354. *Id.* at 109.

were considerable First Amendment implications associated with overruling an anti-evolution statute.<sup>355</sup> Justice Black noted that the Court's decision may very well have infringed upon "the religious freedom of those who consider evolution an anti-religious doctrine."<sup>356</sup> Justice Black also stated that the Arkansas statutory scheme was arguably neutral as to religion and anti-religion because neither the Biblical origins of man nor the anti-religious doctrine of evolution were allowed to be taught in the Arkansas schools.<sup>357</sup> Justice Black's concerns, however, went largely unnoticed.<sup>358</sup> Today, as a result of the work done by the BSCS, the vast majority of public school biology textbooks present the theory of evolution.<sup>359</sup>

## B. *Evolution—The Foundation of Secular Humanism*

The theory of evolution is one of the major tenets of Secular Humanism.<sup>360</sup> This tenet is clearly set forth in both *Manifesto I* and *Manifesto II*.<sup>361</sup> *Manifesto I* states, in relevant part:

"Religious humanists regard the universe as self-existing and not created.

Humanism believes that man is part of nature and that he has emerged as a result of a continuous process . . . .

Humanism recognizes that man's religious culture and civilization, as clearly depicted by anthropology . . . and history, are the product of a gradual development . . . ."<sup>362</sup>

*Manifesto II* states, in relevant part, "Science affirms that the human species is an emergence from natural evolutionary forces."<sup>363</sup>

---

355. *Id.* at 113 (Black, J., concurring).

356. *Id.* (Black, J., concurring); see also Bird, *supra* note 305, at 570 (arguing that exclusive instruction in the general theory of evolution violates the Free Exercise Clause). But see Dhooge, *supra* note 339, at 194-96 (asserting that the Free Exercise violations are too tenuous to invoke constitutional protections).

357. *Epperson*, 393 U.S. at 113 (Black, J., concurring). Justice Black further stated that the Court's ruling could only be reconciled if the "Court is prepared to simply write off as pure nonsense the views of those who consider evolution an anti-religious doctrine." *Id.* (Black, J., concurring).

358. For example, in response to the Court's decision in *Epperson*, the California Attorney General drafted an opinion which stated that a treatment of evolution in public school textbooks, without a complimentary discussion of creationism, does not violate the neutrality requirement of the First Amendment. See 58 Op. Att'y Gen. 262 (1975).

359. See *supra* note 334-37 and accompanying text.

360. See Whitehead & Conlan, *supra* note 87, at 47. For a complete list of the tenets of Secular Humanism, see *id.* at 37-54; KURTZ, *supra* note 62, at 41-47.

361. See *supra* notes 186-204 and accompanying text.

362. Whitehead & Conlan, *supra* note 87, at 46 (quoting HUMANIST MANIFESTO I) (emphasis omitted).

363. *Id.* (quoting HUMANIST MANIFESTO II).

The principles set forth in *Manifesto I* and *Manifesto II* suggest that the theory of evolution is the cornerstone of Secular Humanism.<sup>364</sup> Not only is this a logical conclusion, but Secular Humanism would be "incomprehensible without the evolutionary hypothesis."<sup>365</sup> George Wald, a Harvard biologist, stated, "There are only two possibilities: either life arose by spontaneous generation . . . or it arose by supernatural creation . . . . [T]here is no third position."<sup>366</sup> Secular Humanism is founded upon the belief that no deity or Creator exists.<sup>367</sup> The theory of evolution restates this "aversion to the concept of a theistic deity" because the "central thrust of evolution is the eradication of any chance of supernatural intervention into the universe or the affairs of man."<sup>368</sup>

Therefore, at this juncture, having established that (1) the Establishment Clause forbids the teaching of religious principles in the public schools,<sup>369</sup> (2) Secular Humanism is a religion,<sup>370</sup> and (3) evolution is a tenet of the Secular Humanist faith,<sup>371</sup> the critical issue is to determine whether the teaching of evolution in the public schools violates the First Amendment. However, the nature and importance of this issue becomes manifest only after an analysis of the history and inherent meaning of the First Amendment.

---

364. *Id.* at 29.

365. *Id.* at 54.

366. *Id.* at 52 (quoting George Wald, *Theories of the Origin of Life*, in FRONTIERS OF MODERN BIOLOGY 187 (1962)). As noted earlier, there have been attempts to reconcile the two concepts by asserting that a deity utilized the evolutionary process as a means of creating the universe. See *supra* note 308-12 and accompanying text. However, such a reconciliation is not plausible from a Secular Humanist perspective because Secular Humanism rejects the possibility of a deity.

367. *Manifesto I* clearly states that "[r]eligious humanists regard the universe as self-existing and *not created*. Humanism asserts that the nature of the universe depicted by modern science makes *unacceptable any supernatural or cosmic guarantees of human value*." HITCHCOCK, *supra* note 5, at 11 (quoting HUMANIST MANIFESTO I) (emphasis added); accord Whitehead & Conlan, *supra* note 87, at 52.

368. Whitehead & Conlan, *supra* note 87, at 52.

369. See *supra* notes 2-4 and accompanying text.

370. See *supra* notes 181-221 and accompanying text.

371. See *supra* notes 356-68 and accompanying text.



VI. THE PROVERBIAL WALL BETWEEN CHURCH AND STATE—AN  
HISTORICAL PERSPECTIVE OF THE FIRST  
AMENDMENT ESTABLISHMENT CLAUSE

Few nations founded in modern times have had as strong a religious heritage as the United States.<sup>372</sup> To properly understand the many possible interpretations of the Establishment Clause, it is necessary to briefly review that part of American history which led to the adoption of the First Amendment.

A. *A Trip Through Early American History*

Many of the early American settlers were Christians seeking freedom to worship according to their own conscience.<sup>373</sup> Many of these settlers fled "from Europe to escape the bondage of laws which compelled them to support and attend government favored churches."<sup>374</sup> Pursuant to the laws of these European nations, any citizen who refused to support the state church was punished by fines, jail terms, torture, and even death.<sup>375</sup>

---

372. HITCHCOCK, *supra* note 5, at 49.

373. *Id.* Among the early settlers were Puritans who settled in New England, Quakers who settled in Pennsylvania, English Protestants who settled on the Atlantic Seaboard, and French and Spanish Catholics who settled in the Mississippi Valley, Florida, and the Southwest. *Id.*

374. *Everson v. Board of Educ.*, 330 U.S. 1, 8 (1947). In *Everson*, Justice Black set forth a detailed historical analysis which prefaced his interpretation of the Establishment Clause. *See id.* at 8-14. Justice Black noted that "Catholics had persecuted Protestants, Protestants had persecuted Catholics, . . . and all of these . . . had persecuted Jews." *Id.* at 9.

For an historical analysis of the conflicts and tensions among the faiths, see Laycock, *supra* note 2, at 417-18.

375. *Everson*, 330 U.S. at 9. The offenses which warranted such punishments included "speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them." *Id.*

This essential part of history played a great role in the Court's ruling that mandatory prayer in the public schools violated the First Amendment. *See Engel v. Vitale*, 370 U.S. 421, 429-30 (1962). In *Engel*, the Board of Education in New Hyde Park, New York mandated that the public school principal begin each day with a prayer that read, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessing upon us, our parents, our teachers, and our Country." *Id.* at 422. The Court invalidated the board's mandate on First Amendment grounds. *Id.* at 436. Justice Black, again writing for the Court, noted that "[i]t is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." *Id.* at 425.

To the dismay of those who sought religious freedom, the old world practices and persecutions continued to thrive in the American colonies in much the same way as in Europe.<sup>376</sup> The English Crown mandated the creation of religious establishments and required that all colonists support those establishments and attend their religious services.<sup>377</sup> By the time of the American Revolution, all of the American colonies had some form of a quasi-official church.<sup>378</sup>

Surprisingly, these practices did not change after the Revolutionary War.<sup>379</sup> Though many men and women fought and died in efforts to end these practices and persecutions, "some of the very groups which had most strenuously opposed the established Church of England . . . passed laws making their own religion the official religion of their respective colony."<sup>380</sup> Many argue that it was the abhorrence of these practices "which ultimately found expression in the First Amendment."<sup>381</sup>

In 1785, Thomas Jefferson drafted the Virginia Bill for Religious Liberty.<sup>382</sup> The Bill's preamble stated:

"Almighty God hath created the mind free; that all attempts to influence it by temporal punishments, or burthens, or by civil incapacitations . . . are a departure from the plan of the Holy author of our religion who being Lord both of body and mind, yet . . . chose not to propagate it by coercions on either; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical . . ."<sup>383</sup>

376. *Everson*, 330 U.S. at 9.

377. *Id.* (footnote omitted).

378. HITCHCOCK, *supra* note 5, at 49.

379. *Everson*, 330 U.S. at 10-11.

380. *Engel v. Vitale*, 370 U.S. 421, 427 (1962); see, e.g., *Developments in the Law—Religion and the State*, *supra* note 66, at 1614 & n.12 (citing A. REICHLAY, RELIGION IN AMERICAN PUBLIC LIFE 96 (1985) (stating that the Congregational Church was established in Connecticut, New Hampshire, and Massachusetts, while the Anglican Church was established in Georgia, Maryland, New Jersey, New York, North and South Carolina, and Virginia)).

381. *Everson*, 330 U.S. at 11. For an overview of the early colonial practices and the events leading up to the passage of the First Amendment, see generally THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986).

382. *Everson*, 330 U.S. at 11 (footnote omitted). Justice Black believed that the growing opposition to the political power possessed by such religious groups as the Presbyterians, Lutherans, Quakers, and Baptists provided the driving force behind the Bill. *Engel*, 370 U.S. at 428.

383. *Everson*, 330 U.S. at 12-13.

The actual statute stated, “That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs.”<sup>384</sup>

### B. The “Wall” and the Separationist Approach

The Supreme Court’s decision in *Everson v. Board of Education*<sup>385</sup> generated a great deal of Establishment Clause doctrinal tension.<sup>386</sup> At issue was the constitutionality of a New Jersey statute that authorized school districts to reimburse parents for expenses incurred in transporting their children to school.<sup>387</sup> In addition to reimbursing parents of public school children, the districts were authorized to reimburse parents of children who attended Catholic parochial schools.<sup>388</sup> These schools provided students with regular religious instruction in addition to a secular education.<sup>389</sup>

In construing the First Amendment Establishment Clause, Justice Black argued that the Virginia Bill and the resulting law had a tremendous impact on the drafters of the First Amendment.<sup>390</sup> Justice Black noted that the First Amendment was “intended to provide the same protections against governmental intrusion on religious liberty as the Virginia Statute.”<sup>391</sup> On this basis, Justice Black set forth the principle of Separation of Church and State in one of the most often quoted First Amendment interpretations:

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 disbe-

---

384. *Id.* at 13 (footnote omitted). For an overview of the events leading up to the passage of the Virginia Bill and the resulting law, see generally Laycock, *supra* note 2, at 410-11.

385. 330 U.S. 1 (1947). Justice Black delivered the opinion of the Court. *Id.* at 3-18. Justice Jackson authored a dissenting opinion in which Justice Frankfurter joined. *Id.* at 18-28. Justice Rutledge authored a separate dissenting opinion in which Justices Frankfurter, Jackson, and Burton joined. *Id.* at 28-74.

386. See *Developments in the Law—Religion and the State*, *supra* note 66, at 1632-34.

387. *Everson*, 330 U.S. at 3.

388. *Id.*

389. *Id.*

390. *Id.* at 11-14. Justice Black stated that the First Amendment embodies the same objectives and intentions as the Virginia law. *Id.* (citations omitted).

391. *Id.* at 13.

liefs, for church attendance or non-attendance . . . . In the words of [Thomas] Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'<sup>392</sup>

From the date Justice Black enunciated the Separation of Church and State Doctrine, the language of his opinion has become "the governing metaphor in the area of church-state relations."<sup>393</sup> In light of his lengthy analysis, however, Justice Black ruled that, although "[t]he First Amendment has erected a wall between church and state . . . [and] that wall

---

392. *Id.* at 15-16 (emphasis added) (citation omitted). Justice Blackmun has referred to this quotation as "the often-repeated summary" of the essential precepts of the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989).

393. Hitchcock, *supra* note 50, at 7. It is interesting to note that the separationist doctrine rests on anti-religious grounds. *Id.* at 9. For example, Justice Black had a particular dislike of the Catholic Church. *Id.* (citing HUGO BLACK, JR., *MY FATHER, A REMEMBERANCE* (1975); VIRGINIA VAN DER VEER HAMILTON, *HUGO BLACK: THE ALABAMA YEARS* (1972)). Justice Black regarded church-goers as hypocrites and "regarded religious believers as uniquely likely to torture, maim, and kill in the name of their beliefs." *Id.*

It is also worthy to note that Justice Black was not the only member of our Supreme Court to find the Catholic Church objectionable. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice William O. Douglas stated:

In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda, that, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics.

*Id.* at 635 n.20 (Douglas, J., concurring) (citing LORAINÉ BOETTNER, *ROMAN CATHOLICISM* 360 (1962)). In formulating his opinion of the parochial school system, Justice Douglas cited a book written by a Protestant Fundamentalist. Hitchcock, *supra* note 50, at 9. This book claimed "that Catholic priests and religious teachers are not allowed to think, that parochial schools represent a dangerous 'foreign' influence in the United States, and that they produce a disproportionate number of gangsters and juvenile delinquents." *Id.* at 9-10 (citing LORAINÉ BOETTNER, *ROMAN CATHOLICISM* 360-63, 364, 368, 370, 379-80 (1962)).

The anti-Catholic dogma espoused by Justices Black and Douglas was certainly inimical to previous Supreme Court decisions that asserted, "We are a Christian people, and the morality of the country is deeply ingrafted upon Christianity." *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892). Nonetheless, it is difficult to imagine that Justices Black and Douglas, whose opinions obviously rested upon their own anti-Catholic polemic, were "neutral" in regards to their First Amendment philosophies.

must be kept high and impregnable," the statute did not violate the First Amendment.<sup>394</sup>

In a dissenting opinion,<sup>395</sup> Justice Rutledge set forth the separationist approach—a theory that “would require government and religion to occupy strictly autonomous spheres.”<sup>396</sup> Justice Rutledge argued that the wall separating Church and State must remain *truly* “high and impregnable.”<sup>397</sup> In support of this position, Justice Rutledge asserted:

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed, or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot *all* such relationships . . . . It was to create a *complete* and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding *every* form of public aid or support for religion.<sup>398</sup>

Accordingly, Justice Rutledge argued that the New Jersey law, by providing funds to assist children in attaining a daily religious education, violated the First Amendment.<sup>399</sup>

### C. Dissent From the Chief Justices

From an historical perspective, Chief Justice Rehnquist has long opposed Justice Black's interpretation of the Establishment Clause.<sup>400</sup> Jus-

---

394. *Everson*, 330 U.S. at 18.

395. *Id.* at 28-74 (Rutledge, J., dissenting).

396. See *Developments in the Law—Religion and the State*, *supra* note 66, at 1635 (asserting that separationism is unworkable in practice).

397. *Everson*, 330 U.S. at 29 (Rutledge, J., dissenting).

398. *Id.* at 31-32 (Rutledge, J., dissenting) (emphasis added).

The strict separationist approach originated during the Enlightenment of the eighteenth century. Hitchcock, *supra* note 50, at 7. During that period, most people were “suffering from the aftermath of religious wars which had been common in the previous two centuries.” *Id.* The common perception was that organized religious groups were “the natural enemy of freedom.” *Id.* at 7-8. The strict separationist approach was viewed as a means to protect society from intense and often dangerous religious quarrels. *Id.* at 8.

Justice Black articulated the separationist viewpoint by stating:

It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given a constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere, zealous sectarians entrusted with governmental power to further their causes would sometimes torture, maim, and kill those they branded “heretics,” “atheists,” and agnostics.”

*Zorach v. Clauson*, 343 U.S. 306, 318-19 (1952).

399. *Everson*, 330 U.S. at 33 (Rutledge, J., dissenting). See *Developments in the Law—Religion and the State*, *supra* note 66, at 1631-39 (differentiating the various interpretations of the First Amendment).

400. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-113 (1984) (Rehnquist, J., dissenting) (arguing that “moment of silence” laws may be constitutional under the First

tice Black's reference to "the words of [Thomas] Jefferson" referred to a personal letter written by Jefferson to the Danbury Baptist Association in 1802 that read, "I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a *wall of separation between church and State*."<sup>401</sup> Chief Justice Rehnquist argues that the thoughts and impressions of Jefferson cannot be, and should not have been, relied upon in interpreting the meaning of the Establishment Clause.<sup>402</sup> First, Jefferson was residing in France during the congressional debates which lead to the passage of the First Amendment, and therefore, he did not participate in the drafting of the religion clauses.<sup>403</sup> Second, Justice Black referred to a letter written by Jefferson fourteen years *after* the First Amendment was adopted.<sup>404</sup>

Chief Justice Rehnquist argues that the works of James Madison, rather than the works of Jefferson, should provide the focal point of First Amendment analysis.<sup>405</sup> Madison, who played a large role in drafting the First Amendment, initially proposed the following language, which became the basis of the First Amendment: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established . . ."<sup>406</sup> Chief Justice Rehnquist asserts that this language does not coincide with the "wall of separation" principle which Justice Black has espoused.<sup>407</sup> Chief Justice Rehnquist adds that none of the members of Congress who spoke during the constitutional debate indicated that the First Amendment would require government to remain "absolutely neutral as between religion and irreligion."<sup>408</sup>

---

Amendment). Chief Justice Rehnquist stated, "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years." *Id.* at 92. (Rehnquist, J., dissenting).

401. *Id.* at 92 (Rehnquist, J., dissenting) (citations omitted) (emphasis added); see also *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (Chief Justice Burger confirming the date of Jefferson's letter).

402. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

403. *Id.* (Rehnquist, J., dissenting).

404. *Id.* (Rehnquist, J., dissenting) (emphasis added). See generally ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982) (analyzing the historical fallacies of Justice Black's *Everson* decision).

405. *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

406. *Id.* at 94 (Rehnquist, J., dissenting) (quoting 1 *Annals of Congress* 434 (1789)).

407. *Id.* at 98 (Rehnquist, J., dissenting).

408. *Id.* at 99 (Rehnquist, J., dissenting).

Rather, Chief Justice Rehnquist argues that “[t]he evil to be aimed at . . . appears to be the establishment of a national religion, and perhaps the preference of one religious sect over another; but [the First Congress] was definitely not concerned about whether the Government might aid all religions evenhandedly.”<sup>409</sup>

Former Chief Justice Warren Burger was in accord with the impressions of his successor. In *Lynch v. Donnelly*,<sup>410</sup> Chief Justice Burger stated that the First Amendment never intended, nor does it require, complete separation of church and state.<sup>411</sup> Chief Justice Burger argued that the concept of the “wall of separation” is only a metaphor which does not “accurately descri[be] the practical aspects of the relationship that in fact exists between church and state.”<sup>412</sup> Chief Justice Burger emphasized that no segment of society, nor any institution, can exist in total isolation from the government.<sup>413</sup>

Regardless of the historical interpretation one chooses to accept, the Framers of our Constitution, and the amendments thereto, intended to protect both believers and non-believers from the evils, fears, and politi-

---

409. *Id.* (Rehnquist, J., dissenting). In support of his argument, Chief Justice Rehnquist quoted Joseph Story, a Justice of the Supreme Court from 1811 to 1845, who stated:

[T]he universal sentiment of America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disappropriation, if not universal indignation . . . . The real object of the [First] [A]mendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.

*Id.* at 104-05 (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 630-32 (5th ed. 1891) (alterations in original)); see also CORD, *supra* note 404, at 8-12 (attacking the position taken by Justice Black). *But see* Laycock, *supra* note 2, at 411-14 (arguing that the amendment actually adopted by the First Congress spoke generically of “religion,” not of “a religion” or “a national religion”).

410. 465 U.S. 668 (1984).

411. *Id.* at 673.

412. *Id.* Chief Justice Burger commented, “Our history is replete with official references to the values and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” *Id.* at 675. As an example, Chief Justice Burger noted that “[t]he day after the First Amendment was proposed, Congress urged President Washington to proclaim a ‘day of public thanksgiving and prayer.’” *Id.* at 675 n.2. For numerous other examples of government acknowledgement of religious activity, see generally *id.* at 674-78.

413. *Id.* at 673. For an overview of the debates which lead to the adoption of the First Amendment, see generally Philip B. Kurland, *The Irrelevance of the Constitution: The Religious Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978).

cal problems present in society at the time.<sup>414</sup> The Framers clearly intended the First Amendment to protect citizens from being forced to abide by and profess a faith in majoritarian religious beliefs.<sup>415</sup> For the purposes of this Comment, however, the issue is whether the First Amendment was also intended to protect those who do profess a belief in the majoritarian views<sup>416</sup> from persecution by those who do not.

VII. THE TEACHING OF EVOLUTION IN PUBLIC SCHOOLS  
IS ARGUABLY A VIOLATION OF THE FIRST  
AMENDMENT ESTABLISHMENT CLAUSE

Questions regarding the propriety of religion in public school curriculums have plagued our society since the origin of the public school system.<sup>417</sup> Initially, schools incorporated Bible readings and prayers in their exercises as a means of instructing values and ideals.<sup>418</sup> Proponents of such teaching methods argued that Bible readings and prayers were a means of avoiding an irreligious, or non-religious, morality in society.<sup>419</sup>

In the 1960s, however, the role of religion in the public schools began to change dramatically.<sup>420</sup> In 1962, the Supreme Court ruled that recitation of prayers in the public schools violates the Establishment Clause of the First Amendment.<sup>421</sup> One year later, the Court also declared Bible readings in public schools to be unconstitutional.<sup>422</sup> Since that time, the Court has consistently ruled that any state-sanctioned religious expression in the public schools violates the Establishment Clause.<sup>423</sup>

---

414. See *Everson v. Board of Educ.*, 330 U.S. 1, 8-18 (1947).

415. See generally Bergeron, *supra* note 65.

416. A recent study suggests that approximately ninety-five percent of Americans believe in God. *Religion in America: 50 Years: 1935-1985*, THE GALLUP REPORT 50 (May 1985). This study suggested that this percentage has remained constant since 1945. *Id.* Therefore, the author's reference to "majoritarian beliefs" refers to those religious faiths which are theistic in nature.

417. MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW*, 146 (3rd ed. 1992).

418. *Id.* (citing LAWRENCE A. CREMIN, *THE AMERICAN COMMON SCHOOL* 66-70 (1951)).

419. *Id.*

420. *Id.*

421. *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

422. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963).

423. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (declaring that a "moment of silence" law violated the First Amendment because the fundamental purpose of the law was to promote religion); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (striking down a statute requiring the Ten Commandments to be posted in public school class-



A. *The Supreme Court's Role—Keep Religion Out of the Public Schools*

Before determining the central issue of this Comment—whether the teaching of evolution, a tenet of the religion of Secular Humanism, violates the Establishment Clause—it is essential to set forth the Supreme Court's rationale for prohibiting all forms of religious expression in the public schools. In general, the Court's rationale was best stated as follows: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."<sup>424</sup>

Essentially, the Court's statement is an attempt to address several concerns. First, the Court has recognized that a primary function of the public school system is to promote tolerance and respect for the variety of beliefs that exist in our culture.<sup>425</sup> In this sense, subjecting a public school student to instruction that is adverse to his or her religious beliefs may burden that student's religious liberty.<sup>426</sup> Therefore, the public school's function requires that its curriculum remain free of any religious training which may interfere with, or contradict, the religious beliefs of students.<sup>427</sup>

Secondly, the Court has consistently recognized the particular vulnerability of school-age children.<sup>428</sup> Courts and commentators have acknowledged that students at the secondary and elementary levels are especially susceptible to a teacher's influence and to peer pressure from fellow classmates.<sup>429</sup> The Court's general fear is that "children's impressionabil-

---

rooms); see also *Developments in the Law—Religion and the State*, *supra* note 66, at 1659).

424. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (striking down the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act).

425. *Developments in the Law—Religion and the State*, *supra* note 66, at 1660 (citing *School Dist. of Abington Township*, 374 U.S. at 242 (Brennan, J., concurring)).

426. Bird, *supra* note 305, at 524 (arguing that the exclusive teaching of evolution is a violation of the Free Exercise Clause).

427. See *Developments in the Law—Religion and the State*, *supra* note 66, at 1659-60.

428. *Id.* at 1660 (arguing that minor children are especially vulnerable to "indoctrination and coercion"); accord *Smith v. Board of Sch. Comm'rs*, 827 F.2d 684, 690 (11th Cir. 1987).

429. Bird, *supra* note 305, at 527. Accord *Developments in the Law—Religion and the State*, *supra* note 66, at 1660 (citing *McCullum v. Board of Educ.*, 333 U.S. 203, 227 (1947)); Paul A. Freund, *The Legal Issue*, in PAUL A. FREUND & ROBERT ULRICH, *RELIGION AND THE PUBLIC SCHOOLS* 15 (1965) (commenting on the impressionability of school children).

This particular susceptibility is extremely dangerous, especially in the area of religious instruction, because students at the secondary and elementary levels are not

ity might lead them to perceive the presence of religious expression in school as signifying the school authorities' approval of such expression, and consequently, to feel pressure from teachers and fellow students to conform to majority practice."<sup>430</sup>

This coercive pressure may manifest itself in numerous ways. First, the teacher's position of authority, superior education, and difference in age may have the effect of exerting influence over, and perhaps altering, a student's personal beliefs.<sup>431</sup> In addition, the teacher's "ability to count discrepant responses 'wrong'" may have the effect of penalizing disagreements with the classroom presentation.<sup>432</sup> Further, school-age children often have a "need for group acceptance and social approval."<sup>433</sup> A student risks being classified as a deviant by classmates if he or she refuses to adopt the majority view.<sup>434</sup> Such a classification may have a severe and adverse emotional impact.<sup>435</sup>

Lastly, the Court has recognized that mandatory attendance requirements intensify the public school's coercive authority.<sup>436</sup> "Students are required to attend classes and may be required to study particular subjects."<sup>437</sup> As a result, course material that contradicts the student's religious faith may undermine those beliefs.<sup>438</sup>

All of these rationales have been widely asserted to prevent the perceived dangers of allowing "majoritarian orthodoxy" into the public

able to "weigh classroom instruction analytically and do not approach religious issues abstractly." Bird, *supra* note 305, at 527 (citations omitted). At least one commentator has asserted that the ability to conceptualize religious questions does not fully develop until after adolescence. *Id.* at 527 n.57 (citations omitted).

430. *Developments in the Law—Religion and the State*, *supra* note 66, at 1660 (relying on *McCullum*, 333 U.S. at 227).

431. Bird, *supra* note 305, at 532; *see also Smith*, 827 F.2d at 690 (noting that students often emulate teachers as role models).

432. Bird, *supra* note 305, at 532.

433. *Id.* at 532-33.

434. *Id.* at 533-34; *see also Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169 (S.D. W. Va. 1985) (noting that a Jewish boy was harassed by Christian students because he refused to pray during a mandatory moment of silence).

435. Bird, *supra* note 305, at 533-34.

436. *Developments in the Law—Religion and the State*, *supra* note 66, at 1660; *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (striking down the Louisiana Balanced Treatment for Creation-Science and Evolution Science in Public School Instruction Act).

437. Bird, *supra* note 305, at 528 (asserting that exclusively teaching evolution in the public schools violates the Free Exercise Clause).

438. *Id.*

school forum.<sup>439</sup> It is these very rationales, however, that should also preclude the teaching of non-majoritarian beliefs in the public schools.<sup>440</sup> The Court has ruled that government cannot delete the theory of evolution from the public school curriculum.<sup>441</sup> The Court has also ruled that government cannot seek to balance the theory of evolution with an equal discussion of creationism.<sup>442</sup> However, the Court has not ruled upon the propriety of teaching the theory of evolution as a proven scientific fact.<sup>443</sup> On the basis of the assertion that Secular Humanism is a religion, this Comment hypothesizes that the teaching of evolution in the public schools, as a matter of proven scientific fact rather than as theory, constitutes an establishment of religion in violation of the First Amendment. In light of the absence of clear judicial authority, the following analysis relies upon inference from precedent and the very purpose of the First Amendment.

---

439. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (declaring that a "moment of silence" law violates the First Amendment because the fundamental purpose of the law was to promote religion); *Stone v. Graham*, 449 U.S. 39, 40 (1980) (striking down a statute requiring the Ten Commandments to be posted in public school classrooms); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963) (declaring Bible reading in public schools unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (declaring the recitation of a state-composed prayer in the public schools unconstitutional).

440. Commentators have argued that teaching the tenets of Secular Humanism in public schools promotes an anti-religion which violates the principles of the First Amendment. See generally *Toscano*, *supra* note 67. Secular Humanism rejects all notions of a deity, and therefore, these arguments may have merit. However, as noted in Section IV, *supra*, this Comment takes the position that Secular Humanism is a religion, rather than an anti-religion.

441. *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968) (declaring that a law prohibiting the teaching of evolution in the public schools was enacted solely to prevent the teaching of a theory that conflicted with divine creationism). For a more detailed analysis of *Epperson*, see *supra* notes 339-59 and accompanying text.

442. *Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (striking down the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act as promoting creationism in violation of the First Amendment).

443. In 1981, the issue of whether the theory of evolution can be taught as fact rather than as theory was addressed in *Segraves v. California Bd. of Educ.*, No. 278978 (Cal. Super. Ct. June 12, 1981). In *Segraves*, Kelly Segraves, co-founder of the Creation Science Research Center, "argued that the State of California had violated the religious freedom of his children by teaching evolution as fact." Peter Gwynne et al., "Scopes II" in California, *NEWSWEEK*, Mar. 16, 1981, at 67. Segraves' son testified that his public school teacher "insisted that he descended from an ape." *Id.* California Superior Court Judge Irving H. Perluss ruled that school teachers must qualify their discussions of evolution with a statement that evolution is only a scientific hypothesis and not a proven fact. *Id.*

## B. The "Midnight Ghoul"—The Lemon Test

The Supreme Court has ruled that the Establishment Clause requires government to "pursue a course of complete neutrality toward religion."<sup>444</sup> In 1971, the Court developed a three-prong test to delineate the breadth of the Establishment Clause and to determine whether government action infringes upon the neutrality requirement which the First Amendment mandates.<sup>445</sup> In *Lemon v. Kurtzman*,<sup>446</sup> the Court stated that government actions must (1) have a secular purpose, (2) have as their primary effect neither the advancement nor the inhibition of religion, and (3) not create "excessive governmental entanglements with religion."<sup>447</sup> Government action violates the Establishment Clause if it fails to satisfy any one of these three prongs.<sup>448</sup>

The first prong of the Lemon test requires that the content of the public school curriculum have a secular, or non-religious, purpose.<sup>449</sup> "The purpose prong of the Lemon test asks whether government's *actual* purpose is to endorse or disapprove of religion."<sup>450</sup> Unless the government either overtly promotes the religion of Secular Humanism or pursues a blatantly anti-religious agenda, the teaching of evolution in the public schools, even if taught as fact rather than scientific hypothesis, would probably not breach this first prong requirement.<sup>451</sup> Introduction of the evolutionary theory into the public school curriculum can be justified on

444. *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985).

445. *See Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

446. *Id.*

447. *Id.* (citations omitted); *see, e.g., Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 485 (1986) (striking a state law that prohibited vocational rehabilitative assistance to students of private Christian colleges); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382-83 (1985) (striking a state "Shared Time" statute that provided classes to nonpublic school students at public expense); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) (ruling that a state law granting Sabbath observers an absolute right not to work on their chosen Sabbath violated the Establishment Clause); *Committee for Pub. Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 653 (1980) (upholding a state law appropriating public funds to reimburse both church-sponsored and secular nonpublic schools for performing services mandated by the State). This three-prong test is hereinafter referred to as "the Lemon test."

448. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

449. *Lemon*, 403 U.S. at 612; Freed, *supra* note 163, at 1174.

450. *Edwards*, 482 U.S. at 585 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)) (emphasis added); *see also Stone v. Graham*, 449 U.S. 39, 40 (1980) (invalidating a law requiring the Ten Commandments to be posted in public school classrooms).

451. *See Freed, supra* note 163, at 1174 & n.202.

the basis of furthering scientific awareness and knowledge, a completely secular purpose, rather than as promoting Secular Humanism.<sup>452</sup>

The second prong of the Lemon test requires that the "subject matter taught in public schools not have the primary effect of advancing or inhibiting religion."<sup>453</sup> If the public school system "espouses religious beliefs, it advances religion; if it espouses anti-religious beliefs, it inhibits religion."<sup>454</sup> In determining whether the *primary* effect of the public school curriculum is to espouse religious or anti-religious beliefs, the court must determine "whether the Government *intends* to convey a message of endorsement or disapproval of religion."<sup>455</sup>

When focusing on the public school system as a whole, once again, unless the government either blatantly engages in a policy of promoting Secular Humanism or pursues an obvious anti-religious agenda, the teaching of evolution in the public schools, even as proven fact, would probably not violate the second prong of the Lemon test.<sup>456</sup> The teaching of evolution may further a tenet of Secular Humanism and may arguably be tantamount to espousing a belief in conflict with those religions founded upon creationism. However, it would be quite easy to argue that the *primary* purpose of introducing the evolutionary theory is to further scientific literacy, not to advance Secular Humanism or inhibit other religions.<sup>457</sup> Further, the Supreme Court has consistently ruled that subject matter "taught in public schools does not violate the Establishment Clause simply because the material [presented] 'happens to coincide[] or harmonize with the tenets of some or all religions.'"<sup>458</sup>

When focusing on the individual public school teacher, however, it is arguable that a contrary conclusion could be reached in certain circumstances. An individual teacher may violate the second prong if it is evident that he is utilizing the public school forum as a means of furthering his own private religious agenda. For example, despite the policies and mandates of a local school board, a public school teacher would clearly

---

452. *Id.* at 1174.

453. *Lemon*, 403 U.S. at 612 (citing *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968)); Freed, *supra* note 163, at 1174.

454. Freed, *supra* note 163, at 1174 (citing *Lynch v. Donnelly*, 465 U.S. 668, 691-92 (1984) (O'Connor, J., concurring)).

455. *Wallace v. Jaffree*, 472 U.S. 38, 61 n.52 (1985) (quoting *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring)) (emphasis added).

456. See Freed, *supra* note 163, at 1182.

457. *Id.* As Justice Powell stated, "A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must *predominate*." *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring) (emphasis added).

458. *Harris v. McRae*, 448 U.S. 297, 319 (1980) (quoting *McGowan v. Maryland*, 366 U.S. 420, 422 (1961)); see also *Edwards*, 482 U.S. at 605 (Powell, J., concurring).

violate the Establishment Clause if he took it upon himself to espouse the principles set forth in the Bible.<sup>459</sup>

Similarly, a public school teacher would violate the First Amendment if he used the public school forum as his own private pulpit to espouse the doctrines of Secular Humanism as set forth in *Manifesto I* and *Manifesto II*.<sup>460</sup> Likewise, a public school teacher who affirmatively states that the theory of evolution is the *only* true explanation of "where we come from" might give rise to some very serious First Amendment concerns. In this regard, the Supreme Court has stated that the Constitution forbids hostility toward religion.<sup>461</sup> On that basis, it would appear that such an affirmation would violate the Establishment Clause, especially if made in response to an inquiry concerning countervailing theories of life's origins. Although such statements would not necessarily affirm the religion of Secular Humanism, they might be hostile to those religions founded on tenets which are in conflict with evolution. Such an affirmation could easily be construed as being tantamount to telling a student that his religion is "wrong."<sup>462</sup>

459. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) (declaring Bible reading in public schools unconstitutional).

460. For example, an unnamed Secular Humanist was quoted as stating:

I am convinced that the battle for human kind's future must be waged and won in the *public school classroom* by teachers who correctly perceive their role as the *proselytizers of a new faith, a religion of humanity . . . .* These teachers must be ministers of another sort, utilizing a classroom instead of a pulpit to convey humanist values in whatever subject they teach regardless of the grade level . . . .

*Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 969 (S.D. Ala.) (emphasis added) (examining expert testimony as to the meaning of Secular Humanism), *rev'd*, 827 F.2d 684 (11th Cir. 1987). This excerpt, which calls for the wholesale indoctrination of public school children, evidences a totalitarian philosophy which would undoubtedly have as its primary effect the advancement of the religion of Secular Humanism.

461. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

462. See *Freed*, *supra* note 163, at 1182-83 (asserting that much of the controversy surrounding First Amendment debate could be avoided if public "schools err on the side of uncertainty and teach that the theory of evolution is indeed a theory and not a fact").

See also *Epperson v. Arkansas*, 393 U.S. 97 (1968). In *Epperson*, the Supreme Court ruled that a statute prohibiting public school teachers from teaching the theory of evolution violated the First Amendment. *Id.* at 109. The Court stated that the law was enacted solely to prevent the teaching of a theory which conflicted with creationism. *Id.* The Court concluded that such a purpose was an obvious violation of the religious neutrality mandated by the First and Fourteenth Amendments. *Id.*

However, Justice Black recognized that there were considerable First Amendment

The connection between the theory of evolution and hostility toward religion may, however, be too tenuous to give rise to First Amendment protections. For instance, in *Wright v. Houston Independent School District*,<sup>463</sup> a group of students sought to enjoin the public schools from teaching the theory of evolution without critical analysis and without reference to other theories of life's origins.<sup>464</sup> The students claimed that such teaching practices violated the First Amendment.<sup>465</sup> The District Court denied the students' claim and ruled that the offensive material was only peripheral to the matter of religion.<sup>466</sup>

The third prong of the Lemon test prohibits government from engaging in excessive entanglements with religion.<sup>467</sup> Unless there is evidence of contact between the public school authorities and Secular Humanist organizations in regard to the subject matter of the school curriculum, the teaching of evolution in the public schools, even if taught as proven fact rather than scientific hypothesis, would probably not breach the third prong requirement.<sup>468</sup> Therefore, unless there is evidence that the public schools are pursuing the illegitimate purpose of furthering the religion of Secular Humanism, the teaching of evolution in the public schools would probably not violate the Lemon test, and therefore would not violate the First Amendment.<sup>469</sup>

### C. The Endorsement Test—The Impending Doom of Lemon

Although the Supreme Court has not explicitly overruled *Lemon*,<sup>470</sup> the rigid three-part test has been the subject of intense criticism.<sup>471</sup> At least one commentator has noted that "the three-part test has been so

---

implications in overruling an anti-evolution statute. *Id.* at 113 (Black, J., concurring). Justice Black noted that the Court's decision may have infringed upon "the religious freedom of those who consider evolution an anti-religious doctrine." *Id.* (Black, J., concurring).

463. 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1974). For an additional analysis of *Wright*, see Sherri Schaeffer, Note, *Edwards v. Aguillard: Creation Science and Evolution—The Fall of Balanced Treatment Acts in the Public Schools*, 25 SAN DIEGO L. REV. 829, 835 (1988).

464. *Wright*, 366 F. Supp. at 1208.

465. *Id.* at 1209.

466. *Id.* at 1211.

467. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971) (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

468. *See id.* at 613-14.

469. *See Freed*, *supra* note 163, at 1174 n.202.

470. *See Laycock*, *supra* note 2, at 449 (discussing the three-part Lemon test).

471. *Id.* at 449 & n.252 (citing Johnson, *supra* note 3; Kurland, *supra* note 413); *see also Developments in the Law—Religion and the State*, *supra* note 66, at 1647-50 (noting that the Lemon test does not take into account the divergence of perspectives between the accommodated and unaccommodated religious groups).

elastic in its application that it means everything and nothing."<sup>472</sup> In this respect, application of the Lemon test often leads to irreconcilable decisions.<sup>473</sup>

Critiques of the Lemon test have not been limited to scholarly commentary. Chief Justice Rehnquist has long suggested that the Court completely abandon the rigid test.<sup>474</sup> Chief Justice Rehnquist argues that the Lemon test is difficult, if not impossible to apply because the Court has never delineated exactly how the test is to operate.<sup>475</sup> The Chief Justice attributes many of the problems inherent in the Lemon test to a lack of historical foundation.<sup>476</sup> As a result of the scholarly and judicial criticism, the Supreme Court's recent First Amendment decisions evidence a shift away from the Lemon test.<sup>477</sup>

472. Laycock, *supra* note 2, at 450 (asserting that the second and third prongs of the Lemon test are Free Exercise concepts that have little to do with the Establishment Clause).

473. *Id.* Compare *Engel v. Vitale*, 370 U.S. 421 (1962) (declaring prayer in public schools unconstitutional) with *Marsh v. Chambers* 463 U.S. 783 (1983) (upholding prayer in state legislature session openings). Compare *Lynch v. Donnelly*, 465 U.S. 668 (1984) (ruling that a city supported Nativity scene had a secular purpose and did not create excessive entanglements) with *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (approving government grants to church-sponsored colleges and universities).

474. *Wallace v. Jaffree*, 472 U.S. 38, 107-14 (1985) (Rehnquist, J., dissenting).

475. *Id.* at 108 (Rehnquist, J., dissenting). *Accord Lynch*, 465 U.S. at 688-89 (O'Connor, J., concurring) ("It has never been entirely clear . . . how the three parts of the test relate to the principles enshrined in the Establishment Clause.")

476. *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting). Chief Justice Rehnquist has not been alone among the members of the Supreme Court in his criticism of the Lemon test. *See id.* at 90-91 (White, J., dissenting) (arguing for a complete reconsideration of the Court's Establishment Clause doctrine). Most notable for his criticism of *Lemon* is Justice Antonin Scalia. In *Lamb's Chapel v. Center Moriches Union Free School District*, Justice Scalia stated:

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence . . . .

The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely.

113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring) (citations omitted).

477. In several cases involving Establishment Clause issues, the Supreme Court refused to even apply the Lemon test. *See Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) (finding that the Lemon test was unnecessary in holding that a civic prayer at



In *Lynch v. Donnelly*,<sup>478</sup> Justice O'Connor argued for a reformation of Establishment Clause doctrine.<sup>479</sup> At issue was the constitutionality of a Nativity scene, or crèche, erected by the city of Pawtucket, Rhode Island, as part of an annual Christmas display.<sup>480</sup> The display included many secular items in addition to the crèche.<sup>481</sup> Certain city residents and the American Civil Liberties Union argued that the crèche promoted Christianity, and, therefore, violated the Establishment Clause.<sup>482</sup> The district court agreed and permanently enjoined the city from including the crèche in its holiday display.<sup>483</sup> In a plurality decision, however, the Supreme Court ruled that the Christmas display did not run afoul of the Lemon test, and therefore, did not violate the Establishment Clause.<sup>484</sup>

Justice O'Connor authored a separate concurring opinion in which she called for a rethinking of the Lemon test.<sup>485</sup> Justice O'Connor argued for the adoption of a new approach—an approach which latter became known as the “endorsement” test.<sup>486</sup> Justice O'Connor stated that “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.”<sup>487</sup> In this sense, government action violates the Establishment Clause if it endorses or disapproves of religion. “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”<sup>488</sup> Likewise, government “[d]isapproval sends the opposite message.”<sup>489</sup>

---

a public school graduation ceremony violates the Establishment Clause); *Marsh v. Chambers* 463 U.S. 783, 786-95 (1983) (failing to comment on the circuit court’s use of the Lemon test with respect to prayer in the state legislature); *Larson v. Valente*, 456 U.S. 228, 252 (1982) (clarifying that the Lemon test is “intended to apply [only] to laws affording a uniform benefit to *all* religions”). *But see Lamb’s Chapel*, 113 S. Ct. at 2148 (utilizing the Lemon test in determining whether a school district violated the Establishment Clause by refusing a church the use of school facilities for a religious-oriented film series).

478. 465 U.S. 668 (1984).

479. *Id.* at 687-94 (O’Connor, J., concurring).

480. *Id.* at 671.

481. *Id.* The display “included, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, [and] a large banner that reads ‘SEASONS GREETINGS.’” *Id.*

482. *Id.* at 671-72.

483. *Id.* at 672.

484. *Id.* at 678-87.

485. *Id.* at 687-94 (O’Connor, J., concurring).

486. *See Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O’Connor, J., concurring) (elaborating on the standards set forth in *Lynch*).

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

488. *Id.* at 688 (O’Connor, J., concurring).

489. *Id.* (O’Connor, J., concurring); *see also* Arnold H. Loewy, *Rethinking Govern-*

In addressing the issue of whether government action endorses or disapproves of religion, courts must undergo essentially a two-part analysis. First, every government action must be assessed by focusing on the particular facts and circumstances.<sup>490</sup> Second, courts must examine both the message which the government intends to convey *and* the message which the government actually conveys.<sup>491</sup> The government's message, therefore, must be scrutinized both subjectively and objectively.<sup>492</sup> In this sense, even government actions which unintentionally make religion relevant to an individual's standing in the community may endorse or disapprove of religion in violation of the Establishment Clause.<sup>493</sup>

In *Lynch*, Justice O'Connor applied the endorsement test to the facts and asserted that the holiday display did not violate the Establishment Clause.<sup>494</sup> First, in addressing the physical setting, Justice O'Connor noted that the crèche was only a small part of a large Christmas display which featured numerous secular ornaments.<sup>495</sup> Second, when focusing on the display as a whole and in the context of the holiday season, Justice O'Connor stated that the display could not reasonably be understood as either an endorsement of the Christian religion or a disapproval of non-Christian faiths.<sup>496</sup>

---

*ment Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049 (1986) (providing additional analysis of the *Lynch* decision); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503 (1992) (observing that Justice O'Connor's endorsement test will probably replace the Lemon test in light of recent Supreme Court decisions).

490. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

491. *Id.* at 690 (O'Connor, J., concurring).

492. *Id.* (O'Connor, J., concurring).

493. *Id.* at 692; see *Developments in the Law—Religion and the State*, *supra* note 66, at 1648-49 ("When government makes religion a part of civic life, the absence of an official intention to influence or coerce religious belief does not negate the message that adherence or participation is a precondition to full membership in the community.").

494. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

495. *Id.* at 691-92 (O'Connor, J., concurring).

496. *Id.* at 691 (O'Connor, J., concurring).

In *Wallace v. Jaffree*, Justice O'Connor reasserted the endorsement test. 472 U.S. 38, 67-84 (1985) (O'Connor, J., concurring). At issue was the constitutionality of an Alabama "moment of silence" law which mandated that public schools observe a daily period of silence for meditation. *Id.* at 40. (O'Connor, J., concurring). Justice O'Connor noted that the statute unconstitutionally endorsed religion because the law possibly favored the child who engages in prayer over the child who does not. *Id.* at 73 (O'Connor, J., concurring). Justice O'Connor further stated that "the message of

In *County of Allegheny v. ACLU*,<sup>497</sup> the Supreme Court adopted the endorsement test.<sup>498</sup> At issue, once again, was the constitutionality of two Christmas holiday displays.<sup>499</sup> The first display included a crèche placed on the steps of the county courthouse.<sup>500</sup> With the exception of several poinsettia plants and evergreen trees, the crèche stood alone, unaccompanied by any other secular ornaments.<sup>501</sup> The second display included a Jewish menorah.<sup>502</sup> Unlike the crèche, the menorah was accompanied by other secular holiday ornaments, including a large decorated Christmas tree and a banner that read "Salute to Liberty."<sup>503</sup> Several local residents and the American Civil Liberties Union sued the county and the city claiming that both displays violated the Establishment Clause of the First Amendment.<sup>504</sup> In a plurality decision, the Supreme Court ruled that only the crèche display violated the Establishment Clause.<sup>505</sup>

In its decision, the Court applied the two-part endorsement test.<sup>506</sup> In addressing the physical setting of the crèche display, the Court noted that the crèche stood alone, unaccompanied by any secular symbols, and therefore, nothing detracted from its religious message.<sup>507</sup> On that basis, the Court concluded that it was reasonable for viewers to believe that the government was sending a message of support and approval of a particular religion.<sup>508</sup> The crèche conveyed "a message to nonadherents of Christianity that they are not full members of the political community,

---

endorsement would seem inescapable if the teacher exhorts children to use the designated time to pray." *Id.* (O'Connor, J., concurring).

Commentators have given the endorsement test mixed reviews. See Loewy, *supra* note 489 (commenting that government neutrality toward religion can be best achieved by application of the endorsement test). *But see* County of Allegheny v. ACLU, 492 U.S. 573, 668-69 (1989) (Kennedy, J., dissenting) (arguing that the endorsement test is flawed and unworkable, but recognizing that it is becoming the majority approach in assessing Establishment Clause violations); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987) (criticizing the endorsement test).

497. 492 U.S. 573 (1989); see Barbara S. Barrett, Note, *Religious Displays and the First Amendment: County of Allegheny v. ACLU*, 13 HARV. J.L. & PUB. POL'Y 399 (1990) (providing additional analysis of the *County of Allegheny* decision).

498. *County of Allegheny*, 492 U.S. at 599-600, 612-15.

499. *Id.* at 578.

500. *Id.* at 580-81.

501. *Id.*

502. *Id.* at 582.

503. *Id.* at 581-82.

504. *Id.* at 587-88.

505. *Id.* at 621.

506. *Id.* at 598-613.

507. *Id.* at 598.

508. *Id.* at 599-600.

and a corresponding message to Christians that they are favored members of the political community.<sup>509</sup>

In addressing the Chanukah menorah, the Court noted that the menorah was only a small part of an overall display which was predominated by secular symbols.<sup>510</sup> On that basis, the Court ruled that the presence of the menorah neither endorsed nor disapproved of religion, but simply created an overall holiday setting.<sup>511</sup>

When analyzing the public school curriculum under the endorsement test, it is arguable that the government violates the Establishment Clause by teaching evolution as a proven scientific fact, rather than as a hypothesis, because such teaching makes adherence to a religion relevant to the public school students' standing in the community. At least one commentator has noted that when the public schools adopt a curriculum that is in accord with "the beliefs or practices of certain creeds[, it] is likely to cause nonadherents of the accommodated faiths to feel that full membership in the community is contingent on acceptance of such creeds."<sup>512</sup> Therefore, the teaching of evolution as fact may send a message to adherents of religions which denounce evolution "that they are outsiders, not full members of the political community."<sup>513</sup> Likewise, the teaching of evolution as fact may send an accompanying message to adherents of religions that accept the theory of evolution, such as Secular Humanism, "that they are insiders, favored members of the political community."<sup>514</sup>

The first part of the endorsement test requires an examination of the particular physical setting in which the government's message is heard.<sup>515</sup> As noted earlier, the Supreme Court has consistently recognized that the public school forum is an especially sensitive area in regard to Establishment Clause issues.<sup>516</sup> As such, the Court has been especially vigorous in prohibiting the presence of religion in the public schools.<sup>517</sup>

---

509. *Id.* at 626 (O'Connor, J., concurring).

510. *Id.* at 613-18.

511. *Id.* at 614-21.

512. *Developments in the Law—Religion and the State*, *supra* note 66, at 1649-50.

513. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

514. *Id.* (O'Connor, J., concurring).

515. *Id.* at 692-93 (O'Connor, J., concurring).

516. *See supra* notes 424-38 and accompanying text; *see also* *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (referring to the public school forum as a "special context").

517. *See* *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (declaring that a "moment of silence" law violated the First Amendment because the fundamental purpose of the law was to promote religion); *see also* *Stone v. Graham*, 449 U.S. 39, 40 (1980) (strik-

In light of the sensitive nature of the public school forum, the second part of the endorsement test requires an objective examination of the message which the government intends to convey, and a subjective examination of the message which the government actually conveys.<sup>518</sup> As noted earlier, by introducing the evolutionary theory into the public school curriculum, it is quite easy to argue that the government intends to promote scientific awareness rather than endorse or disapprove of religion. In teaching the theory of evolution as fact, however, the government may be unintentionally conveying a much different message.

Proponents of the evolutionary theory have stated, "It is absolutely safe to say that, if you meet somebody who claims not to believe in evolution, that person is ignorant, stupid, or insane."<sup>519</sup> Another commentator has opined that "every right thinking person *knows* that we have evolved from lower species, and . . . notions of special creation proceed from ancient myths, to be believed only at the peril of being out of touch with reality."<sup>520</sup> Although such characterizations may appear to be extreme positions, some argue that it is this very mentality which has crept into the public school system.<sup>521</sup> In fact, it is difficult to imagine that a public school student, who is inundated with the evolutionary theory, without exposure to countervailing viewpoints, would believe that contrary theories of life's origins are even remotely possible.

Parents who have raised their children to believe in creationism have noted that their children are often ridiculed by their public school classmates for refusing to accept the evolutionary theory as fact.<sup>522</sup> In this sense, government clearly makes adherence to religion relevant to the students' standing in the community. On this basis, it is plausible to argue that government, in allowing the theory of evolution to be taught as proven scientific fact rather than as theory, is endorsing Secular Humanism and disapproving those religions founded upon creationism, thereby violating the First Amendment.

---

ing down a statute requiring the Ten Commandments to be posted in public school classrooms); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 205 (1963) (declaring Bible reading in public schools unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (declaring the recitation of a state-composed prayer in the public schools unconstitutional).

518. See *supra* notes 490-93 and accompanying text.

519. JOHNSON, *supra* note 303, at 9.

520. SMITH, *supra* note 50, at 97.

521. See *Smith v. Board of Sch. Comm'rs*, 655 F. Supp. 939, 945-46 (S.D. Ala.) (cross-complainants arguing that the teachings of Secular Humanism should be removed from the purview of the public school curriculum), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

522. *Id.* at 945 (parent testifying that he feels compelled to re-educate his child in regards to the theory of creationism on a daily basis).

In sum, it is essential to return to the Supreme Court's rationale for prohibiting all forms of religious expression in the public schools. The Court has firmly stated that "[f]amilies entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family."<sup>523</sup> To fully appreciate the intrinsic importance of this statement as it relates to the purpose of this Comment, it is necessary to focus upon the context in which the Court made this statement.

In *Edwards v. Aguillard*,<sup>524</sup> the Supreme Court addressed whether Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act violated the First Amendment.<sup>525</sup> The Act prohibited the teaching of evolution unless accompanied by instruction in creation science.<sup>526</sup> Justice Brennan, writing for the Court, used the above-stated language to rule that the Act violated the Establishment Clause because its primary purpose was "to advance the religious viewpoint that a supernatural being created humankind."<sup>527</sup>

Those who rely on Justice Brennan's statement as a means of prohibiting the teaching of creationism and other theories which are antithetical to evolution cannot "have their cake and eat it too." Justice Brennan was quite correct in stating that parents entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not be used to advance religious views such as creationism.<sup>528</sup> In the same vein, however, many parents also condition their trust on the understanding that the classroom will not be used to promote non-theistic religions, such as Secular Humanism, nor to denigrate the theistic beliefs they are trying to instill in their children. Just as creationism may conflict with the private beliefs of the student and his family, so too may evolution and other tenets of Secular Humanism conflict with the private beliefs of many students and their families. Therefore, the same rationales used to prohibit the teaching of creationism in the public school classrooms can, and should, be used to prevent the teaching of evolution as an established fact, rather than as a scientific hypothesis.

---

523. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

524. *Id.*

525. *Id.* at 580-81.

526. *Id.* at 581.

527. *Id.* at 591.

528. *See id.* at 584.

## VIII. PROPOSED SOLUTION TO THE UNSOLVABLE PROBLEM

In the years following *Engel v. Vitale*<sup>529</sup> and *School District of Abington Township v. Schempp*,<sup>530</sup> numerous commentators have argued that the public schools have become hostile to religion.<sup>531</sup> Many of these assertions stem from studies which have concluded that religion has been completely removed from textbooks and school curriculums.<sup>532</sup>

### A. Previous Proposals That Have Failed

In response to these complaints, numerous solutions have been proposed. However, either Congress or the courts have rejected all of these proposed solutions. For example, a number of jurisdictions enacted so-called "moment of silence" laws which mandated a period of silence at the beginning of every school day.<sup>533</sup> Many of these laws were either expressly or implicitly designed to provide a substitute for religious activities.<sup>534</sup> In *Wallace v. Jaffree*,<sup>535</sup> the Supreme Court ruled that a daily period of silence, used for either meditation or voluntary prayer, was tantamount to an endorsement of religion in violation of the First Amendment.<sup>536</sup>

Efforts by former President Ronald Reagan, who was openly skeptical of the evolutionary theory, proved equally futile.<sup>537</sup> In 1980, Reagan campaigned on a platform that included allowing the biblical theory of creation to be taught in public schools.<sup>538</sup> Once in office, Reagan proposed a constitutional amendment that would have allowed prayer in the public schools.<sup>539</sup> Reagan suggested that the amendment state, "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required

---

529. 370 U.S. 421 (1962) (declaring recitation of prayer in public schools unconstitutional).

530. 374 U.S. 203 (1963) (declaring Bible reading in public schools unconstitutional).

531. YUDOF, *supra* note 417, at 147-48 (citing generally George W. Dent Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 864 (1988)).

532. *Id.* at 148 (citing PAUL C. VITZ, *CENSORSHIP: EVIDENCE OF BIAS IN OUR CHILDREN'S TEXTBOOKS* (1986)).

533. *Id.*

534. *Id.*

535. 472 U.S. 38 (1985).

536. *Id.* at 60-61.

537. Malcom Jay Kottler, *Evolution: Fact? Theory? . . . or Just a Theory?*, in *EVOLUTION VERSUS CREATIONISM: THE PUBLIC EDUCATION CONTROVERSY* 29 (J. Peter Zetterberg ed., 1983).

538. *Id.*

539. YUDOF, *supra* note 417, at 148.

by the United States or by any State to participate in prayer."<sup>540</sup> Congress, however, never approved the proposed amendment.<sup>541</sup>

*B. A Proposition From the Author—Fact vs. Scientific Hypothesis—Qualified Teaching Practices*

As noted earlier, debates concerning the propriety of religion, as well as the teaching of evolution, in public schools have raged from the day the public school system was created.<sup>542</sup> Given that the theory of evolution may conflict with many religious views, the divergence of religious beliefs in this country, and the fervor with which those beliefs are held, there may never be a solution to this debate that will be amenable to all sides. The purpose of this Section, however, is to propose a possible solution to this seemingly irreconcilable conflict.<sup>543</sup>

A great deal of the controversy surrounding the theory of evolution, as an integral part of the public school curriculum, centers on the reality that evolution is often taught as fact, and not as a scientific hypothesis.<sup>544</sup> Such a method of teaching has a significant impact on most, if not all, secondary public school students.<sup>545</sup> Most public school students are required to enroll in at least one biology course.<sup>546</sup> The vast majority of these biology courses exclusively teach the theory of evolution.<sup>547</sup> For example, the BSCS publishes one of the most widely used high school biology textbooks.<sup>548</sup> This text notes that the entire biology

540. *Id.*

541. *Id.*

542. *Id.* at 146.

543. At least one commentator has postulated a solution that is worthy of note. In *Wisconsin v. Yoder*, the Supreme Court allowed Amish parents to remove their children from the public school system on the basis that the secular education conflicted with their religious beliefs. 406 U.S. 205, 211-12, 235-36 (1972). Based on *Yoder*, Eric Freed has argued that those who find the public school curriculum offensive to their own religious beliefs should simply withdraw their children from the public school system. Freed, *supra* note 163, at 1180. However, Freed's "like-it-or-leave-it" solution is completely repugnant to the very principles which underlie the First Amendment.

544. See JOHNSON, *supra* note 303, at 3-14; see, e.g., *supra* text accompanying note 1. *But see* Bird, *supra* note 305, at 537 (arguing that the exclusive teaching of evolution violates the Free Exercise Clause regardless of whether it is labeled as "fact," "theory," or "one theory").

545. Bird, *supra* note 305, at 536.

546. *Id.*

547. *Id.*

548. *Id.* at 521 n.25 (citing BIOLOGICAL SCIENCES CURRICULUM STUDY, BIOLOGICAL SCIENCE: AN ECOLOGICAL APPROACH (3d ed. 1973)); see *supra* notes 334-37 and accompa-



course “can be regarded as a summary of the evidence for evolution.”<sup>549</sup>

Many proponents of evolution, including noted scientist Theodosius Dobzhansky, have referred to evolution, not as a theory, but as “the fact of evolution.”<sup>550</sup> Dobzhansky has stated that the great weight of evidence in favor of the evolutionary theory establishes that evolution is a fact, much in the same way as evidence supports the conclusion that the earth revolves around the sun.<sup>551</sup> Dobzhansky concludes that “[e]volution, as a process that has always gone on in the history of the earth, can be doubted only by those who are ignorant of the evidence or are resistant to evidence, owing to emotional blocks or to plain bigotry.”<sup>552</sup>

Although there are many scientists who view countervailing theories of life’s origins as tantamount to believing “that it is the stork that brings babies,” many dissidents deny that evolution is a fact.<sup>553</sup> Some scientists recognize “the evolutionary *theory* as a conglomerate idea consisting of conflicting hypotheses.”<sup>554</sup> Eminent paleontologist and Harvard Professor Stephen Jay Gould published a scientific journal in which he stated that “the weight of the evidence had driven him to the reluctant conclusion that the [Darwinian] synthesis, ‘as a general proposition, is effectively dead, despite its persistence as textbook orthodoxy.’”<sup>555</sup> Even Dobzhansky admits that there are “a multitude of problems yet unresolved and . . . questions unanswered.”<sup>556</sup> Dobzhansky is quick to note that anti-evolutionists mistake disagreements among scholars as indicating the “dubiousness of the entire doctrine of evolution.”<sup>557</sup> However, a theory rife with a multitude of unresolved problems and unanswered questions can hardly be termed “factual.” Although a detailed analysis of the evidence in favor of, and in opposition to, the theory of evolution is beyond the scope of this Comment, it is reasonable to conclude that

---

nying text (discussing the incorporation of evolution into biology textbooks).

549. Bird, *supra* note 305, at 537 n.104 (quoting E. KLINCKMAN, BIOLOGY TEACHERS’ HANDBOOK 68 (2d ed. 1970)).

550. *See id.*

551. *See* Theodosius Dobzhansky, *Nothing in Biology Makes Sense Except in the Light of Evolution*, in *EVOLUTION VERSUS CREATIONISM: THE PUBLIC SCHOOL CONTROVERSY* 18-19 (J. Peter Zetterberg ed., 1983).

552. *Id.* at 27.

553. JOHNSON, *supra* note 303, at 3-6.

554. *Id.* at 11.

555. *Id.* (Johnson provides no citation for this scientific journal). Gould also stated, “Darwin’s notion of predictable progressive evolution is so much claptrap.” *See* SMITH, *supra* note 50, at 98.

556. *See* Dobzhansky, *supra* note 551, at 27.

557. *Id.*

there is a legitimate controversy regarding the underlying principals of evolution.<sup>558</sup>

On the basis of this conflict, it would perhaps be best if public school teachers, without providing instruction as to religious philosophies, were to instruct their students that the theory of evolution is just that—a theory.<sup>559</sup> When certain doctrines are taught as fact, and no other plausible alternative views are presented, the implication is that “whatever those doctrines exclude cannot be true.”<sup>560</sup> Therefore, when evolution is taught as fact, rather than as a scientific hypothesis, the public school system sends a clear message to students that their world view may be erroneous.<sup>561</sup> This is especially pertinent to those students whose religious beliefs mandate a strict adherence to the theory of creationism.

As noted earlier, “the Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools” because students in these institutions are especially impressionable and subject to coercion from their teachers and other students.<sup>562</sup> On this basis, it is quite possible that teaching evolution as fact is tantamount to impressing upon a child that his religion is wrong.

The distinction between fact and theory must not simply be a matter of semantics. Throughout elementary and secondary grade levels, the public school system inundates students with the evolutionary theory. If students are not also provided with critical analysis and sufficient caveats, the mere labeling of evolution as a “theory” will do little or nothing in the way of convincing students that other alternative theories of human origins exist and are adhered to. For this very reason, the public school system should undertake several steps to insure that students are not left with the impression that evolution is a matter of fact, and correspondingly, that their view of the world is wrong.

First, the school curriculum should provide students with an ongoing critical analysis of evolution. Lectures on the evolutionary theory should

---

558. For a more detailed analysis of this debate, see generally JOHNSON, *supra* note 303.

559. See Freed, *supra* note 163, at 1182 (asserting that much of the controversy surrounding the debate could be averted if public “schools err on the side of uncertainty and teach that the theory of evolution is indeed a theory and not a fact”).

560. JOHNSON, *supra* note 303, at 7.

561. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 981 (1987) (addressing the creation-science controversy).

562. *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); see *supra* notes 422-35 and accompanying text.

be accompanied by in-depth discussions of the numerous problems that modern science has yet to adequately resolve. Second, at the outset, students should be fully aware that the theory of evolution might conflict with their personal religious beliefs. Lastly, and in connection with the second step, teachers should inform students that evolution is not the *only* theory of human origins. Students must be able to recognize that not every segment of society is in complete agreement with certain members of the scientific community.

The purpose of this proposition is not to advocate that creationism or creation-science<sup>563</sup> be introduced into the public school forum. Additionally, the purpose of this proposition is not to limit the teaching of evolution as a means of endorsing creationism, creation-science, or the tenets of any particular religious doctrine. The essential purpose of the public school system is to educate society, and as such, it is recognized that the theory of evolution may have great value in promoting scientific awareness. The issue, therefore, is not evolution versus creationism.

The purpose of this proposition is essentially twofold. First, the purpose is to protect the freedom of mind and conscience of impressionable students from views which may conflict with their private religious beliefs and the religious beliefs of their families.<sup>564</sup> The second purpose, which is related to the first, is to promote compassion and understanding of a child's religious beliefs. As one commentator stated, "It is not that parents want the public schools to proselytize in their favor; it is rather that they do not want the schools to press their own children to reject what the parents believe by calling into question a central article of their faith."<sup>565</sup>

This proposed solution has actually been adopted by at least one member of the judiciary. In *Segraves v. California Board of Education*,<sup>566</sup> the Creation-Science Research Center sued the California Board of Education, claiming that the state's public school science curriculum "assert-

---

563. See *supra* notes 304-11 and accompanying text; accord Schaeffer, *supra* note 463; see *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1272 (E.D. Ark. 1982) (arguing that it is unlikely that public schools could ever teach either creationism or creation-science without violating the Establishment Clause because "[t]here is no way teachers can teach the Genesis account of creation in a secular manner"), *aff'd*, 723 F.2d 45 (8th Cir. 1983). But see generally Leedes, *supra* note 308 (examining the educational value of scientific creationism).

564. This first purpose is in accordance with the Court's rationale for prohibiting all forms of religious expression in the public schools. As the Court has stated, "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Edwards*, 482 U.S. at 584.

565. See Carter, *supra* note 559, at 981.

566. No. 278978 (Cal. Super. Ct. June 12, 1981); see *supra* note 1.

ed evolutionary theories dogmatically and violated the free exercise of religion."<sup>567</sup> Superior Court Judge Irving H. Perluss ordered the school board to teach evolution as a theory and not as scientific fact.<sup>568</sup> Such a proposition would not appear to have any adverse effects on the quality of education in the public school "[s]o long as students recognize they are free to draw their own ultimate conclusions."<sup>569</sup>

The Supreme Court has never addressed the issue of whether government may mandate that evolution be taught as theory rather than as proven fact. This proposed solution, however, finds some support in the Court's dictum. In *Edwards v. Aguillard*,<sup>570</sup> the Supreme Court invalidated a Louisiana law which required that the theory of evolution be accompanied by equal instruction in the theory of creation-science.<sup>571</sup> The Court ruled that the law impermissibly endorsed religion by advancing the belief that a supernatural being created humankind.<sup>572</sup> In striking down the law, the Court noted, "We do not imply that a legislature could never require that scientific critiques of prevailing theories be taught."<sup>573</sup> Regardless of the Court's dictum, it seems incomprehensible that requiring public schools to teach the truth—that evolution is not a proven scientific fact—would violate the United States Constitution.

#### IX. CONCLUSION

In applying the principles of the First Amendment, the United States Supreme Court has been especially vigorous in striking down laws and practices that in any way introduce the tenets of religion into the public school system. However, it often appears that "there exists a constitutional right on the part of non-believers to be protected from unpalatable

---

567. Schaeffer, *supra* note 463, at 836-37 (citing *Segraves*, No. 278978 (Cal. Super. Ct. June 12, 1981)) (arguing that creation-science is inherently religious).

568. *Id.* at 837.

569. Freed, *supra* note 163, at 1183.

570. 482 U.S. 578 (1987); see Schaeffer, *supra* note 463, (providing additional analysis of the *Edwards* decision).

571. *Edwards*, 482 U.S. at 580-81, 593.

572. *Id.* at 591-92.

573. *Id.* at 593. See generally Schaeffer, *supra* note 463 (discussing the legal background of the creation-science versus evolution debate). But see Freed, *supra* note 163, at 1182 n.264 (interpreting *Epperson v. Arkansas*, 393 U.S. 97 (1968), as holding that evolution can be taught as fact).

impositions of religious beliefs, but no corresponding right on the part of believers to be protected from ideas which they find offensive.<sup>574</sup>

Due to the rapid expansion of beliefs which can be classified as religious in nature, the line between that which can be labeled sectarian and that which can be labeled secular has become truly tenuous. On that basis, the Supreme Court must recognize that in our pluralistic society those beliefs which can be characterized as religious in nature cannot be dogmatically determined. As such, the Court should be equally vigorous in addressing those laws and practices that introduce the tenets of both theistic *and* non-theistic religions into the public schools.

Contrary to modern portrayals, one does not have to be a “radical fundamentalist” to believe in the precepts of one’s religious faith. Similarly, one does not have to be an avid supporter of creation-science to believe that the theory of evolution is far from an established “fact.” Lastly, one certainly does not have to be either a “radical fundamentalist” or an avid supporter of creation-science to believe that the First Amendment was designed to protect the integrity of all religious beliefs—whether those beliefs can be classified as theistic or non-theistic.

In an era in which every nuance of life is viewed as alienating a particular group, it is perplexing to note that our society has been so willing to turn its back on religious believers who see their very way of life jeopardized by government action. If government wishes to remain truly neutral as to all religions, it must respect those beliefs that refute the theory of evolution. To accomplish this goal, government must mandate that evolution be taught for what it is—a theory. Our society is designed to accommodate cultural diversity, and as such, “it can not afford to place ‘a badge of inferiority’ on some of its citizens” because of their religious beliefs.<sup>575</sup>

MICHAEL R. O’NEILL<sup>576</sup>

---

574. Hitchcock, *supra* note 50, at 13.

575. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

576. The author wishes to thank his niece, Jennifer O’Neill, whose Christmas Eve story inspired this Comment.