Notre Dame Law Review

Volume 63 | Issue 3 Article 5

1-1-1988

Secular Humanism in Public School Textbooks: Thou Shalt Have No Other God (Except Thyself)

B. Douglas Hayes

Secular Humanism in Public School Textbooks: Thou Shalt Have No Other God (Except Thyself)

The Supreme Court has recently developed an increasingly broad definition of religion for the first amendment in the context of free exercise cases.[1] As the number and diversity of religions in the United States continue to grow, interesting issues have arisen in attempts to apply this broad definition. One of the more notable issues has been raised by conservative Christians[2] who have argued that the expansive Supreme Court definition should be applied to establishment clause cases as well as free exercise cases, and that secular humanism is a religion under this definition.[3] These conservative Christians argue that the religion of secular humanism is being endorsed in public school textbooks in violation of the establishment clause. Several lower federal courts have already examined this issue with mixed results.

Part I of this note outlines the approaches which courts and commentators have taken in defining "religion" for purposes of the first amendment and examines whether the same definition of religion should apply to both the free exercise and establishment clause cases. Part II describes secular humanism and discusses whether it is a religion for first amendment purposes. Part III reviews two cases which have ruled on whether secular humanism was being taught in public school textbooks. Finally, Part IV analyzes the claim that secular humanism is endorsed by public school textbooks and suggests that the establishment clause has been violated when the issue is examined under a faith claim test.

I. The Meaning of "Religion" in the First Amendment

Many conservative Christians have become concerned in recent years with what they perceive as opposition to traditional theism and morality in public school textbooks. They believe that separation of church and state in the classroom has gone beyond mere neutrality toward traditional Judaeo-Christian religions and has become actively hostile toward theism.[4] In particular, these Christians believe that public school textbooks are promoting the antitheistic religion of secular humanism.

These Christians have brought their claims to the courtroom; their basic legal argument can be stated in four propositions. First, secular

1 The first amendment reads in part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

2 This note uses the term "conservative Christians" to refer to Christians of both fundamentalist and evangelical faiths.

3 Secular humanism is a belief system which rejects the transcendent in favor of the centrality of man, and faith in favor of reason. *See* Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978).

4 "The government is neutral, and, while protecting all, it prefers none, and it disparages none." Abington School Dist. v. Schempp, 374 U.S. 203, 215 (1963) (quoting Minor v. Bd. of Educ. of Cincinnati (Super. Ct. of Cincinnati 1870), *reprinted in* THE BIBLE IN THE COMMON SCHOOLS (1870)).

humanism is a religion for purposes of the first amendment.[5] Second, certain public school textbooks advocate secular humanism.[6] Third, state officials' selection of these textbooks constitutes state action in violation of the establishment clause.[7] Finally, to remedy the constitutional violation, those textbooks that promote secular humanism must be removed from the classroom.[8] Before this legal argument can be examined, however, the underlying issue of what constitutes "religion" for purposes of the first amendment must be discussed. Only then can it be determined whether secular humanism is a religion which falls under the restrictions of the establishment clause.

A. *Supreme Court Criteria for Defining Religion*

The Supreme Court has never given a comprehensive definition of "religion" for purposes of the first amendment. The Court looked to traditional theism in early attempts at defining religion. In the 1890 case of *Davis v. Beason*,[9] the Court stated that "the term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[10] However, in more recent cases, the Supreme Court has moved toward a definition of religion that includes nontheistic belief systems.

The two cases which best express this more recent understanding of religion are not explicitly constitutional cases. Instead, they are cases in which conscientious objectors sought exemption from the draft under statutory law.[11] However, it is generally agreed that the definition of religion for the statute was constitutionally rather than statutorily required.[12]

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5 Smith v. Bd. of School Comm'rs of Mobile County, 655 F. Supp. 939, 968-71, 980-83 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). *See infra* notes 60-74 and accompanying text.

6 *Id.* at 972-74. *See infra* notes 91-116 and accompanying text.

7 *Id.* at 947, 974.

8 *Id.* at 946, 988.

9 133 U.S. 333 (1890).

10 *Id.* at 342. *See also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being."); United States v. Macintosh, 283 U.S. 605, 612 (1931) ("Religion . . . embraces human conduct expressive of the relation between man and God.")

11 The federal statute under which the conscientious objectors sought exemption read as follows:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

50 U.S.C. App. § 456(j) (1958 ed.).

12 United States v. Seeger, 380 U.S. 163, 188 (1965) (Douglas, J., concurring) (the result was constitutionally required because otherwise adherents of some religious faiths would be subject to penalties that adherents of other religions would not be subject to, in violation of the free exercise clause; the due process clause of the fifth amendment would also be violated since all religions would not receive equal protection). *See also* Malnak v. Yogi, 592 F.2d 197, 202-03 (3d Cir. 1979) (Adams, J., concurring); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 760-61 (1984); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1064 (1978).

The first of these two cases was *United States v. Seeger*.[13] Seeger was a conscientious objector who sought exemption from the draft because of personal philosophical beliefs which he characterized as religious, although they had no connection to any recognized religion.[14] The Court stated that

> the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in relation to a Supreme Being" and the other is not.[15]

In *Welsh v. United States*,[16] the conscientious objector's conviction against war was formed "by reading in the fields of history and sociology."[17] Although he first denied that his objections to war were based on religious beliefs, he later declared that his beliefs were "certainly religious in the ethical sense of the word."[18] The Supreme Court held that Welsh was entitled to conscientious objector status because the only two groups of objectors who are not conscientious objectors by religious training and belief are those whose "beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency."[19]

The Court apparently retreated from equating philosophy with religion in *Wisconsin v. Yoder*.[20] In *Yoder*, Amish parents refused to send their children, ages fourteen and fifteen, to school beyond the eighth grade, although state law required children to attend school until reaching age sixteen.[21] In holding that the Amish's right to free exercise of their religion had been violated, the Court noted that

> if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.[22]

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13 380 U.S. 163 (1965).

14 *Id.* at 166. *See supra* note 11 for the text of the statute under which Seeger sought exemption from the draft.

15 380 U.S. at 165-66. The Court was influenced in reaching this conclusion by liberal theologian Paul Tillich's language of "ultimate concern." *Id.* at 187 (quoting P. TILLICH, THE SHAKING OF THE FOUNDATIONS 57 (1948)). An "ultimate concern" is a concern which has to do with human reality and the meaning and aim of existence. C. ARMBRUSTER, THE VISION OF PAUL TILLICH 26 (1967).

16 398 U.S. 333 (1970).

17 *Id.* at 341. *See supra* note 11 for the text of the statute under which Welsh sought exemption from the draft.

18 *Id.*

19 *Id.* at 342-43.

20 406 U.S. 205 (1972).

21 *Id.* at 207.

22 *Id.* at 216.

Although *Yoder* backs away from equating personal philosophy with religion, it seems to leave intact the *Seeger* test of looking to whether the beliefs function in a position parallel to that of traditional religious beliefs.[23] So while a personal philosophy might not be religion for purposes of the first amendment, a belief system which functions as traditional religions function in the lives of their adherents might be religion for first amendment analysis.[24]

B. *Lower Federal Courts' Criteria for Religion*

While the Supreme Court has avoided giving a more comprehensive definition of religion, lower federal courts have had occasion to build on the Supreme Court's definition. In *Founding Church of Scientology v. United States*,[25] the Circuit Court of Appeals for the District of Columbia held that the appellants had made out a prima facie case that Scientology was a religion for purposes of the first amendment.[26] In finding that Scientology was a religion, the court found it important that Scientology had licensed ministers with legal authority to marry and bury and that its doctrine contained an account of man and his nature "comparable in scope, if not in content, to those of some organized religions."[27] The fact that Scientology was nontheistic did not preclude if from being classified as a religion.[28]

In *Malnak v. Yogi*,[29] the Third Circuit held that teaching Transcendental Meditation in the New Jersey public schools violated the establishment clause.[30] Judge Arlin Adams filed a concurring opinion in *Malnak* in order to give greater insight into the court's expansive reading of religion in the first amendment.[31]

> Essentially, the Court set up two "poles" of belief. At one end, there is purely religious belief, exemplified by the Amish, and at the other, there is purely philosophical belief, exemplified by Thoreau. . . . [T]he Court suggested that an inquiry should be made to determine where the belief at issue falls on this continuum . . . .

Note, *Secular Humanism, the Establishment Clause, and Public Education*, 61 N.Y.U. L. REV. 1149, 1161 n. 103 (1986).

Justice Douglas, dissenting, disagreed with the Court's retreat from equating philosophy with religion, and felt that it was contrary to *Welsh* and *Seeger*. 406 U.S. at 247-48 (Douglas, J., dissenting).

23 *See* Note, *supra* note 22, at 1161-62.

24 For a more complete overview of the history of the definition of religion in Supreme Court cases, as well as an analysis of the framers' intent in drafting the first amendment, see Whitehead & Conlan, *supra* note 3, at 2-15. *But see* Davidow, *"Secular Humanism" as an "Established Religion": A Response to Whitehead and Conlan*, 11 TEX. TECH L. REV. 51 (1979) (arguing that Whitehead and Conlan fail to reconcile two pieces of evidence which contradict their thesis that the framers did not intend the first amendment to prevent an establishment of Christianity but instead intended to avoid the domination of one Christian denomination over the others).

25 409 F.2d 1146 (D.C. Cir.), *cert. denied*, 396 U.S. 963 (1969).

26 *Id.* at 1162. In *Founding Church*, the Church of Scientology appealed a judgment requiring condemnation and destruction of Scientology "E-meters" for being devices with false and misleading labeling and for lacking adequate directions for use in violation of the Food, Drug, and Cosmetic Act. *Id.* at 1148. The court held that literature which was religious doctrine could not be used in a finding of false labeling. *Id.* at 1162.

27 *Id.* at 1160.

28 *Id.*

29 592 F.2d 197 (3d Cir. 1979).

30 *Id.* at 199.

31 *Id.* at 200.

Judge Adams looked to three criteria in determining what constituted religion for purposes of the first amendment. First, the "religion" must address fundamental questions, "the deeper and more imponderable questions—the meaning of life and death, man's role in the Universe, the proper moral code of right and wrong . . . ."[32] Secondly, the "religion" must provide *comprehensive* answers to these fundamental questions.[33] Providing an answer to only one fundamental question would not suffice; the "religion" would have to provide "a systematic series of answers."[34] Thirdly, a court should examine whether the "religion" has any of the traditional external indicia of religion such as "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observation of holidays and other similar manifestations associated with the traditional religions."[35] Judge Adams noted that a religion could exist without any of these outward signs, and their absence should not be dispositive.[36]

A three judge panel for the Third Circuit accepted Judge Adams' three criteria two years later in *Africa v. Pennsylvania*.[37] In *Africa*, Judge Adams, writing for the court, held that an organization of prisoners named MOVE, which belived in absolute peace, purity in nature, and the necessity of limiting one's diet to raw foods, was not a first amendment religion because it met none of the three criteria.[38]

Essentially, the lower federal courts have only refined the criteria set out by the Supreme Court in *Seeger* and *Welsh*.[39] In *Founding Church*, the criterion of looking to the comprehensiveness of the religion's account of man and his nature is equivalent to the parallel position test in *Seeger*.[40] A belief system which gives a comprehensive account of man and his na-

32 *Id.* at 208. Judge Adams found that Science of Creative Intelligence/Transcendental Meditation met this criterion because it held to the existence of a fundamental life force and dealt with the nature of man and his world, the sustaining force of the universe, and the way to find happiness. *Id.* at 213. Fundamental questions are equivalent to questions of ultimate concern, discussed *supra* note 15.

33 *Id.* at 209. Judge Adams found that this criterion was met, for even though SCITM was not as comprehensive as some religions and had no complete moral code, it addressed enough fundamental questions that it was more than an ideology driven by only one isolated theory. *Id.* at 213.

34 *Id.* at 209.

35 *Id.* Judge Adams found that this criterion was met because of SCITM's ceremonies, trained teachers, and organization even though it lacked clergy and marriage and burial rites. *Id.* at 214.

36 *Id.* at 209.

37 662 F.2d 1025 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982). The court noted that Judge Adams' concurring opinion in *Malnak* did not "purport to have isolated the only possible factors that could be used to 'test' for the presence of a religion." *Id.* at 1032 n. 13.

38 *Id.* at 1026-28, 1033-36. Other MOVE beliefs included opposition to all that was wrong, ending all violence, and returning to nature. MOVE had no ceremonies, rituals, or holidays, but did consider every act of life to be full of religious significance. *Id.* at 1026-28.

In applying the three *Malnak* criteria to MOVE, the Third Circuit first found that MOVE addressed no ultimate fundamental questions except perhaps some notion that man's role in the universe was to live in harmony with nature. *Id.* at 1033. Secondly, MOVE's ideology was not comprehensive, but was limited to its single fundamental ideal of "philosophical naturalism." *Id.* at 1035. Lastly, MOVE had no special services, rituals, holidays, catechism, or organizational structure and therefore lacked the traditional external indicia of religion. *Id.* at 1036.

39 Judge Adams' three criteria in *Malnak* and *Africa* amount to a "definition by analogy" approach which is "a refinement and an extension of the 'parallel'-belief course first charged by the Supreme Court in *Seeger*." *Id.* at 1036.

40 *See supra* notes 27-28 and accompanying text for the *Founding Church* criteria. *See supra* note 15 and accompanying text for the *Seeger* parallel position test.

ture fills a role parallel to that of traditional religion. Judge Adams' first two criteria in *Malnak* and *Africa* expand the parallel position test by defining when a belief system will occupy a position parallel to that of traditional religion.[41] Under Judge Adams' first two criteria, a belief system meets *Seeger*'s parallel position test when it addresses fundamental questions and does so in a comprehensive manner. The only criterion which these cases have added which goes beyond refinement of the *Seeger* test is that of looking to whether traditional external indicia such as ritual and organization exist.[42]

C. *A Unitary Definition Versus a Bifurcated Definition*

Before turning to the question of whether secular humanism meets these criteria for religion, one further issue regarding the definition of religion must be addressed. This issue is whether the definition of religion should be the same for both the free exercise and the establishment clauses. Some commentators have suggested that religion should be given different meanings for the two clauses.[43] These commentators believe that a broad reading of the free exercise clause would maximize protection of individual religious rights while a narrow reading of the establishment clause would avoid the possibility that all "humane" government programs could be deemed constitutionally suspect as an establishment of religion.[44]

Several problems exist with this bifurcated reading, however. First, the word "religion" appears only once in the first amendment. To claim that "religion" could have different meanings for the two clauses would contradict a plain reading of the amendment.[45] Secondly, a bifurcated

41 *See supra* notes 32-34 and accompanying text for a description of Judge Adams' first two criteria for defining religion.

42 This is Judge Adams' third criterion in *Malnak* and *Africa*. *See supra* notes 35-36 and accompanying text. Even this third criterion can be seen as merely an extension of the parallel position test since if ritual is incorporated in the belief system, it is more likely to function as religion for the adherent.

43 *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 827-28 (1978); Note, *supra* note 12, at 1083-86.

44 "To borrow the ultimate concern test from the free exercise context and use it with present establishment clause doctrines would be to invite attack on all programs that further the ultimate concerns of individuals or entangle the government with such concerns." Note, *supra* note 12, at 1084.

See also L. TRIBE, *supra* note 43, § 14-6, at 827-28. Professor Tribe fears that if a broad definition of religion is given for the establishment clause that legislation advancing human dignity, freedom, or morality could be invalidated as an establishment of religion. *Id.* at 831. Therefore, Professor Tribe proposes that the definition of religion be bifurcated for the first amendment. For the free exercise clause, anything "arguably religious" should be considered religion, but for the establishment clause, anything "arguably nonreligious" should not be considered religion. *Id.* at 828.

45 Although the Constitution has often been subject to a broad construction, it remains a written document. It is difficult to justify a reading of the first amendment so as to support a dual definition of religion, nor has our attention been drawn to any support for such a view in the conventional sources that have been thought to reveal the intention of the framers.

Malnak v. Yogi, 592 F.2d 197, 211-12 (3d Cir. 1979). *See supra* note 1 for the text of the first amendment.

The legislative history behind the drafting of the first amendment appears to support the proposition that the framers were defining religion in terms of theism for both clauses. *See* M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978). *But see*

reading would result in three categories of beliefs.[46] The first category would be those belief systems which are not religion for either clause and therefore would not receive the protections of the free exercise clause or the restrictions of the establishment clause. The second category would be those belief systems which are religion for both clauses and would receive the protections of the free exercise clause and the restrictions of the establishment clause. The third category of beliefs would be protected by the free exercise clause but not subjected to the restrictions of the establishment clause. In effect, this third category of beliefs would be given preferred status over other belief systems without any reason for giving it such status.[47] A third problem with a bifurcated reading, the possibility that government programs will be subject to wholesale invalidation under a broad definition of religion for the establishment clause, is probably overstated. Humane government programs should not be invalidated if they are based on some ultimate concern such as human dignity, merely because a program based on only one ultimate concern would fail the criterion of comprehensiveness.[48] Because of the analytical problems presented by the bifurcated reading of the religion clauses, and because courts have not been responsive to attempts to promote this reading,[49] this note will apply the unitary reading of the religion clauses in determining whether secular humanism is a religion.

Note, *supra* note 12, at 1060 (although the framers believed religion entailed a relationship between man and a Supreme Being, no clear evidence exists that the framers wanted to protect only theism). Nothing in the legislative history supports a dual definition of religion, especially any sort of "arguably religious/arguably nonreligious" dichotomy.

46 *See Malnak*, 592 F.2d at 212-13 (dual definition creates three categories of beliefs); Greenawalt, *supra* note 12, at 813-15 (Tribe's definition creates a broad intermediate category that could protect even Marxism and use of psychedelic drugs as arguably religious while not subjecting them to establishment clause restrictions).

47 592 F.2d at 212-13. Arguably, this would make the third category "officially preferred beliefs." Note, *supra* note 22, at 1160.

> There is no reason to distinguish in ideological matters between different comprehensive world views, calling some religion and some not. A more plausible interpretation is to consider, in the context of the marketplace of ideas, that the ideological competitors of religion *are* religion for both clauses of the first amendment.

Note, *The Myth of Religious Neutrality By Separation in Education*, 71 VA. L. REV. 127, 154 (1985).

48 592 F.2d at 212. In *Malnak*, Judge Adams argues that criticisms about possible "wholesale invalidation" of government programs are unfounded because that would be too broad a reading of *Seeger*, *Welsh*, and *Torcaso*. A government program would have to be based upon a comprehensive set of ultimate concerns rather than just a single such ultimate concern. And even if a program was supported for religious reasons, that alone would not invalidate it if the law or program itself is constitutional. *Id.* *See also* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 605-06 (arguing that a dual definition of religion is not necessary to avoid invalidation of large numbers of government programs).

49 In Everson v. Bd. of Educ., 330 U.S. 1 (1947), Justice Rutledge, writing for four dissenters, rejected a bifurcated definition of religion. "Religion appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' " *Id.* at 32 (Rutledge, J., dissenting). The views of the four dissenters on the unitary definition were not disputed by the majority in *Everson*.

Judge Adams also rejected a bifurcated definition in *Malnak*. 592 F.2d at 213. In a footnote, Judge Adams noted that the majority of the court also appeared to implicitly reject a bifurcated definition. *Id.* at 211 n. 51. *See also* Oaks, *Separation, Accomodation and the Future of Church and State*, 35 DE PAUL L. REV. 1, 9-10, 22 (1985) (predicting that the Supreme Court will develop a single definition of religion for both clauses equivalent to the broad definition it has currently given for the free exercise clause). *But see* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir.) (Canby,

II. Secular Humanism as a Religion

Having defined religion for purposes of the first amendment, the next step is to examine secular humanism and determine whether it meets the criteria for classification as a religion. A description of secular humanism's tenets and organization will be necessary.

A. *A Description of Secular Humanism*

The term "humanism" generally refers to a "devotion to the humanities . . . characterized by a revival of classical letters, an individualistic and critical spirit."[50] The term "secular humanism," however, has markedly different connotations.[51]

Secular humanists have set down in writing their basic belief system in three main works since their formation. These three writings are the *Humanist Manifesto I*, the *Humanist Manifesto II*, and *A Secular Humanist Declaration*.[52] In the *Humanist Manifesto II*, secular humanists divided their "creed" into five basic areas:

1. Religion: Religions which place God above humans do a disservice. "We find insufficient evidence for belief in the existence of a supernatural: it is either meaningless or irrelevant to the question of the survival and fulfillment of the human race. As nontheists, we begin with humans not God, nature not deity." Teachings of eternal salvation or damnation are "illusory and harmful" because they "distract humans from present concerns . . . ."[53]

2. Ethics: Morals and ethics are to be based on man, and are "*autonomous* and *situational*." Meaning in life is found through creativity and development. Reason is the most effective means for solving human problems, but reason should be balanced by humility and compassion.[54]

3. The individual: The dignity of an individual and his self-actualization are of cardinal importance.[55]

J., concurring) (implying that a bifurcated definition might best serve the purposes of the religion clauses), *cert. denied*, 474 U.S. 826 (1985).

50 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986). "In this century the label has been appropriated by those who reject all religious beliefs, insisting that we should be exclusively concerned with human welfare in this, allegedly, the only world." A DICTIONARY OF PHILOSOPHY 153 (2d ed. 1984).

51 According to Dr. Russell Kirk, the term "secular humanism" came into being as a result of a battle for the use of the term "humanism" by a group of ethical humanists and a group of religious humanists in the late 20's and early 30's. The ethical humanists, led by Irving Babbitt and Paul Elmer More, emphasized classical disciplines and the study of the humanities. The religious humanists were led by John Dewey and his followers. Both groups proclaimed themselves American humanists, and the term "secular humanists" eventually was applied to the group of religious humanists to distinguish them from the ethical humanists. Smith v. Bd. of School Comm'rs of Mobile County, 655 F. Supp. 939, 961-62 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

52 *Humanist Manifesto I*, 6 NEW HUMANIST (May-June 1933) (signed by 34 prominent humanists, including John Dewey); *Humanist Manifesto II*, *reprinted in* P. KURTZ, IN DEFENSE OF SECULAR HUMANISM 39 (1983) [hereinafter *Humanist Manifesto II*] (signed by more than 275 prominent intellecuals, including Isaac Asimov, Sidney Hook, Corliss Lamont, Andrei Sakharov, and B.F. Skinner); *A Secular Humanist Declaration*, *reprinted in* P. KURTZ, IN DEFENSE OF SECULAR HUMANISM 14 (1983) [hereinafter *Declaration*].

53 *Humanist Manifesto II*, *supra* note 52, at 41-42.

54 *Id.* at 42-43.

55 *Id.* at 43. *Humanist Manifesto II* noted that because of this tenet any religion, ideology, or moral code which denigrates the individual should be rejected. In reference to the individual, soci-

4. Democratic society: The individual must have a wide range of civil liberties.[56]

5. World community: A world community should be developed through "a system of world law and a world order based upon transnational federal government."[57]

A Secular Humanist Declaration adds to this list of beliefs those of the importance of moral education in public schools, the immorality of indoctrinating children in religion, and support of the theory of evolution.[58]

These three main documents enumerate the secular humanist belief system. It is a belief system which rejects the transcendent and substitutes an emphasis on the centrality of man. It stresses the importance of reason over faith, both for solving the world's problems and for developing a system of ethics and morals. Secular humanism also has organizational structure, with a segment functioning as churches but with a limited amount of ritual.[59]

B. *An Examination of Secular Humanism Under the Criteria for Religion*

Having briefly examined what secular humanism is, it must next be determined whether secular humanism meets the first amendment crite-

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ety must also recognize the right to birth control, abortion, divorce, and sex between consenting adults. *Id.*

56 *Id.* at 43-45. These civil liberties include not only the freedoms recognized in the Bill of Rights, but also the right to die with dignity, euthanasia, and the right to suicide. *Id.* at 43. In regard to democratic society, *Humanist Manifesto II* also places among its tenets that participatory democracy must be extended to "the economy, the school, the family, the workplace, and voluntary associations." *Id.* at 44. Separation of church and state is imperative. Economic systems should be tested by whether they further individual economic well-being. Discrimination must be eliminated, and everyone should have a right to education at any level. *Id.* at 44-45.

57 *Id.* at 45.

58 *Declaration*, *supra* note 52, at 18, 20. Organization and ritual is also important in determining whether a belief system is religion. A number of organizations are dedicated to the promotion of secular humanism. These include the American Humanist Association, American Ethical Union, Fellowship of Religious Humanists, Society for Humanistic Judaism, Council for Democratic and Secular Humanism, and the Canadian Humanist Association. P. KURTZ, IN DEFENSE OF SECULAR HUMANISM 177 (1983). In addition, secular humanism has had influence in the Unitarian Church. *Id.* at 189. The American Humanist Association has been recognized as a religious minority and has sought first amendment protection. Smith v. Bd. of School Comm'rs of Mobile County, 655 F.Supp. 939, 970 (S.D. Ala.) *rev'd*, 827 F.2d 684 (11th Cir. 1987). *See also* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Cal. Dist. Ct. App. 1957) (the humanist group Fellowship of Humanity was recognized as a religion under the United States Constitution and given exemption from property taxes). The American Humanist Society also certifies humanist counselors who have the legal status of ministers. *Smith*, 655 F.Supp. at 970. Some of the secular humanist groups function as churches and have incorporated rituals such as burial services. *Id.* at 971. The Ethical Culture Society functions as a church. *Id. See also Fellowship of Humanity*, 315 P.2d at 397 (humanist group Fellowship of Humanity functioned similarly to a church). But note that humanist organizations are relatively small. As of 1983, the American Humanist Association had 3,500 members, the American Ethical Union 3,500 members, the Society for Humanistic Judaism 4,000 members, and the Fellowship of Religious Humanists 300 members. P. KURTZ, *supra*, at 189. The secular humanist movement is much broader than those who actually adhere to one of the organized groups, and, according to Dr. Kurtz, it is the dominant moral and religious point of view among intellectuals. *Id.* at 135. Secular humanists promote their views through several magazines dedicated to humanist discussion. *Smith*, 655 F.Supp. at 981. These magazines are FREE INQUIRY, THE HUMANIST, and PROGRESSIVE WORLD.

59 *See id.*

ria for classification as a religion. In *Torcaso v. Watkins*,[60] the Supreme Court recognized that first amendment rights extend to nontheistic religions. The Court stated that "[a]mong religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."[61] However, this statement is probably not dispositive of the issue since it is dictum and since, as Judge Adams noted in *Malnak*, it does not necessarily "stand for the proposition that 'humanism' is a religion, although an organized group of 'Secular Humanists' may be."[62]

On the lower court levels, the courts have generally avoided the question of whether secular humanism is a religion. They have sidestepped the issue by assuming for the sake of argument that secular humanism is a religion, but then finding that secular humanism has not been established in violation of the first amendment.[63] The district court decision in *Smith v. Board of School Commissioners of Mobile County*[64] has been the only court to determine whether secular humanism is a religion.

The district court in *Smith* held that secular humanism is a religion for both free exercise and establishment clause purposes.[65] The *Smith* court noted that secular humanism has an organizational structure that attempts to proselytize, leaders who are recognized as authorities, and "diversity of views and philosophies within the humanist community very similar to the schisms and debates existing within the Christian, Jewish and Muslim communities."[66]

Turning to the content of the beliefs of secular humanism, the *Smith* court found that secular humanism's most important belief was its denial of the transcendent.[67] The court found that this belief was a faith assumption, which resulted in secular humanism being a first amendment

60 367 U.S. 488 (1961).

61 *Id.* at 495 n. 11.

62 Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979). Judge Adams was noting that the Supreme Court's statement was followed by reference to a case in which an organized group of secular humanists recieved tax exempt status as a religion. *See* Fellowship of Humanity v. County of Alameda, 133 Cal. App. 2d 673, 315 P.2d 394 (Cal. Dist. Ct. App. 1957). But note that a number of cases have referred to this Supreme Court dictum as conclusive. *See* Int'l Society for Krishna Consciousness v. Barber, 650 F.2d 430, 439-40 (2d Cir. 1981); Crockett v. Sorenson, 568 F. Supp. 1422, 1425 (W.D. Va. 1983); Van Schaik v. Church of Scientology of Calif., Inc., 535 F. Supp. 1125, 1143 (D. Mass. 1982); Lovey v. Scurr, 474 F. Supp. 1186, 1194 (S.D. Iowa 1979).

63 *See* Smith v. Bd. of School Comm'rs of Mobile County, 827 F.2d 684, 689 (11th Cir. 1987); Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1534, 1537 (9th Cir. 1985).

64 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

65 *Smith*, 655 F. Supp. at 982. The court implied acceptance of a unitary definition of religion for the first amendment. *Id.* at 975-80.

66 *Id.* at 981.

67 *Id.* This belief was found to be the foundation of secular humanism. If no supernatural realm exists, the universe is then completely physical and knowable through reason. Since there is no supernatural, man's highest goal is self-fulfillment, and any moral code which he follows should be based upon himself. *Id.*

religion.[68] The court held this over the protests of adherents claiming that secular humanism was not a religion.[69]

If secular humanism is examined under Judge Adams' three criteria in *Malnak*, one can see that secular humanism is not easily classified.[70] Secular humanism does answer fundamental questions and does so in a comprehensive manner.[71] But under the third criterion, while secular humanism does have some of the traditional external indicia of religion, it does not have structures and rituals that are nearly as extensive as most traditional religions.[72] But as Judge Adams noted, the third criterion is the least important of the three, and absence of such external indicia is not determinative.[73] Since secular humanism tests positive under the first two criteria and not completely negative under the third, secular humanism should be considered a religion for purposes of the first amendment.[74]

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68 *Id.* at 982. Specifically, the court said that it was a faith statement to claim:

> that observable data is all that is real. A statement that there is no scientific proof of transcendental 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. . . . If there is no evidence, the theory, one way or the other, has nothing to do with science.

Id. On appeal, the Eleventh Circuit did not reach the question of whether secular humanism is a religion. *See infra* note 109 and accompanying text.

69 *Id.* at 969-70, 982. However, Dr. Paul Kurtz, a leader of the secular humanist movement, admitted that there is sharp division within the movement itself over whether it is a religion and that he himself held at one time that it is a religion. *Id.* at 969-70. *Humanist Manifesto I* refers to the beliefs as religious and states that the supporters of the *Manifesto* wished to establish a new religion. *HumanistManifesto I*, *supra* note 52. According to Dr. Russell Kirk, John Dewey, one of the founders of the movement, claimed that he was trying to found a religion. *Smith*, 655 F. Supp. at 969. To the extent that secular humanism's adherents claim that it is not a religion, note the Supreme Court's statement in *Welsh*: "The Court's statement in *Seeger* that a registrant's characterization of his own belief as 'religious' should carry great weight . . . does not imply that his declaration that his views are nonreligious should be treated similarly." Welsh v. United States, 398 U.S. 333, 341 (1970). And as Judge Adams pointed out in *Malnak*, "Supporters of new belief systems may not 'choose' to be non-religious, particularly in the establishment clause context." Malnak v. Yogi, 592 F.2d 197, 210 n. 45 (3d Cir. 1979).

70 For Judge Adams's three criteria, see *supra* notes 32-36 and accompanying text.

71 Secular humanism answers a number of questions of ultimate concern. As to the question of the existence of a Supreme Being, it denies the existence of any supernatural realm. As to the meaning of life and death, it answers that life has no ultimate meaning beyond what we are able to give to it. As to man's role in the universe, it answers that our highest goal is to seek creative self-fulfillment. As to a moral code, it states that there are no absolute right and wrongs, but that morals should be based upon man and determined from reason. This moral code is not as in depth as the moral codes of most traditional religions, but it does provide a means for "discovering" morals. Certain other moral tenets are laid out by secular humanism as well, including the immorality of indoctrinating children in religion, recognizing the dignity of the individual, the importance of balancing reason with compassion, and the morality of sexual freedom. *See supra* notes 52-58 and accompanying text.

72 Secular humanism has no worship, prayer, or chants. Those secular humanists who do engage in its limited organization and ritual are only a small portion of its adherents. *See supra* notes 58, 66 and accompanying text for a discussion of the external structure and ritual of secular humanism.

73 *See supra* note 36 and accompanying text.

74 *See also* Whitehead & Conlan, *supra* note 3, at 30-31 (secular humanism is a religion which worships man as the source of knowledge and truth); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1210 n. 71 (1982) (secular humanism is easily classified as religious).

III. Secular Humanism in Public School Textbooks

Two major cases have examined the question of whether secular humanism is being promoted in public school textbooks. Although both cases presented the issue of whether secular humanism was being promoted by public school textbooks, the types of teaching that the plaintiffs claimed were secular humanist differed markedly.

A. *Grove v. Mead School District No. 354*

In *Grove v. Mead School District No. 354*,[75] Cassie Grove claimed that *The Learning Tree*, a book in the sophomore literature curriculum, was promoting secular humanism in violation of the establishment clause.[76] *The Learning Tree* was a novel about life and racism from the perspective of a black youth.[77] It contained a number of comments denigrating Christianity, such as a reference to "Jesus Christ, the long-legged white son of a bitch."[78]

The United States Court of Appeals for the Ninth Circuit held that use of *The Learning Tree* in the public schools did not violate the establishment clause.[79] The court noted that the establishment clause requires government neutrality toward religion, and that to avoid an establishment clause violation, state action must pass the three part test enunciated in *Lemon v. Kurtzman*.[80] The plaintiffs had contended that the book had the primary effects of advancing secular humanism and inhibiting Christianity,[81] but the court concluded that the primary effects were secular, since only a minor portion of the book contained comment on religion.[82]

Unlike the majority opinion in *Grove*, Judge Canby, in his concurring opinion, discussed whether the textbook passed the purpose and entanglement prongs of the *Lemon* test. Judge Canby concluded that the textbook had been included for the nonreligious purpose of exposing students to the attitudes and viewpoints of different cultures, and it therefore satisfied the purpose prong.[83] He concluded that the textbook also satisfied the entanglement prong, since secular humanist groups neither sanctioned nor provided the textbook.[84]

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75 753 F.2d 1528 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

76 *Grove*, 753 F.2d. at 1531.

77 *Id.* at 1534.

78 *Id.* at 1547. Other passages which the plaintiffs characterized as secular humanism included statements by the characters in the novel doubting the existence of heaven and hell, the importance or credibility of religion, a passage referring to homosexuality, and a reference to "a poor white trash God." *Id.* at 1543-52.

79 *Id.* at 1534.

80 *Id.* The *Lemon* test requires that the state action (1) have a secular purpose, (2) the primary effect of which neither advances nor inhibits religion, and (3) does not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13, *reh'g denied*, 404 U.S. 876 (1971).

81 Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985).

82 *Id.* No free exercise problem existed since the teacher did not force Cassie to read the book but instead assigned her alternate reading. *Id.* at 1531, 1533-34.

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

84 *Id.* at 1538. Plaintiffs had contended that the state had flunked the entanglement prong because the state was not merely entangled with religious agencies but was itself the agency of antireli-

In examining the effect prong of the test, Judge Canby noted that a preliminary problem was that the plaintiffs seemed to regard secular humanism and antireligion as synonomous.[85] This forced him to analyze whether the textbook had the primary effect not only of advancing secular humanism, but also of inhibiting Christianity.[86] Judge Canby noted that it would not suffice for the textbook to confer an indirect, remote, or incidental benefit on religion,[87] but that it must instead "communicate a message of governmental endorsement or disapproval of religion."[88] Judge Canby decided that *The Learning Tree* did not communicate governmental endorsement of secular humanism or disapproval of Christianity because the book was fiction, only tangentially concerned with religion, rather than a book of "dogmatic philosophy" teaching religious viewpoints as truth.[89] Because the book was being used for a literature class, "[t]o include the work no more communicates governmental endorsement of the author's or characters' religious views than to assign *Paradise Lost*, *Pilgrim's Progress*, or *The Divine Comedy* would convey endorsement or approval of Milton's, Bunyan's, or Dante's Christianity."[90]

B. *Smith v. Board of School Commissioners of Mobile County*

In *Smith v. Board of School Commissioners of Mobile County*,[91] the plaintiffs argued that public school textbooks selected by the Alabama Textbook Selection Committee violated the establishment clause by promoting secular humanism and inhibiting Christianity.[92] The textbooks in question fell into two categories. One category consisted of high school history and grade school social studies textbooks which omitted facts about Christianity's role in American history to such an extent that the plaintiffs claimed it inhibited Christianity and promoted secular humanism.[93] The second category consisted of home ecomonics textbooks which the plaintiffs claimed promoted secular humanism by making antitheistic statements, such as "[y]ou are the most important person

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gion. Judge Canby dismissed this contention by stating that plaintiffs failed to recognize that government could exclude religious influence and remain nonreligious as opposed to antireligious. *Id.* at 1536, 1538.

85 *Id.* at 1535-36.

86 *Id.* at 1535-36, 1540.

87 *Id.* at 1539. *See* Lynch v. Donnelly, 465 U.S. 668, 683, *reh'g denied*, 466 U.S. 994 (1984); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973).

88 *Grove*, 753 F.2d at 1539 n. 17 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

89 *Id.* at 1540.

90 *Id.* at 1540-41.

91 Smith v. Bd. of School Comm'rs of Mobile County, 655 F. Supp. 939 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

92 *Smith*, 655 F. Supp. at 946, 949.

93 *Id.* at 946. Specific facts about Christianity which the history and social studies textbooks left out included the religious significance of the history of the Puritans and any mention of the Great Awakenings. The textbooks either failed to mention colonial missionaries or presented them as oppressors of native Americans. Religious influence on the abolitionist, women's suffrage, temperance, civil rights and peace movements were either not mentioned or treated as insignificant. The role of religion in the lives of immigrants and minorities was ignored. The textbooks rarely mentioned religion's role in the time period after the Civil War at all. *Id.* at 983-84.

in your life" (rather than God), and by statements teaching that morals are relative to man, such as "[m]orals are rules made by people."[94]

1. The District Court Decision

Chief Judge Hand of the United States District Court for the Southern District of Alabama held that the history, social studies, and home economics textbooks all violated the establishment clause.[95] After determining that secular humanism is a religion for purposes of the first amendment,[96] Judge Hand gave his analysis of how the history and social studies textbooks violated the establishment clause.

Since the plaintiffs did not claim that the history and social studies books made actual antireligious comments but rather that they consistently omitted significant facts about religion's role in American history, Judge Hand first decided that omissions in textbooks could rise to the level of a first amendment violation.[97] Judge Hand then determined that references to religion had been omitted for the impermissible religious purpose that secular humanists wished to exclude any influence of theistic religions from the public schools.[98] As for whether a valid secular reason existed for teaching facts about religion's role in history, Judge Hand pointed not only to the secular purpose of providing the student with a more complete understanding of history but also to the possibility that it would better enable the student to develop informed religious beliefs and exercise his first amendment religious freedoms.[99]

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94 *Id.* at 972-73, 999, 1003. Statements in the home economics textbooks which the plaintiffs claimed promoted the view that values and morals are relative to man as opposed to the possibility that there might be absolute right and wrongs included statements telling the student that he is the only one who can decide what is right and wrong and that values are "personal and subjective." *Id.* at 973. Other teachings which the plaintiffs said promoted morals centered on man included statements such as "[w]hat is right and wrong seems to depend more upon your own judgment than on what someone tells you to do;" "[i]t takes time and experience for people to arrive at the beliefs best for their life;" "[t]oo strict a conscience may make you . . . feel different and unpopular [and n]one of these feelings belongs to a healthy personality;" "[o]nly you can judge your own values;" and "what is right for one person is not necessarily right for another." *Id.* at 1001-04.

Statements which the plaintiffs said were antitheistic teachings included stating that the basic types of needs which everyone has are "physical, emotional, mental, and social" (omitting spiritual needs); "[s]elf-actualization is the highest level of human need" (rather than knowing and serving God); and "[d]ivorce was considered a sin against God [and m]any people thought it immoral and an indication of a weak or poor character" (implying that it is outmoded to so think today). *Id.* at 999-1001. Appendix N of the district court opinion contains a comprehensive list of passages plaintiffs considered objectionable, including passages which the plaintiffs said taught hedonism and antifamily values. *Id.* at 999-1013.

95 *Id.* at 988.

96 *See supra* notes 64-69 and accompanying text.

97 Smith v. Bd. of School Comm'rs of Mobile County, 655 F. Supp. 939, 984 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987). The proposition that omissions could constitute a first amendment violation was based on Epperson v. Arkansas, 393 U.S. 97 (1968). Judge Hand stated that in *Epperson* the Supreme Court decided that an Arkansas law mandating the omission of the teaching of evolution in Arkansas public schools and universities rose to a first amendment violation since the subject was excluded for religious reasons and valid secular reasons existed for teaching the subject. *Smith*, 655 F. Supp. at 984. *See infra* note 115 for the Eleventh Circuit's holding on this proposition.

98 *Smith*, 655 F. Supp. at 984. See *supra* note 53 and accompanying text for a description of secular humanism's antitheistic tenets.

99 *Id.* at 984-85. Judge Hand explained that the history and social studies textbooks had strayed so far from giving a balanced view of historical facts about religion that it rose to the level of ideological promotion. By implying "that people's actions, behaviors, jobs, schooling, [and] their very lives

Turning to the home economics textbooks, expert testimony agreed that these textbooks attempted to teach students a method for developing morals and values known as values clarification which was based on humanistic psychology.[100] Judge Hand found humanistic psychology to be an outgrowth of secular humanism,[101] although some of the experts had given textimony to the contrary.[102]

The court noted that for the student to accept what was taught in the home economics textbooks would necessarily require him to believe faith assumptions about "human nature, the origin and nature of the rules governing human relationships, the non-existence of supernatural or transcendent reality, and the purpose of human existence individually

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are based on anything but religion" students tend to "think differently about their belief system . . . than students educated in a fairer and more objective environment," and their ability to develop religious beliefs are adversely affected. *Id.* at 984-86. A student would "reasonably assume . . . that theistic religion is, at best, extraneous to an intelligent understanding of this country's history." *Id.* at 985.

100 *Id.* at 953 (testimony of Dr. Halpin); *id.* at 957 (testimony of Dr. Baer); *id.* at 958 (testimony of Dr. Coulson). For an explanation of humanistic psychology, *seeid.* at 952-54 (testimony of Dr. Halpin). For an explanation of humanistic education and values clarification, *see* L. RATHS, M. HARMIN, AND S. SIMON, VALUES AND TEACHING (1966); Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education* 6 PEPPERDINE L. REV. 105, 114-32 (1978); Note, *supra* note 74, at 1204-11. Values clarification is a seven-step method for teaching students how to develop values. The child develops values by (1) choosing his values freely (2) from among alternatives (3) after giving thoughtful consideration to the consequences of each alternative; the child should prize the choice by (4) being happy with his choice and (5) affirming his choice publically; he should (6) act upon his value choice (7) repeatedly, developing it into a pattern in his life. L. RATHS, M. HARMIN, AND S. SIMON, *supra*, at 28-30.

Humanists themselves have noted that values clarification can lead to relativism in morals:

> [V]alues-clarification activities can lead to a rather relativistic view of moral decision making. If young people are led to believe that decision making is *only* a matter of becoming aware of their own feelings and if they realize, as most do, that other people have feelings which are different from their own, they inevitably come to the conclusion that there are as many good moral decisions as there are people and that no single decision can be shown to be preferable to any other decision.

Hall, *Moral Education Today: Progress, Prospects, and Problems of a Field Come of Age*, 38 THE HUMANIST 9-10 (Nov.-Dec. 1978). *See also Smith*, 655 F. Supp. at 959-60, 965 (testimony of Dr. Kurtz).

101 *Smith*, 655 F. Supp. at 986. Judge Hand made this finding because secular humanism and humanistic psychology made the same faith statements. "Both deny the supernatural, both make man the center of all existence, including morals formulation, both view man's sole collective and individual purpose as fulfillment of his physical, temporal potential. Both view man as a completely physical being, leaving no supernatural dimension. Such characteristics constitute a religious faith . . . ." *Id.* at 987. *See also* Note, *supra* note 74, at 1209 (premises of humanistic education and secular humanism coincide).

102 Dr. Halpin stated that she did not equate secular humanism and humanistic psychology because she believed that the latter did not deny man's spiritual nature or the existence of God. *Id.* at 954. Dr. Paul Kurtz, drafter of *Humanist Manifesto II* and *A Secular Humanist Declaration*, also stated that humanistic psychology and secular humanism are not the same. *Id.* at 965. According to Dr. Kurtz, humanistic psychology believes that values are subjective and relative to the individual. *Id.* Apparently, secular humanism differs in that although secular humanism also believes that values and morals are relative to man, it uses the objective criterion of the consequences of moral decisions to reason to moral principles and values. P. KURTZ, *supra* note 58, at 28. *See also Smith*, 655 F. Supp. at 965, 987 n.76. Judge Hand noted that although all secular humanists might not agree with all tenets of humanistic psychology, this does not mean that humanistic psychology is not a variety of secular humanism or a religion in its own right. *Id.* at 986. *See also* P. KURTZ, *supra* note 58, at 95-96, where Dr. Kurtz implies that secular humanist educators are the promoters of values clarification and moral development courses, although Dr. Kurtz does not believe that secular humanism is being promoted by these courses.

and collectively."[103] The court held that textbooks may not present a faith based system as truth.[104] Since acceptance of the teachings would require the student to make faith assumptions based on the teachings of secular humanism, the court found an unconstitutional establishment of secular humanism in the home economics textbooks.[105] Although the defendants argued that only a small portion of the home economics textbooks dealt with values, Judge Hand noted that "a religion may not be promoted through one chapter any more than through a whole book."[106] For humanistic psychology to be taught constitutionally in the textbooks, it could not be presented as truth, and other faith based systems would have to be compared to it in the textbooks for their competing points of view.[107]

Because the court found an establishment clause violation, the court granted an injunction against the use of the history, social studies, and home economics textbooks except as a reference source for a course in comparative religions.[108] The defendants appealed to the United States Court of Appeals for the Eleventh Circuit.

2. The Eleventh Circuit Decision

The Eleventh Circuit did not reach the question of whether secular humanism was a religion, for they held that no establishment clause violation had occured even assuming secular humanism was a religion.[109] Unlike the district court, the Eleventh Circuit applied the *Lemon* establishment clause test to the Alabama textbooks.[110] Since both parties agreed that there was no question of a violation of the religious purpose or excessive government entanglement prongs, the court limited itself to a review of whether the textbooks had the primary effect of advancing or inhibiting religion.[111]

The court first reviewed the home economics textbooks. The court determined that the effect prong had not been violated since the textbooks did not convey a message of governmental endorsement of secular humanism but a message that the government approved of instilling values in its public school children.[112] Although the textbooks contained ideas that were consistent with secular humanism, the court noted that

103 *Id.* at 986. The court gave as an example the teaching that students should determine right and wrong based upon their own experience and values, and that values originate from within. The court noted that this is a description of the origin of morals, and any description of the origin of morals can only be a faith statement. Also, for the student to assume that the validity of a moral choice was merely a matter of personal preference, he would have to assume that "self-actualization is the goal of every human being, that man has no supernatural attributes or component, that there are only temporal and physical consequences for man's actions, and that these results, alone, determine the morality of an action." *Id.* at 986-87.

104 *Id.* at 987.

105 *Id.*

106 *Id.*

107 *Id.*

108 *Id.* at 988-89.

109 Smith v. Bd. of School Comm'rs of Mobile County, 827 F.2d 684, 689 (11th Cir. 1987).

110 *Id.* at 689-90. See *supra* note 80 for the *Lemon* test.

111 *Id.* at 690.

112 *Id.* at 692.

mere consistency with religious tenets did not constitute an establishment clause violation.[113] The court stated that the home economics textbooks were merely neutral toward religion rather than antagonistic, and that some of the textbooks acknowledged that religion was a source of morals and values.[114]

Turning to the history and social studies textbooks, the Eleventh Circuit first stated that even assuming downplaying the role of religion in American history was a tenet of secular humanism, any benefit to secular humanism would only be incidental since anyone noting the absence of facts about religion would not assume that Alabama was endorsing secular humanism or disapproving of theistic religions.[115] Since no message of governmental endorsement or disapproval of religion existed, the court concluded that the textbooks passed the effect prong and no establishment clause violation had occurred.[116]

IV. Analysis

A. *A Comparison of* Grove *and* Smith

As Judge Canby noted in his concurring opinion in *Grove*, a problem in this area is the tendency of the plaintiffs to equate secular humanism and antireligion.[117] Although one of the tenets of secular humanism is antitheism,[118] plaintiffs err when they attribute every antireligious statement they find in a book to secular humanism. Those holding antireligious attitudes in our country extend well beyond those who believe in secular humanism.

In *Grove*, most, if not all, of the statements in *TheLearning Tree* had no connection to tenets of secular humanism other than being antireligious.[119] Similarly, in the history and social studies textbooks in *Smith*, the plaintiffs showed no connection between the omissions of religion's role in American history and secular humanism, other than noting that

113 *Id.* *See* Lynch v. Donnelly, 465 U.S. 668, 681 (1984); Harris v. McRae, 448 U.S. 297, 319 (1980), *reh'g denied*, 448 U.S. 917 (1980); McGowan v. Maryland, 366 U.S. 420, 442 (1961).

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

115 *Id.* at 693-94. The court thought that the message conveyed by the absence of facts about religion was that "education officers . . . chose to use these particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs." *Id.*

The Eleventh Circuit also noted that the district court's reliance on *Epperson* for its holding that omitting historical facts about religion could be a first amendment violation was unfounded. The court pointed out that in *Epperson* the Supreme Court found a violation of the purpose prong, but in this case there was no question that the defendants had selected the textbooks for secular reasons. *Id.* at 694. *See supra* note 97 and accompanying text for the district court's holding that omissions could be a first amendment violation.

116 *Id.* at 693-94. Having found no violation of the establishment clause in either the home economics or the social studies and history books, the Eleventh Circuit reversed the district court and dissolved the injunction against use of the textbooks. *Id.* at 695.

117 Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1535-36 (9th Cir. 1985).

118 *See supra* note 53 and accompanying text.

119 The appendix to the Ninth Circuit's decision contains a number of the passages the *Grove* plaintiffs found objectionable. *Grove*, 753 F.2d at 1543-52. For a representative list, see *supra* note 78 and accompanying text.

such omissions were antireligious.[120] Plaintiffs generally hurt their cases when they fail to make this distinction between antireligion and secular humanism, or at least between antireligion in general and antireligion which has some connection to secular humanism. Failure to make this distinction makes it appear as though plaintiffs are trying to purge the schools of everything they find at all objectionable, which lessens their credibility.

Because antireligious attitudes extend beyond those who believe in secular humanism, antireligious statements or omissions alone will not suffice to show an establishment of secular humanism. One would have to at least show some actual connection between the antireligious statements and secular humanism to make a credible claim. Because the history and social studies books in *Smith* had no such connection, these books did not violate the establishment clause by endorsing secular humanism.[121]

The strongest claim of an establishment of secular humanism lies in the home economics textbooks in *Smith*. Not only did the plaintiffs claim that more tenets of secular humanism were being promoted than antireligion, but they also showed that the sources of those statements had a connection to secular humanism. The experts in *Smith* agreed that what was being taught was humanistic psychology.[122] Because humanistic psychology is an outgrowth of secular humanism,[123] the plaintiffs showed that the objectionable statements in the home economics textbooks were connected to secular humanism, or at least a variety of secular humanism. Such a connection makes this a much stronger claim than the history textbooks which had no such connection.

B. *An Ultimate Concern/Faith Statement Analysis*

Since neither the plaintiffs in *Grove* nor in *Smith* presented a compelling case for showing lack of a secular purpose or excessive government entanglement with religion,[124] their claims that secular humanism was being promoted in the textbooks hinged on whether the primary effect of the textbook passages was to advance secular humanism, the second prong of the *Lemon* test.[125] Violation of this primary effect prong occurs

120 *See supra* notes 97-99 and accompanying text.

121 Even though the history and social studies books in *Smith* did not endorse secular humanism, the question still remains whether the omissions were so grave as to inhibit Christianity or establish a religion of secularism. Likewise, even though the plaintiffs showed no connection between the antireligious statements in the *Grove* textbook and secular humanism, the question still remains as to whether the statements violated the establishment clause by inhibiting or showing hostility to Christianity rather than by endorsing secular humanism. This note expresses no opinion on this issue as it is beyond the scope of this note. *But see infra* notes 127-30 and accompanying text for a further discussion of why the *Grove* textbook does not violate the establishment clause.

122 *See supra* note 100 and accompanying text.

123 *See supra* notes 101-02 and accompanying text.

124 *See supra* notes 83-84, 111 and accompanying text.

125 The test with this prong should be whether the primary effect of the passages in question promotes secular humanism rather than whether the primary effect of the whole textbook is to promote secular humanism. For instance, if a math textbook endorsed the statement "Jesus Christ is God come in the flesh," in an isolated passage, this statement would clearly violate the establishment clause. However, in analyzing the statement through the *Lemon* test, the statement does not violate the purpose prong if the state chose the book for the valid secular reason that it believed the book

when government appears to be endorsing or disapproving religion, regardless of government's actual purpose.[126] The question, then, is what is required in order to find government endorsement of religion where such textbooks are used in public schools.

First, textbooks will not contain government endorsement of religion when the "religious" literature is being used objectively for its literary and historical qualities.[127] Therefore, the Ninth Circuit was correct in *Grove* to find no establishment clause violation.[128] Even if the characters in the novel *The Learning Tree* were endorsing secular humanism or inhibiting Christianity,[129] the government would not have the appearance of endorsing or disapproving religion because the school used the textbook objectively as part of a literature class rather than promoting the beliefs as truth.[130]

Second, textbooks will not contain government endorsement of religion merely because the teaching coincides with particular religious tenets.[131] The question, then, is when will such teaching be considered to have merely *coincided* with religious tenets and when will it be considered to have *endorsed* religious tenets? Must the textbooks systematically promote the belief system as a whole to have gone beyond mere coincidence as the district court stated in *Smith*?[132]

Requiring the textbooks to systematically promote the belief system as a whole before finding endorsement would require too much. For instance, if a science textbook merely stated that God exists, and promoted

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effectively taught math principles rather than because of the statement being in the book, nor would it violate the entanglement prong since no reason exists to believe that the statement in the textbook would serve to entangle the government with any particular religious organization. Therefore, the statement must violate the effect prong. But it could only do so if the primary effect test deals with the effect of the particular passage rather than the textbook as a whole. The primary effect of the textbook as a whole is obviously to teach math. Therefore, the Ninth Circuit in *Grove* erred when it stated that part of the reason THE LEARNING TREE did not violate the establishment clause was because only a small part of the book discussed religion and that the primary effect of the book must therefore be secular. *Grove*, 753 F.2d at 1534. Even if only a small part of the book discussed religion, the court should have focused on the primary effect of those particular passages.

126 Wallace v. Jaffree, 472 U.S. 38, 53 n.42 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

127 It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Arlington School Dist. v. Schempp, 374 U.S. 203, 225 (1963). *See also* Stone v. Graham, 449 U.S. 39, 42 (1980) ("Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like."), *reh'g denied*, 449 U.S. 1104 (1981).

128 *See supra* notes 75-90 and accompanying text.

129 *See supra* notes 117-19 and accompanying text.

130 *See supra* notes 75-78, 89-90 and accompanying text. "The more closely the manner of teaching resembles indoctrination, the more likely that it violates the establishment clause. Conversely, the more closely the manner of teaching resembles unfettered analytical inquiry, the less likely that it violates the establishment clause." Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 382 (1986).

131 "However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." McGowan v. Maryland, 366 U.S. 420, 442 (1961).

132 Smith v. Bd. of School Comm'rs of Mobile County, 655 F.Supp. 939, 983 (S.D. Ala.), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

this statement as truth, this statement alone would clearly endorse religion in violation of establishment clause even though it promotes no belief system as a whole. The reason this statement would go beyond coinciding with religious tenets by actually endorsing religious tenets is because the statement that God exists is a statement of faith dealing with an issue of ultimate concern, one of the fundamental questions. If, on the other hand, the textbook merely promoted the statement that one should not commit murder, this would not violate the establishment clause, because although it deals with an issue of ultimate concern, the proper moral code of right and wrong, it is not a statement of faith. Many reasons not based on faith can be given for the proposition that one should not commit murder, so this merely coincides with religious tenets.[133]

If textbooks promote as truth faith statements on matters of ultimate concern, these statements will not merely coincide with religion, but will give government the appearance of endorsing religion. This standard makes sense since the most important characteristic in finding a belief system to be a religion is whether it gives answers to the questions of ultimate concern.[134] One would expect that if textbooks promoted as truth any religion's answers to questions of ultimate concern, it would in effect be endorsing that religion.

The *Smith* home economics textbooks taught an area of ultimate concern—the proper moral code of right and wrong. Teaching the student that only he could decide what was right and wrong and that values are personal and subjective was promoting a faith statement as truth.[135] Whether morals and values are relative to man or have an absolute external reference is a matter of faith, not one susceptible to proof. The home economics textbooks in *Smith* went beyond merely coinciding with the tenets of secular humanism; they endorsed its tenets, and the district court properly issued an injunction against them.[136]

The Eleventh Circuit erred in *Smith* when it held that the home economics textbooks did not convey a message of government endorsement

133 "Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulation." *McGowan*, 366 U.S. at 442.

134 *See supra* notes 32-36, 39-42 and accompanying text.

135 *See supra* note 94 and accompanying text. In Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, No. 87-1100 (U.S. Feb. 22, 1988), Judge Boggs noted in his concurring opinion that

> The most difficult case would be if the state were teaching "critical reading" in the sense that plaintiffs were told to believe (or were downgraded for not believing) that values comes from within oneself, rather than from an external religious source. If this were the case, I think it clear that such teaching would violate the Establishment Clause.

Id. at 1076-77 (Boggs, J., concurring). Teaching of values clarification is a particular threat to religious private choice "in the public school context because pre-college students may lack the capacity to reflect maturely on the programs' messages or to resist peer pressure, and because the schools themselves are inherently authoritarian." Note, *supra* note 74, at 1210.

136 *See supra* note 108 and accompanying text. *See also* Moskowitz, *supra* note 100, at 124-26 (teachings of values clarification which show hostility to religion violate the purpose prong of the *Lemon* test, and teaching of ethical relativism violates the effect prong); Note, *supra* note 74, at 1211 n. 77 (some humanistic education teaching, including some of the values clarification, has the primary effect of inhibiting religion).

of secular humanism, but only a message that the government approved of instilling values in school children.[137] While the home economics textbooks did indeed convey such a message, if those values were the values of secular humanism, the government was also conveying a message of government endorsement of secular humanism.

The Supreme Court has noted the importance of instilling values in school children through the educational system.[138] Since the government cannot promote any faith statement on matters of ultimate concern, it follows that when government teaches students the proper moral code of right and wrong, a matter of ultimate concern, it must avoid teaching faith statements as truth. This can be accomplished by either avoiding the making of a faith statement altogether as to why a particular mode of conduct is correct, or, if a faith statement is given, by not promoting the faith statement as truth but clearly labeling it as a theory.[139]

V. Conclusion

The lack of a comprehensive definition of religion under the first amendment hampers analysis of the claim that secular humanism is being endorsed in public school textbooks. However, if religion is defined using the more expansive criteria articulated by the Supreme Court, secular humanism appears to fall into the category of religion because of its comprehensive answers to questions of ultimate concern and its moral code, as well as the limited amount of religious structure and ritual.

Whether the public school textbooks are actually promoting secular humanism is also not clear. The area has been confused by plaintiffs who

137 *See supra* notes 112-14 and accompanying text.

138 Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986).

139 *See* Moskowitz, *supra* note 100, at 136 (schools should limit themselves to teaching values which are "necessary for the sustenance and preservation of our modern state [and] one of the bulwarks of democratic government"); Note, *supra* note 74, at 1223 (schools could teach morality without burdening the establishment clause by avoiding controversial moral issues and presenting issues in such a way as to avoid biasing the student against possible external absolutes). Since the state can teach a faith statement if it does not teach it as truth but instead clearly labels it as theory, the state does not violate the effect prong of the establishment clause test by teaching evolution. Textbooks clearly label evolution as theory, so even though evolution ultimately rests on faith assumptions (that matter and life came into existence where once no matter and life existed without the aid of a transcendent being) and deals with an ultimate concern (the origin of life), the state avoids endorsement of these faith claims by teaching evolution as theory.

However, Edwards v. Aguillard, 107 S. Ct. 2573 (1987) notes that the *purpose* of teaching such a theory cannot be to promote a particular religious viewpoint. In *Edwards*, the Supreme Court struck down a Louisiana law which stated that Louisiana public schools which taught either evolution or creation science had to teach both theories. *Id.* at 2575-76, 2583. The Court held that the law violated the purpose prong of the *Lemon* test because the purpose behind the law was to further the religious doctrine of creation. *Id.* at 2582-83. But the Court noted that had the state not required the teaching of creation science for the purpose of promoting a religion but instead to enhance science instruction that the state could validly have required the teaching of creation science and other scientific theories of the origin of life. So long as the state purpose in teaching a theory of the origin of man is not to promote a religion, it can validly be taught if taught as theory and not as truth. However, one can certainly argue that the *Edwards* court erred in their application of the *Lemon* test. Under the purpose prong, all that must be found is a valid secular purpose, not the absence of any religious purpose. *Id.* at 2593-94 (Scalia, J., dissenting). If evidence exists that contradicts the theory of evolution, the state surely has a valid secular purpose in seeing to it that school children be presented with evidence of both scientific theories since it would help them to understand the current state of evidence on the origin of life.

fail to distinguish between statements in the textbooks which actually promote tenets of secular humanism and those which are merely antireligious. While making antireligious statements or ignoring religion's role in history might establish a religion of secularism or impermissibly inhibit Christianity, such statements do not establish the religion of secular humanism. However, values education in the public school textbooks does appear to promote secular humanism. The teaching of values clarification violates the establishment clause because it is an outgrowth of humanistic philosophy and is based upon the answers to questions of ultimate concern and the faith claims of the adherents of secular humanism.

Lawsuits claiming an establishment of secular humanism will probably not be a panacea for concerned plaintiffs. Much of what they find objectionable in the public schools cannot be clearly traced to actual teaching of secular humanism. However, when the tenets of secular humanism are promoted as truth in the textbooks, courts should not hesitate to find a violation of the establishment clause. If the government is to truly maintain a position of neutrality toward religion, it cannot endorse the faith claims of any religion, whether centered on God or man.

B. Douglas Hayes