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Student Comments

“Secular Humanism”: A Blight on the Establishment Clause

I. INTRODUCTION

A new complication has beset establishment clause jurisprudence.¹ Some Christians find in the Supreme Court's “wall of separation between church and state”² a hostility toward religion they believe the first amendment should not permit.³ They argue that the exclusion of traditional religion from government amounts to an unconstitutional establishment of a secular⁴ religion, variously referred to as secularism, atheism or, most popularly, secular humanism.⁵ To these disaffected Christians, secular humanism refers to a philosophy that “replaces a worship of the transcendent or supernatural deity with the deification of man and humankind.”⁶

Several claims based on these arguments have made their way

1. The first amendment to the U.S. Constitution guarantees that “Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.” U.S. CONST. amend. I. The first part of this clause is referred to as the establishment clause, and the latter part, the free exercise clause. These restrictions are applied to the states through the fourteenth amendment. *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

2. See *infra* note 9.

3. See generally Horn, *Secularism and Pluralism in Public Education*, 7 HARV. J.L. & PUB. POL'Y 177 (1984) (discussing the “secularist bias” of strict separationism); Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978) (attacking the progressive secularization of government).

4. The word “secular” commonly means “of or relating to the worldly or temporal as distinguished from the spiritual or eternal . . . not sacred . . . not overtly or specifically] religious . . . of or relating to the state as distinguished from the church.” WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2053 (1961).

5. See *Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg*, 630 F.2d 850, 853-54 (1st Cir. 1980) (denial of tax deduction for parochial school expenses does not establish secular humanism). See generally C. RICE, *BEYOND ABORTION: THE THEORY AND PRACTICE OF THE SECULAR STATE* (1979); McGarry, *The Unconstitutionality of Exclusive Governmental Support of Entirely Secularistic Education*, 28 CATHOLIC LAWYER 1 (1983); Commentary, *Secularism in the Law: The Religion of Secular Humanism*, 8 OHIO N.U.L. REV. 329 (1981); Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127, 127-128 (1985).

6. Commentary, *supra* note 5, at 350. Accord Whitehead and Conlan, *supra* note 3, at 34-36 (secular humanism is man-centered, not God-centered). Secular humanism looks

into the courts. After describing these claims and how the courts have responded to them, this comment will discuss the analytical problems involved in treating secular matters as religious within the context of the establishment clause. It will urge courts to recognize the inconsistencies in an establishment of the secular, and to reevaluate present concepts of neutrality and hostility toward religion which unnecessarily complicate establishment clause jurisprudence.

II. BACKGROUND

A. *How Much Separation?*

The Judeo-Christian civilization of western Europe has informed our political institutions. During much of the long history of that civilization, church and state were closely identified.⁷ This nation, in contrast, espouses religious freedom. The first amendment to the United States Constitution guarantees that freedom—on the one hand by ensuring that the state does not adopt an official religion or impose religion on anyone, via the establishment clause; and on the other hand by interfering as little as possible with religious practice and belief, via the free exercise clause.⁸

The Supreme Court has declared that the establishment clause erects a "wall of separation between church and state."⁹ Exactly

to reason and science rather than divine guidance for the solution of moral, social and political questions. *Id.*

Christians have borrowed the term secular humanism from a movement whose philosophy is set out in the "Humanist Manifesto." See C. RICE, *supra* note 5, at 33; Whitehead & Conlan, *supra* note 3, at 31-46. Usually, though, they use secular humanism to refer to particular ideas and not to self-proclaimed Secular Humanists. This comment does not attempt to define secular humanism precisely. Rather, the comment uses the term as it is used popularly, without regard for whether that usage is appropriate. References, in a few instances, to Secular Humanists (capitalized) indicate members of the organized group by that name.

Opponents of secular humanism also complain of secularization—the removal of religion—or secularism—a preference for the secular. For explanations of secular humanism by its critics, see C. RICE, *supra* note 5; Taylor, *The Christian and Secular Humanism*, 1982 J. CHRISTIAN JURISPRUDENCE 219, 222-28 (1982); Whitehead & Conlan, *supra* note 3, at 29-61.

7. See *A.C.L.U. v. City of Birmingham*, 791 F.2d 1561, 1563 (6th Cir. 1986). The close alignment of church and state produced an oppressiveness that led many of the earliest European Americans to this continent. For a description of how the religion clauses of the first amendment grew out of experiences of religious oppression, see *Eversen v. Board of Educ.*, 330 U.S. 1, 8-14 (1947).

8. See *supra* note 1.

9. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). The Supreme Court has given the following interpretation to the establishment clause:

Neither a state nor the Federal Government can set up a church. Neither can

what separation implies, however, has never been clear.¹⁰ In the last several decades, the Court has defined separation in ways that have surprised and angered many Christians.¹¹

In two controversial decisions of the late 1940s, the Supreme Court held that the establishment clause goes beyond merely prohibiting the state from adopting an official religion. In *Everson v. Board of Education*,¹² the Court first outlined the broad scope of the establishment clause: government may not pass laws to aid religion, force religion on anyone, or use tax monies to support religious institutions.¹³ Though upholding a statute that reimbursed parents for the cost of transporting children to religious schools,¹⁴ *Everson* defined establishment to preclude direct government aid to religion.¹⁵ The next year, the Court applied this principle by holding unconstitutional a public school program that allowed students to attend religion classes on school grounds during the day.¹⁶

Public reaction to those decisions was heated.¹⁷ Some religious groups and constitutional scholars called for a narrow interpretation of the establishment clause that would limit its scope to the prohibition of an official state religion, and allow the impartial support of all religions.¹⁸ But in the 1960s, the Supreme Court reaf-

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. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Everson, 330 U.S. at 15-16 (quoting *Reynolds*, 98 U.S. at 164).

10. See *A.C.L.U. v. City of Birmingham*, 791 F.2d at 1563.

11. Though Christian groups are in the forefront of the opposition to strict separation, not all Christians are like-minded. Some Christian groups have actively supported separation of church and state. For example, though Protestants historically formed the primary support for Bible reading in the public schools, Unitarians, Universalists, Seventh Day Adventists, and some Lutheran and Southern Baptist groups have long opposed the practice. L. PFEFFER, *CHURCH, STATE AND FREEDOM* 449 (1967). Within recent decades, a majority of Protestant churches have opposed Bible reading in the schools. *Id.* In *Zorach v. Clauson*, 343 U.S. 306 (1952), an Episcopal parishioner unsuccessfully challenged a public school program releasing students for voluntary, off-grounds religion classes.

12. 330 U.S. 1 (1947).

13. *Id.* at 15-16.

14. The Court upheld the statute as an exercise of the state's authority to ensure the safety of children en route to and from accredited schools. *Id.* at 18.

15. *Id.* at 15.

16. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

17. See L. PFEFFER, *supra* note 11, at 151-53.

18. *Id.* (discussing the positions of prominent Catholic and Protestant clergy and scholars).

firmed that public schools may not lend their support to religion, by striking down statutes that authorized daily prayer¹⁹ and Bible reading²⁰ at school. The result of those decisions was to focus debate in the academic community and among the general public on the appropriate extent of separation.²¹ Some saw the Court's "strict separation" of church and state as hostile toward religion.²²

B. *The Secular As Religious*

The argument against strict separation assumes that a traditional theistic perspective is embodied in our political institutions and necessary to their vitality.²³ Freedom of religion, it is argued, does not imply "freedom from religion."²⁴ The loss of a religious perspective in government is linked to the breakdown of Christian morality in society generally.²⁵ Changes in society—in family structure, in the roles of the sexes, in the relations between generations—are viewed as reflecting the decreasing importance of religion in people's lives, and the Court's separation decisions as accelerating this process.²⁶ The strict separation of government and religion, or secularization,²⁷ is seen as replacing traditional morality with other values, referred to as "secular" because they do not rely on God or transcendence.²⁸ Some Christians perceive a comprehensive system of secular values in direct conflict with their own beliefs.²⁹ They see these values as akin to another religion,

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

20. *Abington School Dist. v. Schemmp*, 374 U.S. 203 (1963).

21. See L. PFEFFER, *supra* note 11, at 466-69, 473-76.

22. Supreme Court Justice Potter Stewart was among those who saw strict separation as anti-religious. In his dissent to the 1963 decision on school prayer and Bible reading, Justice Stewart argued that the prohibition of religious exercises in schools placed religion at a "state-created disadvantage." *Schemmp*, 374 U.S. at 313 (Stewart, J., dissenting). In consigning religion to private conduct, the Court, he argued, in effect had established a religion of secularism. *Id.*

23. See Taylor, *supra* note 6, at 222.

24. L. PFEFFER, *supra* note 11, at 466 (emphasis omitted) (attributing the statement to evangelist Billy Graham); Horn, *supra* note 3, at 177 (quoting *No Law But Our Own Prepossessions?*, 34 A.B.A. J. 482, 484 (1948)).

25. Whitehead, *Judicial Schizophrenia: The Family and Education in a Secular Society*, 1982 J. CHRISTIAN JURISPRUDENCE 49, 50, 72-91 (1982) (explaining the role of Supreme Court decisions in the demise of traditional family values).

26. *Id.*

27. Secularization refers to the removal of religious doctrine. Thus, "the process of secularization has been the means of achieving compliance with the establishment clause." *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528, 1538 n.12 (9th Cir.) (Canby, J., concurring), *cert. denied*, 106 S. Ct. 85 (1985). Secularism, on the other hand, refers to a "body of anti-religious doctrine." *Id.*

28. See *supra* note 6 and accompanying text.

29. E.g., Rushdoony, *An Historical and Biblical View of the Family, Church, State,*

which is replacing Christianity as the majority religion of the country, stressing the secular to the exclusion of traditional theism.³⁰ Secular religion, it is argued, does not belong in the schools any more than prayer or Bible reading; the establishment clause applies to all religions, not just traditional ones.³¹

Frequently, this "religion" of secular values is referred to as secular humanism.³² The term "secular humanism" is borrowed from twentieth century philosophy.³³ It is variously defined, and is sometimes used interchangeably with "secularism" and "humanism."³⁴ Authorities agree that secular humanism represents a modernistic moral perspective that does not rely on a transcendent being.³⁵ Members of current humanist organizations disagree with respect to whether humanism is a religion.³⁶ The argument that secular humanism is a religion draws support from modern theologians who suggest that religion includes any belief system that addresses the "ultimate concerns" of individuals, regardless of whether those concerns are secular in a traditional sense.³⁷ Under

and Education, 1982 J. CHRISTIAN JURISPRUDENCE 21, 30-31 (1982); Taylor, *supra* note 6, at 221, 227.

30. Ball, *Keynote Address: 1981 Seminar on Church, Family, State, and Education*, 1982 J. CHRISTIAN JURISPRUDENCE 11, 14-18 (1982); Taylor, *supra* note 6, at 221-22.

31. *Malnak v. Yogi*, 440 F. Supp. 1284, 1315 (1977) (new religions "cannot stand outside the first amendment merely because they did not exist when the Bill of Rights was drafted"), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979).

32. See *supra* note 6, discussing secular humanism.

33. See *Smith v. Board of School Comm'rs*, 655 F. Supp. 939, 961 (S.D. Ala. 1987), *rev'd*, No. 87-7216 (11th Cir. Aug. 26, 1987).

34. See *id.* at 960-65 (summarizing the testimony of philosophy experts).

35. *Id.* at 961, 964.

36. *Id.* at 969. In an often cited footnote to a 1961 decision, *Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961), the Supreme Court listed Secular Humanism as one of several non-theistic religions practiced in this country. See *Grove*, 753 F.2d at 1536-37; *Malnak*, 592 F.2d at 212 (Adams, J., concurring); *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022, 1034 (D. Neb. 1979).

37. For a description of modern definitions of religion, by both theologians and courts, see *Malnak*, 592 F.2d at 207-10 (Adams, J., concurring); Note, *supra* note 5, at 144-45; Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1066-1072 (1978). The courts have relied on an encompassing definition of religion outside of the establishment clause context. For example, they have extended the protection of conscientious objector statutes to those whose pacifistic beliefs would not traditionally qualify as religious. See, e.g., *Welsh v. United States*, 398 U.S. 333, 341-42 (1970) (plurality opinion) (pacifist exempted from military service though he characterized his beliefs as non-religious); *United States v. Seeger*, 380 U.S. 163, 187 (1965) (conscientious objector need not believe in a supreme being as long as his pacifistic beliefs occupy a place of "ultimate concern" in his life); *In re Weitzman*, 426 F.2d 439 (8th Cir. 1970) (naturalization applicant granted exemption from oath to bear arms on basis of pacifism amounting to religious convictions); *United States v. Levy*, 419 F.2d 360, 368 (8th Cir. 1969) ("Any type of sincerely held belief opposing war" would most likely qualify as a religious exemption). Opponents of secularization argue that if holders of non-

this rubric, ideas that have no connection with an organized religion could be considered religious.³⁸

"Secular humanism claims" incorporate several interrelated ideas: 1) the strict separation of government and Christianity represents a hostile attitude toward religion, preferring the interests of non-believers;³⁹ 2) hostility toward traditional theistic teachings characterizes secular humanism;⁴⁰ and 3) certain secular ideas, for instance the theory of evolution and birth control, may not be promoted by government because they are tenets of the religion of secular humanism.⁴¹ All of these factors—a breach of neutrality; a hostile, anti-religious attitude toward traditional faiths; and the promotion of tenets of secular humanism—are seen as establishing a state religion of secularism.

Thus, a claim may challenge sponsorship of a particular idea, as, for example, the claim in *Wright v. Houston Independent School District*⁴² that public schools breached neutrality by teaching evolution but not creationism. In *Crowley v. Smithsonian Institution*,⁴³ fundamentalist Christians⁴⁴ charged that a museum exhibit explaining evolution advanced a tenet of secular humanism.⁴⁵ Alternatively, a claim may challenge the exclusion of theistic religion from state sponsorship as an unconstitutional preference for the

traditional beliefs are accorded such special protections reserved for religious belief, they must be willing to accept the "proscription of nonestablishment" as well. See Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177, 204 n.98 (quoting OAKS, *Introduction*, in *THE WALL BETWEEN CHURCH AND STATE* 1, 5 (D. Oaks ed. 1963)).

38. Judge Lay of the Eighth Circuit found religious grounds for pacifism in plaintiff's reverence for the laws of nature. See *In re Weitzman*, 426 F.2d 439, 455-57 (8th Cir. 1970).

39. *Smith*, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, No. 87-7216 (11th Cir. Aug. 26, 1987); see *Jackson v. California*, 460 F.2d 282, 283 & n.1 (9th Cir. 1972).

40. See *Grove*, 753 F.2d at 1535 (Canby, J., concurring); *Jackson*, 460 F.2d at 283 & n.1.

41. See *Crowley v. Smithsonian Inst.*, 636 F.2d 738, 740 & n.3 (D.C. Cir. 1980); *Civic Awareness of Am. Ltd. v. Richardson*, 343 F. Supp. 1358, 1360 (E.D. Wis. 1972).

42. 366 F. Supp. 1208, 1209 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

43. 636 F.2d 738 (D.C. Cir. 1980).

44. The term "fundamentalists" usually refers to certain Protestant Christians who generally oppose modernism and interpret the Bible literally. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 921 (1976). But see Arnold, *The Rise of Catholic Fundamentalism*, 156 AMERICA 297 (1987) (discussing fundamentalism among Roman Catholics).

45. See *Crowley*, 636 F.2d at 740. See also *Civic Awareness*, 343 F. Supp. 1358 (rejecting a claim that federal support of Planned Parenthood establishes the secular humanistic tenet of abortion rights).

secular over the religious.⁴⁶ Thus, the exclusive support of public, but not religious, schools has been challenged as establishing an "irreligion" hostile to Christianity.⁴⁷ The ideas expressed in these claims are closely connected; they are formulations of a single idea—that the removal of traditional religion from government establishes a religion of secularism.⁴⁸ Some plaintiffs, in fact, have suggested that government achieve neutrality by restoring traditional perspectives alongside the prevalent secular outlook. For example, plaintiffs alleging that the teaching of evolution establishes secular humanism have proposed that equal time be devoted to teaching the Biblical version of creation.⁴⁹

Much of the commentary about secular humanism and several of the claims based on secular humanism theories focus on public schooling.⁵⁰ Dissatisfied parents complain that school curricula of-

46. The *Crowley* court's explication of the establishment clause seems to allow for two formulations. Not only may government not advance or support a particular religion, it also must maintain neutrality between religions, and between religion and irreligion. *Crowley*, 636 F.2d at 743.

47. See *Jackson v. California*, 460 F.2d 282, 283 n.1 (9th Cir. 1972) (per curiam).

48. See *Grove*, 753 F.2d at 1538 n.12. The plaintiffs in *Grove* challenged a particular reading assignment as anti-religious. The concurring opinion noted that "[p]laintiffs' brief . . . leaves the distinct impression that their objection is . . . to the public school curriculum itself—a curriculum which, as a result of Supreme Court rulings removing inculcation in religious doctrine and dogma from the classroom, they perceive as 'establishing' secularism." *Id.*

A case from Alabama illustrates secular humanism claims as a reaction to the separation doctrine. *Smith*, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, No. 87-7216 (11th Cir. Aug. 26, 1987). The case originally entered the court as a challenge to statutes authorizing prayer and a moment-of-silence in school. *Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala.), *stay granted*, 459 U.S. 1314, *aff'd* in part, *rev'd* in part, 705 F.2d 1526 (11th Cir. 1983). The district court upheld the statutes, regardless of Supreme Court precedents dictating otherwise. After a lengthy exegesis on the history of the first amendment, the court concluded that the establishment clause does not support the separation doctrine. 554 F. Supp. at 1128. Following reversal by the Supreme Court, the district court realigned the parties sua sponte. Christian parents who had intervened in the original action to defend prayer in the schools became plaintiffs in a suit to challenge secular humanism in the schools. By neglecting traditional religion, they argued, the schools established secular humanistic doctrine. See *Smith*, 655 F. Supp. at 947.

49. See *Wright v. Houston Indep. School Dist.*, 366 F. Supp. 1208, 1209, 1211 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

50. For examples of claims based on secular humanism theories, see *Grove*, 753 F.2d 1528 (claim that novel used in literature class was anti-religious rejected); *Duro v. District Attorney*, Second Jud. Dist., 712 F.2d 96 (4th Cir. 1983) (claim that curriculum inculcated secular humanism rejected); *Wright*, 366 F. Supp. 1208 (teaching evolution held not to establish secular humanism).

For a commentary regarding secular humanism in public schools, see *Delconte v. State: Some Thoughts on Home Education*, 64 N.C.L. REV. 1302 (1986); Horn, *supra* note 3; McGarry, *supra* note 5.

For a competing view—that secularization of public schools is both proper and neces-

fend their religious beliefs.⁵¹ Specifically, they object to the teaching of evolution, which conflicts with a literal reading of the Biblical account of creation.⁵² Similarly, parents object to sex education classes, which allegedly teach children a morality that conflicts with Christian teaching in the home.⁵³ Other parents view certain reading assignments as indoctrinating their children in secular humanist ideas including feminism, world government, and pacifism.⁵⁴ Assignments that allegedly communicate anti-religious sentiments also have been attacked.⁵⁵

III. JUDICIAL RESPONSE

The few courts that have confronted secular humanism claims have applied a traditional establishment clause analysis. Before considering the courts' treatment of those claims, a review of practices violating the establishment clause is useful.

A. *Defining Establishment*

The establishment clause prohibits government sponsorship, financial support, or active involvement in religious activity.⁵⁶ Accordingly, grants of public funds to religious groups generally are unconstitutional.⁵⁷ The regular, free use of public facilities for religious activities also has been held an unconstitutional use of public funds.⁵⁸

To determine whether an activity represents an establishment of religion, courts most often use a three-prong test, first enunciated

sary—see Wood, *Editorial: The Battle over the Public Schools*, 28 J. CHURCH & STATE 5 (1986).

51. See generally *Toscano*, *supra* note 37. The same sentiment underlies the argument that government should support parochial schools. For a description of that position, see L. PFEFFER, *supra* note 11, at 521-24.

52. See *Wright*, 366 F. Supp. at 1209. Debate over the teaching of evolution first made its way into the courts sixty years ago. See *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). For a discussion of evolution and creationism in the classroom, see R. O'NEIL, *CLASSROOMS IN THE CROSSFIRE* 88-97 (1981).

53. See *Smith v. Ricci*, 89 N.J. 514, 446 A.2d 501, 505 (1982).

54. *Mozert v. Hawkins County Pub. Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd*, No. 86-6144 (6th Cir. Aug. 24, 1987).

55. See *Grove*, 753 F.2d at 153.

56. *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

57. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (upholding release of public school students to attend off-grounds religion classes).

58. See *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 209-10 (1948). *But see Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980) (public university must grant religious groups equal access to facilities). Sectarian welfare institutions may qualify for government funds if they fulfill secular needs. See *Bradfield v. Roberts*, 175 U.S. 291 (1899). See also L. PFEFFER, *supra* note 11, at 199-205.

by the Supreme Court in *Lemon v. Kurtzman*.⁵⁹ Under the *Lemon* test, an activity will not violate the establishment clause if it 1) has a secular purpose, 2) does not have a primary effect of either promoting or inhibiting religion, and 3) does not foster government entanglement in religious affairs.⁶⁰ For example, posting the Ten Commandments in public school classrooms was held unconstitutional because it served no secular purpose.⁶¹ On the other hand, a statute regulating access to abortions, challenged as an establishment of Roman Catholicism, was upheld because it passed all three prongs of the test.⁶²

Among activities that courts have held to represent an establishment of religion in public schools are organized prayer,⁶³ daily Bible reading,⁶⁴ and religion classes conducted on school grounds by church personnel.⁶⁵ A state may not cater to religious belief by prohibiting the teaching of evolution⁶⁶ or mandating equal time for teaching creationism.⁶⁷ Curricula may include study of religions and of the Bible, though, if the material is presented objectively and not to indoctrinate.⁶⁸

The Supreme Court has indicated that the establishment clause not only prohibits government from advancing religion, but also

59. 403 U.S. 602 (1971) (state statutes authorizing payment to parochial schools and their teachers for secular services held unconstitutional because they required continued state surveillance and therefore fostered entanglement).

60. *Id.* at 612-13.

61. *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam); see also *Lanner v. Wimmer*, 463 F. Supp. 867 (D. Utah 1978) (religion classes had no secular purpose and involved entanglement).

62. *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022 (D. Neb. 1979). For the history and present status of the *Lemon* test, see Comment, *Establishment Clause Analysis: An Apology for the Lemon test in the Wake of Wallace v. Jaffree*, 30 S.D.L. REV. 599 (1985) (arguing that the test remains viable).

63. *Engel v. Vitale*, 370 U.S. 421 (1963); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

64. *Schempp*, 374 U.S. 203.

65. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948). A public school may release students during the day to attend off-grounds religious classes, *Zorach*, 343 U.S. 306, though it may not award credit for those classes, *Lanner*, 463 F. Supp. 867.

66. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

67. *Edwards v. Aguillard*, 107 S. Ct. 2573 (1987); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975).

Creationism rejects the theory of evolution, positing that "all change has a purpose and is preordained by a supernatural creator who produced life, suddenly and in its full complexity, not more than 10,000 years ago." *Darwin Go Home*, *The Economist*, Dec. 13, 1986, at 27.

68. *Wiley v. Franklin*, 468 F. Supp. 133, modified, 474 F. Supp. 525 (E.D. Tenn. 1979).

mandates government neutrality in religious matters.⁶⁹ Neutrality requires that government neither prefer one sect over another nor show a preference between believers and non-believers.⁷⁰ To avoid the latter stricture, government must not "affirmatively oppos[e]" or show hostility toward religion;⁷¹ nor may it endorse anti-religious sentiments.⁷²

While many opinions include language to this effect, the neutrality/hostility analysis appears largely in dicta. Cases typically are decided on other grounds.⁷³ Thus, the opinions offer little guidance in determining whether government activity might breach neutrality or constitute hostility toward religion. One court has held that a university could not deny the use of its buildings to religious groups while granting access to other student groups.⁷⁴ The university's policy "single[d] out" and "stigmatize[d] certain religious activity," thereby violating the establishment clause.⁷⁵ In another case, the Supreme Court upheld a public school program releasing students during the day for off-grounds religious classes, noting that refusal to accommodate sectarian needs would prefer non-believers.⁷⁶

Thus, according to judicial dicta, government activity that is not itself religious may nonetheless violate the establishment clause if it is non-neutral, or anti-religious. This principle is recognized in the second prong of the *Lemon* test, which prohibits government from inhibiting, as well as promoting, religion. Some courts have referred to such a violation as an establishment of secularism.⁷⁷

B. Addressing Secular Humanism Claims

Generally, courts have rejected claims that secular practices establish a religion.⁷⁸ Courts have approached these claims in various ways.

69. *Epperson*, 393 U.S. at 103-04; *Zorach*, 343 U.S. at 314.

70. *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947); *Zorach*, 343 U.S. at 314.

71. *Epperson*, 393 U.S. at 104; see also *Schemmp*, 374 U.S. at 225.

72. See *Grove v. Mead School Dist.* No. 354, 753 F.2d 1528, 1539-40 (9th Cir.) (Canby, J., concurring), *cert. denied*, 106 S. Ct. 85 (1985).

73. See *supra* text accompanying notes 59-62.

74. *Chess v. Widmar*, 635 F.2d 1310 (8th Cir. 1980).

75. *Id.* at 1317.

76. *Zorach*, 343 U.S. at 314.

77. See *Schemmp*, 374 U.S. 203; *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983) (to "insulate . . . public institutions from any mention of God" would establish secular humanism).

78. See, e.g., *Smith v. Board of Comm'rs*, No. 87-7216 (11th Cir. Aug. 26, 1987); *Grove v. Mead School Dist.* No. 354, 753 F.2d 1528 (9th Cir.) (work of fiction not secular humanism), *cert. denied*, 106 S. Ct. 85 (1985); *Crowley v. Smithsonian Inst.*, 636 F.2d

1. Evolution

Fundamentalist Christians long have argued that government may not advance the theory of evolution because it contradicts the Christian explanation of human origins.⁷⁹ In *Crowley v. Smithsonian Institution*,⁸⁰ fundamentalists unsuccessfully challenged evolution exhibits at the Smithsonian as promoting a tenet of secular humanism.⁸¹ The exhibits depicted the emergence of life forms, including human beings, as a response to environmental factors.⁸² The plaintiffs espoused "scientific creationism," which posits that God created all life, at one time, in completed form.⁸³ They alleged that the museum used federal funds to advance a theory that inhibited the exercise of fundamentalist Christianity and established the religion of secular humanism.⁸⁴ The plaintiffs requested either the removal of the evolution exhibits or the commitment of equal funds to exhibits explaining creationism.⁸⁵

The plaintiffs in *Crowley* argued that the theory of evolution is a religion because it "is not a true science, but is a 'faith position.'" ⁸⁶ They defined religion as "a nonobservable and alleged phenomenon which can neither be proven nor verified by the scientific method."⁸⁷ The court rejected such a definition of religion for first amendment purposes.⁸⁸ Under the plaintiffs' definition, the court noted, the theory of relativity, for example, would be "religious," and "obviously the constitution would not interdict government development and diffusion of knowledge about relativity" ⁸⁹ Though evolutionary theory could not be proven in the laboratory, and to that extent rests on faith, it did not qualify as a religion

738 (D.C. Cir. 1980) (evolution exhibits do not establish secular humanism); *Jackson v. California*, 460 F.2d 282 (9th Cir. 1972) (per curiam) (refusal of aid to religious schools not secular humanism); *Wright v. Houston Indep. School Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (teaching evolution does not establish secular humanism); *Civic Awareness of Am. Ltd. v. Richardson*, 343 F. Supp. 1358 (E.D. Wis. 1972) (federal funds for family planning do not establish secular humanism).

79. See *supra* note 52.

80. 636 F.2d 738 (D.C. Cir. 1980).

81. *Id.* at 740. The plaintiff-appellants in *Crowley* were an individual and two organizations, the National Foundation for Fairness in Education and National Bible Knowledge, Inc. *Id.*

82. *Id.*

83. *Id.* at 739.

84. *Id.* at 740.

85. *Id.*

86. *Id.* (emphasis in original) (quoting affidavit of plaintiffs' expert witness).

87. *Id.* at 742.

88. *Id.*

89. *Id.*

under the establishment clause, the court concluded.⁹⁰

Though recognizing that secular humanism advocates the theory of evolution,⁹¹ the court emphasized that government may adopt a position that coincides with a tenet of a religion without establishing that religion.⁹² In support of this proposition, the court referred to a Supreme Court case upholding the limitation of Medicaid funding for abortions. In that case, though religious leaders had vigorously opposed abortion funding, government could also oppose funding without establishing a religion.⁹³ Similarly, in *Crowley*, "[t]he fact that appellants were able to identify one religious group that espoused evolution as one of its tenets [was] immaterial."⁹⁴ The court also noted the absence of a relationship between the defendants and an organized group of secular humanists as an indication that the exhibits were not religiously motivated.⁹⁵

In conclusion, the *Crowley* court approved the district court's application of the *Lemon* test: the exhibits had a secular purpose, they neither advanced secular humanism nor hindered the practice of the plaintiffs' religion, and they did not entangle government with religion.⁹⁶ The court held, therefore, that the exhibits did not establish secular humanism.⁹⁷

The discussion of evolution also has been a source of friction in public schools. In *Wright v. Houston Independent School District*,⁹⁸ a court held that teaching the theory of evolution does not establish secular humanism.

The plaintiffs in *Wright* were students who sought to enjoin a school district from teaching evolution. They claimed that the uncritical presentation of evolution in the curriculum violated the principle of neutrality and established a religion of secularism.⁹⁹ In support of their argument, the plaintiffs relied on *Epperson v. Ar-*

90. *Id.*

91. *Id.* at 740 n.3 ("The record establishes without contradiction that Secular Humanism advocates . . . the theory of evolution . . .").

92. *Id.* at 742-43.

93. *Id.* at 743 (citing *Harris v. McRae*, 448 U.S. 297 (1980)).

94. *Crowley*, 636 F.2d at 743.

95. *Id.* at 740 n.3.

96. *Id.* at 744. In noting that the exhibits did not mention or disparage religion, *id.* at 741, the court appeared to endorse the view that an affirmatively anti-religious exhibit would create establishment problems.

97. *Id.* at 744.

98. 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

99. *Id.* at 1209.

kansas,¹⁰⁰ in which the Supreme Court held unconstitutional a statute prohibiting the teaching of evolution. The Court had stated that the statute attempted to limit classroom discussion of human origins to one particular theory, the Biblical account of creation.¹⁰¹ Thus, the statute in *Epperson* failed the neutrality test.¹⁰²

The plaintiffs in *Wright* maintained that the Houston school district, by teaching evolution and not creationism, similarly failed to remain neutral to religion.¹⁰³ The court rejected the analogy. Whereas Arkansas had imposed a statutory restriction, motivated by sectarian concerns, the Houston schools merely included the theory of evolution in the curriculum. The school district espoused no official position regarding human origins and had not curtailed free discussion of opposing views.¹⁰⁴

The court also looked for a connection between religion and the school's approach to the subject of evolution.¹⁰⁵ Relying on a Supreme Court definition of religion as one's view of his relation to his creator, the court acknowledged a connection, but one too attenuated to support the establishment claim.¹⁰⁶ Though both evolution and religion are concerned with human origins, the challenged material was "peripheral to the matter of religion."¹⁰⁷ Moreover, the *Wright* court likened the requested injunction to "book burning."¹⁰⁸ Noting that science and religion necessarily address many of the same questions, and may often provide different answers, the court warned that public school teachers should not be expected to avoid discussing "every scientific issue on which some religion claims expertise."¹⁰⁹

As an alternative to enjoining discussion of evolution, the plaintiffs proposed that the schools assume a neutral position by giving creationism "equal time" in the curriculum.¹¹⁰ The court found this solution, though "at first glance . . . reasonable and fair," ultimately unworkable.¹¹¹ Noting that religions hold distinctive views

100. 393 U.S. 97 (1968).

101. *Wright*, 366 F. Supp. at 1209-10.

102. *Id.*

103. *Id.* at 1210.

104. *Id.*

105. *Id.*

106. *Id.* at 1210 & n.5 (citing *Davis v. Beason*, 133 U.S. 333 (1890)).

107. *Wright*, 366 F. Supp. at 1210.

108. *Id.* at 1211.

109. *Id.* "[A]s the Supreme Court wrote twenty years ago, it is not the business of government to suppress real or imagined attacks upon a particular religious doctrine. *Burstyn v. Wilson*, 343 U.S. 495 . . . (1952)." *Id.*

110. *Wright*, 366 F. Supp. at 1211.

111. *Id.*

concerning many topics treated in a classroom,¹¹² the court was not prepared to determine which of those views must be included in a school curriculum.¹¹³

2. Sexual Behavior

Another area in which religious views frequently conflict with secular views is human reproduction. In *Cornwell v. State Board of Education*,¹¹⁴ students and parents challenged a board of education bylaw providing for sex education classes in public high schools.¹¹⁵ The plaintiffs charged that the teaching of sex in the schools established religious concepts different from their own.¹¹⁶ The court discussed the history of the establishment clause, and concluded summarily that the statute was simply a public health measure, with neither a purpose nor a primary effect of promoting religious doctrine.¹¹⁷ The court also stressed that the state need not protect religions from views distasteful to them.¹¹⁸

Divergent views regarding reproduction also prompted the claim in *Civic Awareness of America, Ltd. v. Richardson*,¹¹⁹ in which a court held that the use of federal funds for voluntary family planning projects did not establish secular humanism. Characterizing birth control as a tenet of secular humanism, the plaintiffs alleged that government support of birth control amounted to an establishment of religion.¹²⁰ They further argued that promoting any particular pattern of sexual behavior was per se religious.¹²¹

The court began its analysis with the principle, also enunciated in *Crowley*,¹²² that government activity that merely coincides with the tenets of a religion does not thereby promote that religion.¹²³ Similarly, the court noted that laws may incidentally aid a religion without violating the establishment clause.¹²⁴ Thus, the court held

112. *Id.* at 1211 n.6.

113. *Id.* at 1211.

114. 314 F. Supp. 340 (D. Md. 1969), *aff'd per curiam*, 428 F.2d 471 (4th Cir.), *cert. denied*, 400 U.S. 942 (1970).

115. *Cornwell*, 314 F. Supp. at 341.

116. *Id.* at 342.

117. *Id.* at 344. The "purpose and primary effect" test, enunciated in *Abington School Dist. v. Schempp*, 374 U.S. 203, 222 (1963), is a predecessor of the three-prong *Lemon* test.

118. *Cornwell*, 314 F. Supp. at 344.

119. 343 F. Supp. 1358 (E.D. Wis. 1972).

120. *Id.* at 1360.

121. *Id.* at 1361.

122. See *supra* text accompanying notes 92-95.

123. *Civic Awareness*, 343 F. Supp. at 1360.

124. *Id.* at 1360-61.

that government may promote birth control whether or not it is a tenet of secular humanism.

The court also rejected the argument that promoting particular sexual behavior is per se religious. The court acknowledged that some activities are "so steeped in religion" that they are per se religious for establishment clause purposes; beginning the school day with a Bible reading was cited as such an activity.¹²⁵ In contrast, the court concluded that sexual behavior and family planning are not "so steeped with religious implications as to be virtually inseparable from religion;"¹²⁶ do not originate in a religion; and are not limited to religious use.¹²⁷ Holding that government funding of family planning programs does not establish a religion, the court referred to the plaintiffs' constitutional challenge as "insubstantial and frivolous."¹²⁸

3. Disparagement of Christianity

In the cases discussed above, the plaintiffs applied the "secular humanism" label to approaches to one of two topics—human origins and human reproduction. In *Grove v. Mead School District No. 354*,¹²⁹ however, the plaintiffs considered the challenged material secular humanistic because of its treatment of Christianity. Fundamentalist parents alleged that the novel *The Learning Tree*, included in a high school literature class, taught anti-Christian values,¹³⁰ thereby establishing secular humanism.¹³¹ The challenged work depicted the coming of age of a poor black adolescent,¹³² including his doubts concerning religion. In a few brief paragraphs, the appellate court affirmed the district court's denial of the claim, noting that reading the novel was not a ritual and that comment on religion was not a major part of the book.¹³³

Concurring in the opinion, Judge Canby wrote separately to ex-

125. *Id.* at 1361.

126. *Id.*

127. *Id.*

128. *Id.*

129. 753 F.2d 1528 (9th Cir.), *cert. denied*, 106 S. Ct. 85 (1985).

130. *Id.* at 1539 (Canby, J., concurring).

131. *See id.* at 1535 (Canby, J., concurring). "Plaintiffs frequently seem to regard 'secular' and 'humanist' as synonyms for 'anti-religious.'" *Id.* In a footnote to this statement, the concurrence quoted the appellants' brief: "Secular Humanism . . . is a religion dedicated to affirmatively opposing or showing hostility toward Christianity. It has declared its pulpit to be the public school classroom and its 'bible' is adolescent literature like *The Learning Tree*." *Id.* at 1535 n.4.

132. *Id.* at 1540 (Canby, J., concurring).

133. *Id.* at 1534.

plore the "novel problem" posed by the plaintiffs' secular humanism claim.¹³⁴ The plaintiffs, he explained, assumed that all "value-laden" thought is either religious or anti-religious, and that "secular" and "anti-religious" are synonymous.¹³⁵ Under the Supreme Court's establishment decisions, he continued, secular, meaning non-religious, must be distinguished from anti-religious;¹³⁶ the *Lemon* test *requires* that government activity have a secular purpose.

Judge Canby next addressed the question of whether *The Learning Tree* represented a religion of secular humanism. He warned against applying a broad definition of religion in establishment cases, lest all government programs that further "ultimate concerns" be attacked as religious.¹³⁷

Even without defining religion, though, Judge Canby could conclude that the assignment of *The Learning Tree* did not pose an establishment problem.¹³⁸ After demonstrating that the inclusion of the work violated none of the proscriptions of *Lemon*, Judge Canby addressed the claim that the novel was anti-Christian. He acknowledged that passages in the book cast doubt on fundamentalist doctrine and denigrated the figure of Jesus.¹³⁹ Nevertheless, he asserted that the proper inquiry was not whether *The Learning Tree* contained anti-Christian elements, but whether its use in the curriculum communicated government endorsement of those elements.¹⁴⁰ Noting that a teacher may assign *Paradise Lost*, *Pilgrim's Progress*, or *The Divine Comedy* without endorsing Christianity, Judge Canby concluded that assigning *The Learning Tree* did not communicate governmental endorsement of the author's or characters' religious views.¹⁴¹ Nor was the plaintiffs' practice of fundamentalism inhibited by an assignment that merely posed questions, rather than imposing answers.¹⁴² The first amendment, Judge Canby remarked, protects the former as well as preventing the latter.¹⁴³

134. *Id.* at 1535 (Canby, J., concurring).

135. *Id.* at 1535-36 (Canby, J., concurring).

136. *Id.* at 1536 (Canby, J., concurring).

137. *Id.* at 1537 (Canby, J., concurring). Judge Canby noted that some commentators have advocated that a narrower definition of religion be applied in establishment cases than in free exercise cases. *Id.*

138. *See id.* at 1537-38 (Canby, J., concurring).

139. *Id.* at 1541 (Canby, J., concurring).

140. *Id.* at 1539 (Canby, J., concurring).

141. *Id.* at 1540 (Canby, J., concurring).

142. *Id.* at 1541 (Canby, J., concurring).

143. *Id.*

4. Textbooks

In *Smith v. Board of Commissioners*,¹⁴⁴ parents complained that textbooks both neglected Christianity and inculcated secular humanistic values. The eleventh circuit held that the forty-four textbooks banned by the district court did not establish secular humanism.¹⁴⁵

The plaintiffs in *Smith* were six hundred fundamentalists, representing a class of all theistic parents and teachers in Alabama.¹⁴⁶ They requested removal from the curriculum of texts used in history, social studies, and home economics classes. The home economics texts, they argued, undermined students' religious faith by promoting tenets of humanistic psychology.¹⁴⁷ The texts emphasized self-actualization, counseling students to rely on their own experience and feelings when making moral choices. This teaching, according to plaintiffs, denied the importance of a supreme being and the existence of absolute values, implicit in theistic faith.¹⁴⁸

The history and social studies texts were faulted for neglecting the role of religion in American history and culture. Plaintiffs charged that the books omitted events with religious significance and treated religion as a purely private matter, in conformity with a secular humanistic view of religion.¹⁴⁹

The court applied the *Lemon* test to determine whether the schools' use of the texts established a religion. Focusing on the second prong of the test, the court determined that the primary effect of the texts was neither the promotion of secular humanism nor the inhibition of plaintiffs' religion.¹⁵⁰

The use of the texts, the court stated, had a primary effect of conveying information that was neutral with respect to religion.¹⁵¹ Noting that the Supreme Court has not provided a comprehensive definition of religion for first amendment purposes, the court found it unnecessary to address the question of whether secular humanism is a religion.¹⁵² Even assuming secular humanism to be a religion, the textbooks did not impermissibly endorse that religion.

144. No. 87-7216 (11th Cir. Aug. 26, 1987) (LEXIS, Genfed library, US App file).

145. *Id.*

146. *Smith v. Board of Comm'rs*, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, No. 87-7216 (11th Cir. Aug. 26, 1987).

147. *Smith*, No. 87-7216.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

Rather, the books had the "entirely appropriate secular effect" of instilling fundamental values.¹⁵³ The works conveyed the values of "independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making."¹⁵⁴ The court found that the books contained ideas consistent with both secular humanism and theistic religion, but held that "mere consistency" does not constitute advancement of a religion.¹⁵⁵

The court turned next to the question of whether the texts inhibited plaintiffs' religion. The books were neutral, rather than antagonistic, to theistic belief, the court stated.¹⁵⁶ Recognizing Supreme Court dicta proscribing the establishment of secularism, the court distinguished neutrality from the hostility implied by secularism. The first amendment mandates separation and neutrality, the court noted, which do not themselves constitute hostility.¹⁵⁷ Moreover, schools cannot refrain from using material that is objectionable to the "256 separate and substantial religious bodies" in the United States.¹⁵⁸

The *Smith* opinion emphasized that neutrality does not imply "equal time" for differing religious views. The district court had suggested that an establishment of secular humanism could be cured by devoting equal time in a curriculum to theistic beliefs.¹⁵⁹ The appellate court noted that this proposal misconceived the relationship between church and state, and the role of public schools. Public education, the court stressed, by conveying temporal knowledge and maintaining "a strict and lofty neutrality as to religion," prepares the individual to choose his religion.¹⁶⁰

Thus, the *Smith* court held that a school does not establish secular humanism by omitting from its curriculum references to traditional religions. Furthermore, the court recognized that a school curriculum may teach values which coincide with tenets of secular humanism and which fundamentalists find offensive, without establishing a religion of secular humanism.¹⁶¹

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

IV. ANALYSIS

A. *The Secular Is Not Religious for Establishment Clause Purposes*

In traditional establishment cases, doubt seldom arises over whether the challenged practices or ideas are religious.¹⁶² Debate focuses, rather, on whether they represent an establishment of religion.¹⁶³ But a claim that teaching evolution, for example, establishes a religion requires a court to ask whether the activity itself is religious. The word "religion" is defined in many different

162. See, e.g., *Engel v. Vitale*, 370 U.S. 421, 424 (1962) ("There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious act."); *Malnak v. Yogi*, 592 F.2d 197, 203 (3d Cir. 1979) (Adams, J., concurring) ("Both the prayer in *Engel* and the Bible readings in *Schemmp* are unquestionably and uncompromisingly Theist. Even under the most narrow and traditional definition of religion, prayers to a Supreme Being and readings from the Bible would be considered 'religious'.") (holding that teaching transcendental meditation in a public high school establishes the religion called Science of Creative Intelligence).

163. See, e.g., *Abington School Dist. v. Schemmp*, 374 U.S. 203 (1963) (striking school prayer and Bible reading). Often the establishment question is framed in terms of whether certain Christian practices or teachings serve a religious function in a particular context. For example, public school students may read the Bible in a history or literature class, if it is objectively presented. *Id.* at 225. Even a class devoted to Bible study may be permissible if it does not indoctrinate. See *Wiley v. Franklin*, 468 F. Supp. 133, 150, *modified*, 474 F. Supp. 525 (E.D. Tenn. 1970). See generally Sendor, *The Role of Religion in the Public School Curriculum*, 15 SCH. L. BULL. 1 (1984) (reviewing decisions on religion classes and concluding that, to avoid establishment problems, the Bible should be taught like mythology).

One court has ruled that Christmas carols may be sung in a school program because their purpose is primarily secular. *Florey v. Sioux Falls School Dist.*, 464 F. Supp. 911 (D. S.D. 1979), *aff'd*, 619 F.2d 1311 (8th Cir. 1980). In *Murray v. Curlett*, 373 U.S. 203 (1963), the companion case to *Schemmp*, defendant school authorities argued that morning prayer and Bible reading served a secular rather than a religious function, in that they promoted moral values and taught literature. L. PFEFFER, *supra* note 11, at 472. Defendants in *Stone v. Graham*, 449 U.S. 39 (1980), argued that they should be allowed to post the Ten Commandments in classrooms because they are a legal code. *Id.* at 41.

The issue of whether government activity is religious also has arisen in religious symbol cases. See *Lynch v. Donnelly*, 465 U.S. 668, 680-81 (1984) (approving a city's use of a nativity scene in a public Christmas display because the crèche was not religious in that context).

The court in *DeSpain v. Dekalb Community School Dist.*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), confronted the question of whether kindergarten children may recite the following verse at snacktime:

We thank you for the flowers so sweet;
We thank you for the food we eat;
We thank you for the birds that sing;
We thank you for everything.

Id. at 837. Reversing the district court, the Seventh Circuit held the verse to be a prayer and therefore an establishment of religion. *Id.* at 839.

ways.¹⁶⁴ Whether a practice is deemed religious may depend on which definition is applied.

That daily prayer or Bible reading is a religious activity is not generally a controversial proposition.¹⁶⁵ Most likely, one engaged in either of these activities recognizes that he is practicing religion. On the other hand, a teacher discussing the theory of evolution or the novel *The Learning Tree*¹⁶⁶ would probably be surprised to learn that he is promoting religion. These are not religious exercises in the same sense as reverent prayer, in that the "worshipper" is unaware that he is worshipping.¹⁶⁷ Furthermore, whereas the Bible, the Lord's Prayer, and the Ten Commandments are commonly associated with Christian doctrine, ideas referred to as secular humanistic are not commonly understood as religious.¹⁶⁸

Though ideas termed secular humanistic are not religious in any ordinary sense, they might nonetheless be considered religious under a sufficiently broad definition of religion.¹⁶⁹ When deciding whether a practice is religious, however, courts should consider the larger inquiry of whether the practice establishes a religion. Any definition adopted should make sense in the context of the establishment clause. Consider, for example, the allegation in *Crowley v. Smithsonian Institution*¹⁷⁰ that museum exhibits explaining the theory of evolution constituted an establishment of secular humanism.¹⁷¹ The proposed definition of religion did not make sense in the establishment clause context.¹⁷²

Arguments that secular matters are religious are likely to rest on

164. See *Smith v. Board of School Comm'rs*, 655 F. Supp. 939, 965-68 (S.D. Ala. 1987) (testimony of plaintiffs' expert witness), *rev'd* No. 87-7216 (11th Cir. Aug. 26, 1987).

165. "That the reading of the verses of the Bible was religious in nature does not seem to have been questioned by any of the parties or Justices [in *Schempp*, 374 U.S. 203] who heard the appeal" *Malnak v. Yogi*, 592 F.2d 197, 202 (3d Cir. 1979) (per curiam).

Courts have noted, though, that the Bible may be read as history or literature without constituting worship. See *supra* note 145.

166. See *supra* text accompanying notes 129-43.

167. The court in *Malnak*, 592 F.2d 197, held that a public high school could not offer a course in transcendental meditation. Judge Adams, concurring, remarked, "this is the first appellate court decision, to my knowledge, that has concluded that a set of ideas constitutes a religion over the objection and protestations of secularity by those espousing those ideas." *Id.* at 200 (Adams, J., concurring).

168. Cf. *Civic Awareness*, 343 F. Supp. at 1361 (family planning, unlike the Bible, is not so steeped in religious implications that it is religious per se).

169. See *supra* note 37 and accompanying text.

170. *Crowley*, 636 F.2d 738.

171. See *id.* at 742.

172. See *supra* text accompanying notes 86-90.

a broad definition of religion.¹⁷³ Courts should meet such definitions with skepticism, weighing them in terms of their appropriateness for the establishment clause. A definition sufficiently broad to obscure the distinction between the religious and the secular creates unmanageable practical problems. Under a broad definition, government programs might be interpreted as advancing religion because they affect ultimate concerns.¹⁷⁴ While some theologians may find it useful to define religion as a set of beliefs addressing ultimate concerns, transporting that definition to the establishment clause is "simply untenable in an age of such pervasive governmental activity."¹⁷⁵

The establishment clause cannot realistically imply that government may not support basic values, or prefer one set of values over another. Those who urge such an inclusive definition of religion acknowledge the impossible burdens it places on the separation doctrine.¹⁷⁶ In fact, they advocate the abandonment of strict separation in favor of a neutrality that seeks to accommodate all religions equally.¹⁷⁷

Another approach to arguing that ideas are religious is connecting them to an organized religion.¹⁷⁸ Critics of secularization argue that secular humanism is such a religion.¹⁷⁹ For support, they point to humanist movements throughout history and existing humanist organizations.¹⁸⁰

Members of a particular religious group may choose to call themselves Secular Humanists. The existence of that group does not argue, though, that secular humanism, however defined, is a

173. See e.g., *Crowley*, 636 F.2d at 742; *Women's Services, P.C. v. Thone*, 483 F. Supp. 1022, 1036 (D. Neb. 1979).

174. See Geraghty, *Religion and Irreligion in Public Education: The Growing Controversy*, 11 LOY. Q. PUB. ISSUES & L. 57, 58 (1987) (suggesting that governmental efforts to address the spread of AIDS might be thwarted by an overly broad definition of religion).

175. *Grove*, 753 F.2d at 1537 (Canby, J., concurring).

176. See Whitehead & Conlan, *supra* note 3, at 21 (concluding that, because government is based on moral principles, and moral concerns are religious, law is inherently religious).

177. *Crowley*, 636 F.2d at 740 (plaintiffs requested equal funding for museum exhibits explaining evolution and creationism); *Wright*, 366 F. Supp. 1208 (plaintiffs proposed that evolution and creationism be given equal time in the classroom).

178. In traditional establishment cases, practices are most often associated with Christianity.

179. See *Grove*, 753 F.2d at 1536 (Canby, J., concurring); *Civic Awareness*, 343 F. Supp. at 1360.

180. See *Smith v. Board of School Comm'rs*, 655 F. Supp. 939, 968-71 (summarizing testimony leading the court to conclude that secular humanism is an established religion), *rev'd*, No. 87-7216 (11th Cir. Aug. 26, 1987). See text accompanying notes 33-36.

religion.¹⁸¹ Several courts have noted that ideas do not establish a religion simply because they are shared by a particular religious group.¹⁸² Government may engage in activity that is encouraged by "even the most orthodox of religions" without establishing a religion.¹⁸³ As the court in *Civic Awareness* noted, the Biblical condemnation of stealing and murder does not make our criminal justice system an establishment of religion.¹⁸⁴ Similarly, an organized group of secular humanists may espouse feminism or moral relativism, just as Christians may preach brotherly love and obedience to one's parents; but in neither case are those ideas turned into religious teachings wherever they appear.¹⁸⁵ Moreover, a public school system that communicates those values does not thereby run afoul of the establishment clause.¹⁸⁶

The "tenets" argument has been central to the resolution of secular humanism claims. Courts have consistently recognized that government is not prohibited from advancing an idea that incidentally harmonizes with a tenet of a particular religion. Therefore, government endorsement of evolution or birth control is not precluded merely because those concepts are important to a group of religious Secular Humanists. Evolution and birth control are not simply tenets of secular humanism; one is a scientific theory, and the other a practice known to mankind for millennia.¹⁸⁷ Moreover, government entities engaged in teaching evolution or funding family planning are not connected even remotely with a religion of secular humanism. Most likely, the members of local school boards responsible for public school curricula had never heard of secular humanism until fundamentalists popularized the term. Similarly, the overwhelming majority of families who practice birth control have no connection with a religion of Secular Humanism. Secular ideas such as evolution and birth control find support among Americans of varied religious faiths, including

181. See *Malnak*, 592 F.2d at 212 (Adams, J., concurring); cf. *Crowley*, 636 F.2d at 742 (government involvement in a subject important to an organized religion is not support of religion).

182. See, e.g., *Grove*, 753 F.2d at 1539 (Canby, J., concurring) (citing *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)); *Malnak*, 592 F.2d at 212 (Adams, J., concurring).

183. *Malnak*, 592 F.2d at 212 (Adams, J., concurring).

184. *Civic Awareness*, 343 F. Supp. at 1360-61; *Malnak*, 592 F.2d at 212 (Adams, J., concurring).

185. Cf. *Malnak*, 592 F.2d at 212 (Adams, J., concurring) (pacifism is not religion, though some pacifists base their opposition to war on religious belief).

186. See *id.*

187. J. GORMAN, ABORTION AND THE EARLY CHURCH 14, 19 (1982) (abortion was a common practice in ancient times).

traditional ones.¹⁸⁸ Thus, secular ideas do not constitute a religion of secularism. Courts should clarify that the secular humanism of which fundamentalists complain bears no direct relationship to an organized group of Secular Humanists.¹⁸⁹

B. The Secular Is Not Anti-Religious

The charge that a practice is secular humanistic is usually coupled with a claim that it is anti-Christian.¹⁹⁰ Though courts generally have not relied on the hostility argument to find an establishment clause violation, judicial discussions of hostility and neutrality suggest that secular practices could be held unconstitutional without labeling them religious, if they breach the neutrality mandate. Courts have seldom indicated, though, just what government must do, or refrain from doing, to remain neutral.

Neutrality requires that government activity refrain from showing hostility to religion or establishing an anti-religion.¹⁹¹ Dicta to this effect appear in many decisions,¹⁹² but give little guidance to the meaning of hostility or to specific government actions which might breach neutrality. Presumably, a public school course devoted solely to disputing the existence of God, for example, would be hostile to religion. In *Grove*, Judge Canby suggested that, while a literature class may include a novel in which the protagonist refers to Jesus Christ as a "poor white trash God" or "a long-legged white son-of-a-bitch,"¹⁹³ school officials probably could not read a resolution to that effect over the public address system.¹⁹⁴ But most claims of hostility do not involve such direct attacks on religion; rather they are leveled at activities that never mention God or religion, like the teaching of evolution.¹⁹⁵

Hostility becomes an even more troubling concept when applied to the separation of church and state. In *Wright*, for example, the plaintiffs alleged that the schools' presentation of evolution was hostile to Christianity because the Christian version of creation was not also taught. A formal presentation of creationism, though,

188. H. GREGORY, *THE RELIGIOUS CASE FOR ABORTION* 12 (1983) (essays arguing that abortion is supported by "the Bible, four thousand years of Jewish law, and eighteen centuries of Catholic tradition").

189. See *Grove*, 753 F.2d at 1537 (Canby, J., concurring).

190. See, e.g., *id.* at 1539-40 (Canby, J., concurring); *Wright*, 366 F. Supp. at 1209.

191. See *supra* text accompanying notes 69-72.

192. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Abington School Dist. v. Schempp*, 374 U.S. at 225 (1963).

193. *Grove*, 753 F.2d at 1540 (Canby, J., concurring).

194. *Id.*

195. See *Wright*, 366 F. Supp. at 1209.

might itself create an establishment problem.¹⁹⁶ The state must perform a balancing act to avoid either advancing or discriminating against religion. A clarification of separation is in order. Claims that government favors the secular over the religious can be analyzed by addressing the proper scope of separation. If a practice does not violate separation, it may stand; if it does, then government is not hostile in refusing to brook it.¹⁹⁷

Notions of hostility, anti-religion, and neutrality, though frequently mentioned by the courts, remain ill-defined.¹⁹⁸ Thus, their application is unpredictable. Dicta concerning neutrality provide a sword for those who argue that government must not favor the secular over the religious. But the province of the state is secular concerns.¹⁹⁹ The *Lemon* test recognizes this: under the establishment clause, government activity must have a secular purpose.²⁰⁰ Government must address secular matters and advance secular concerns, without facing the dilemma that it thereby establishes a religion.²⁰¹

The Supreme Court has never held government activity violative of the establishment clause on the grounds that it was hostile to religion. If the Court wishes to retain the neutrality/hostility test as a safeguard against government policies that are truly hostile to religion, the Court needs to define hostility. This definition must differentiate between policies that explicitly condemn religion and legitimate secular activities that incidentally offend religious beliefs. Furthermore, if the Court wishes to maintain the vitality of the separation doctrine, it must emphasize that separation is not hostile²⁰²—that government does not manifest hostility in refusing to promote religion.

Alternatively, the Court could reconsider whether "hostility"

196. *Edwards v. Aguillard*, No. 85-1513 (U.S. June 19, 1987).

Courts have suggested that a refusal to extend certain benefits to religious organizations would constitute hostility. *See supra* text accompanying notes 74-76. At some point, though, an extension of benefits conflicts with the ban on government support of religion.

197. *See Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 211 (1948).

198. *See Valauri*, 48 U. PITT. L. REV. 83, 86 (1986) (neutrality can be interpreted as separationist or accommodationist).

199. *See* L. PFEFFER, *supra* note 11, discussing secular purposes in the preamble to the Constitution. *See also* Wood, *supra* note 50.

200. *See supra* text accompanying notes 59-60.

201. *See* Wood, *supra* note 50 (indictment of public education as secular threatens the schools).

202. In the 1962 decision outlawing school prayer, the Supreme Court noted that "nothing . . . could be more wrong" than to regard the decision as hostile toward religion. *Engel v. Vitale*, 370 U.S. 421, 433-35 (1962).

belongs in the establishment clause analysis at all. However hostility is defined, treating it as an establishment issue is troublesome. Logically, references to hostility appear unrelated to the concept that government may not establish a religion. The term "establishment" implies an alliance of the state with a particular religion.²⁰³ Though that alliance may result in hostility toward other religions, hostility alone does not show such an alliance. Yet the courts clearly reiterate that government activity that inhibits religion, establishes anti-religion, or prefers non-believers creates an establishment problem.²⁰⁴

V. CONCLUSION

At the base of secular humanism and neutrality claims is the complaint that government is disadvantaging a religious group, or religion generally. Were this disadvantaging brought about by establishment of a majority religion, as some suggest,²⁰⁵ it would constitute an establishment problem. But government sponsorship of secular ideas that incidentally conflict with the mandates of a particular faith does not violate the establishment clause. Courts should rethink the notion that secularism can be "established."

203. See *A.C.L.U. v. City of Birmingham*, 791 F.2d 1561, 1563 (6th Cir. 1986).

204. See, e.g., *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947); *Daniel v. Waters*, 515 F.2d 485, 490-91 (6th Cir. 1975).

References to hostility and neutrality may express the courts' sense that the first amendment should provide protection against religious persecution, whether that persecution stems from the adoption of a state religion or an official policy of antagonism toward religion. But state activity that burdens religious practice falls under the free exercise clause. Government must show a compelling state interest to justify such activity. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The Supreme Court seemed to suggest an application of the free exercise clause to hostility arguments in *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948). That case held unconstitutional a released-time program on school grounds. The Court noted that government did not show hostility to religion by refusing to disseminate religious doctrines. *Id.* at 211. "A manifestation of such hostility," it remarked, "would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *Id.* at 211-12.

If such burdens also implicate the establishment clause, then establishment seems completely to eclipse free exercise; every free exercise claim also becomes an establishment claim. Riggs, *Judicial Doublethink and the Establishment Clause: The Fallacy of Establishment by Inhibition*, 18 VAL. U.L. REV. 285, 300 (1984). This redundancy unnecessarily complicates the already confused application of the establishment clause. *A.C.L.U. v. City of Birmingham*, 791 F.2d 1561, 1563 (6th Cir. 1986) ("establishment clause has produced a confusing body of law"). See generally Comment, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U.L. REV. 477, 504-13 (1986) (confusion among courts over appropriate analysis for reviewing the constitutionality of religious displays).

205. See McGarry, *supra* note 5, at 2 (secular humanism is dominant in American public schools).

Secular humanism arguments are largely arguments against separation. They urge that separation of theistic teachings from government is hostile rather than neutral, promotes anti-religious attitudes, and establishes a non-theistic majority religion.²⁰⁶ Courts should acknowledge that these arguments attack the separation doctrine.²⁰⁷ At the least, courts should define neutrality and hostility more precisely to discourage the inference that secular activity is non-neutral or hostile. A more forthright approach to establishment might discard references to neutrality and hostility altogether.

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206. See Whitehead & Conlan, *supra* note 3, at 1-2.

207. Whether separation will retain its vitality in Supreme Court decisions is open to question. Some Justices appear to be rethinking the role of separation in the establishment clause. "[J]udicial responses to the complexities of modern society have transformed the once 'high and impregnable' wall erected between church and state by the first amendment . . . into a 'blurred, indistinct and variable barrier.'" Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 850, 857 (1st Cir. 1980). See Braveman, *The Establishment Clause and the Course of Religious Neutrality*, 45 Md. L. Rev. 352 (1986) (suggesting that four Justices may support a narrower interpretation of the establishment clause which would not require strict separation).