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I. INTRODUCTION

Religion and public education are perhaps the two most pervasive facets of American life. The Supreme Court has consistently interpreted the First Amendment to mean that these two areas should not intersect. The difficulty is in the application of the First Amendment to everyday life. Unfortunately, yet understandably, the Supreme Court has complicated this process by failing to give an exact definition of religion. Such a definition may be impossible to ascertain. A definition too broad excludes much of what is necessary to a viable society and leads to anarchy; a definition too narrow constrains the conscience of one person while establishing the religion of another. America's pluralistic nature accentuates this problem. This paper will analyze the Court's attempts at resolving the delicate balance of maintaining an effective public school system that neither alienates nor establishes one religious group over another.

In order to understand a public school system's effectiveness, one must first know what a public school system should effect, thus, part II of this paper will discuss the purposes of public schools and how the Supreme Court has applied the Establishment Clause to help accomplish those purposes. Part III will analyze the federal courts' application of the Establishment Clause in the context of classroom curriculum, bible reading and school prayer. Additionally, Part III will address the effectiveness of the federal court's approach concluding that the court's failure to adequately define religion has not prevented the establishment of religion, has alienated a segment of society and has failed to assist the schools in

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accomplishing their primary objectives. Part IV of this paper will discuss how to improve on the Court's analyses. This section will suggest that because defining religion is so difficult, the Court should revise what constitutes establishment and incorporate a coercion standard such as that used in freedom of speech analyses.

II. THE PURPOSE OF PUBLIC SCHOOLS AND THE ESTABLISHMENT CLAUSE.

One of the most important goals of the public school system is to provide societal cohesion. The Supreme Court has stated that the public school system is "the most pervasive means for promoting our common destiny."[1] The difficulty is in defining that destiny. During the Colonial period of American history, there existed a common assumption that the purpose of life was to promote Christian faith.[2] It is not surprising, therefore, to find that the first form of public schools in America originated in Massachusetts for the purpose of assisting children in learning to read the Bible.[3] The legislation requiring the establishment of these first schools stated:

> It being one chief project of the old deluder, Satan to keep man from the knowledge of the Scriptures . . . . It is therefore ordered, that every township in this jurisdiction, after the Lord hath increased them to the number of fifty householders, shall then forthwith appoint one within their town to teach all such children as shall resort to him to write and read . . . and it is further ordered, that where any town shall increase to the number of one hundred families or householders they shall set up a grammar school.[4]

Beginning with these first public schools and into the Eighteenth Century, public and private schools taught from a religious perspective,[5] apparently to promote a common

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1. Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (opinion of J. Frankfurter) (cited with approval in Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).

2. ROCKNE MCCARTHY, et al., SOCIETY, STATE AND SCHOOLS 80 (1981) [hereinafter SOCIETY].

3. *Id.*

4. R. MCMILLAN, RELIGION IN THE PUBLIC SCHOOLS 78-9 (1984) (footnote omitted).

5. C. MOEHLMAN, SCHOOL AND CHURCH: THE AMERICAN WAY 28 (2 ed. 1944);

destiny of Christian conversion. Thus, there was no reason to distinguish public and private schools in the administration of public funds. The rationale was that private schools provided a public service to the community.

After the Revolutionary War, however, the sense of common destiny and the purpose of public schooling began to change. The public educational system was seen as a way to instill and develop those characteristics necessary to perpetuate and advance a democratic society. The First Congress passed the Northwest Ordinance which stated in article three, "[r]eligion, morality and knowledge being necessary to a good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[6] The Northwest Ordinance evidences the subtle, yet, important shift from schooling for spiritual growth purposes to schooling for civil stability purposes.

This change may have resulted from the pragmatic effect of pluralism. The new states recognized the need for religious instruction but were hesitant to allow the tenets of "other sects" to be taught.[7] R. Freeman Butts, as reported by McMillan, observes:

> With few exceptions the major Protestant denominations turned more and more to the idea of a nonsectarian common school. This was sometimes the result of weariness with sectarian ideological disputes, sometimes in recognition of the added expense of independent denominational effort, sometimes of the need for counteraction against the Catholic threat, and sometimes of a genuine belief in the priority of political community as the goal of training in common citizenship.[8]

Thus the pragmatic effect of pluralism was that the needs and desires of each sect would negate the other. If religious indoctrination remained the sole aim of education, the public schools, failing to agree on one sect, would fail. However, as the Northwest Ordinance evidences, the religious aim of schooling was replaced, at least to some degree, with the aim of

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see James E. Woods, Jr., *Religion and the Public Schools*, 1986 B.Y.U. L. REV. 349 (1986).

6. ADLER, ET AL., THE ANNALS OF AMERICA, 3:194-5 (1968).
7. MCMILLAN, *supra* note 4 at 81.
8. *Id.* at 82.

promoting democratic principles. Thus schooling was seen as a means of preserving a common destiny of self-government.

Promoting democratic principles did not mean that religion needed to be absolutely excluded. Instead, religion was viewed as a necessary component of "good government." Moreover, schooling was seen as a means of transferring religion, as well as morality and knowledge, in order to maintain a "good government and the happiness of mankind."[9] Religion's necessity to a good government is reflected in Benjamin Franklin's words:

> But think how great a Proportion of Mankind consists of weak and ignorant Men and Women, and of inexperienc'd and inconsiderate Youth of both Sexes, who have need of the Motives of Religion to restrain them from Vice, to support their Virtue and retain them in the practice of it until it becomes *habitual*, which is the great Point for its Security .... If men are so wicked as we now see them *with religion*, what would they be *without* it.[10]

Likewise, George Washington concluded that, "[o]f all the dispositions and habits, which lead to political prosperity, religion and morality are indispensable supports.... It is substantially true, that virtue or morality is a necessary spring of popular government."[11] John Adams added, "[o]ur Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[12] Finally, Thomas Jefferson posed this query: "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?"[13]

Indeed, the importance of religion is not lost on those battling for the public school curriculum. As the sense of society's destiny changed, few, if any, advocated the complete eradication of religion from the public schools. A more accurate characterization of the Eighteenth and Nineteenth Century debates regarding public school curriculum is that the

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9. ADLER, *supra* note 6.

10. RICHARD VETTERLI AND GARY BRYNER, IN SEARCH OF THE REPUBLIC 69 (1987) (emphasis in the original) (footnote omitted).

11. *Id.* at 69-70.

12. *Id.* at 70.

13. *Id.* at 105.

nonsectarian goal was to loosen the sectarian control over the public schools. One commentator has noted that Horace Mann, a stalwart supporter of nonsectarian schools, "approved of Bible reading and other nonsectarian religious exercises in the public school."[14] Mueller continues,

> [t]he McGuffey Readers, which for so long set the tone of public-school education, were almost sermonic in style and content. The public school teacher was expected to be as much an exemplar of morality as was the clergyman. It was common practice to recruit public school teachers and administrators from among graduates of seminaries and denominational colleges.[15]

Though the common destiny had changed from that of creating Zion to that of ensuring democracy, religion's role in the public schools, while no longer central, was universally recognized.

Hindsight clarifies the debate over public school curriculum. On the one hand, most, if not all, agree that education is necessary to the progress of a democratic society. Additionally, most, if not all, agree that some moral cohesion is also necessary to democratic stability and this moral cohesion can be found among the rudiments of religion. Yet, if religion is to be taught, what religious morals, or whose religious tenets are necessary to the overall cohesion of society? As a practical matter not all religious teachings can be integrated in the classroom curriculum. However, if religion *per se* is excluded that may undermine the principles of democracy the school system seeks to further.

Thomas Jefferson found an answer to this dilemma in the creation of a civil religion. Jefferson agreed that the divisiveness of sectarian religions would disrupt society unless privatized.[16] However, without some common public morality republicanism would fail.[17] Thus, Jefferson advocated the teaching of a universal religion that would be accepted by all because the truthfulness of its tenets was self-evident.[18] These tenets were: "1. That there is one only God, and He all perfect.

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14. Arnold Mueller, *Religion in the Public Schools, in* CHURCH AND STATE UNDER GOD 300, 301 (1964).

15. *Id.*

16. SOCIETY, *supra* note 2, at 83.

17. *Id.*

18. *Id.*

2. That there is a future state of rewards and punishments. 3. That to love God with all thy heart and neighbor as thyself, is the sum of religion."[19] Jefferson further advocated, in proposing the blueprints for religious study at the University of Virginia, that a professor of ethics be responsible for teaching the "proofs of the being of God" and that religious sects be permitted to use the University's facilities to teach their doctrine.[20] Jefferson reasoned that "[b]y bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices and make the general religion a religion of peace, reason, and morality."[21]

In effect, Jefferson sought to resolve the problem through eradicating the divisiveness of the sects by distilling them to their essence. This essence, Jefferson contended, is what binds society together.[22] In addition, all religions share this essence and therefore no one religion is preferred over another. In a society which, religiously speaking, is fairly homogenous Jefferson's analysis might ring true. Yet, it is clear there must be a near unanimous consensus that the tenets are "self-evident" if Jefferson's reasoning is to withstand practical application. In fact, at least one commentator has suggested that Jefferson simply advanced his sect, Deism, through characterizing it in a manner pleasing to the religious palates of the time.[23]

In general, before, during and after the ratification of the First Amendment,[24] public schools were seen as an environment friendly to religion. Indeed, religion was viewed as necessary to accomplish the purpose for which public schools were organized, whether that be religious inculcation or societal stability. However, the problems caused by the plurality's assessment of religion's role in public education, as a practical matter, were confronted even at a time when society was much more homogenous than it is today.

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19. VETTERLI *supra* note 9, at 102.

20. J. RANDOLPH, EARLY HISTORY OF THE UNIVERSITY OF VIRGINIA, AS CONTAINED IN THE LETTERS OF THOMAS JEFFERSON AND JOSEPH C. CABELL 441 (1856).

21. P. FORD, ED., THE WRITINGS OF THOMAS JEFFERSON 12:272 (1892-99).

22. VETTERLI, *supra* note 9, at 102.

23. SOCIETY, *supra* note 2, at 83-84.

24. Requiring, *inter alia*, that "Congress shall make no law respecting an establishment of religion nor prohibiting the free exercise thereof."

In 1963, the Supreme Court defined the common goal of the public schools as the "preservation of a democratic system of government."[25] The Court also recognized that sectarianism is a divisive force capable of impeding the public school system.[26] Through the incorporation doctrine, the Supreme Court applies the Establishment Clause to issues of religion and education in order to prevent the divisiveness of sectarianism.[27] The Court attempts to do this without diluting the effectiveness of the public schools to provide for society's common destiny. They are not always successful.

The Supreme Court, in 1947, declared that the First Amendment Establishment and Free Exercise Clauses were applicable to the states through the Due Process Clause of the Fourteenth Amendment.[28] This has the practical effect of reshaping the religion/education debate. The primary concern is no longer whether sectarianism is too divisive or how to best promote civic virtue. Today's issue is whether or not a public school's activity "establishes religion" or prohibits the free exercise of religion. As the cases demonstrate, however, this is often difficult to resolve given the public school's goal of promoting a democratic society. One must continually consider at what point moral tenets become religion rather than simply a reflection of cultural mores.

Initially, the Supreme Court defined "establishment" as any interaction between church and state that breached the "wall of separation"[29] built by the First Amendment.[30] In *Everson* the Supreme Court considered whether or not a statute allowing local school boards to reimburse parents of children attending both public and parochial schools

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25. Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); *See supra* note 1 and surrounding text.

26. Illinois *ex. rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (opinion of J. Frankfurter) (stating that "[i]n no activity of the state is it more vital to keep out divisive forces than the schools) (cited with approval in Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).

27. *Id.*

28. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

29. The use of Jefferson's metaphor to exclude religion from the public schools is somewhat disingenuous. Those who offer this standard for constitutional interpretation must think Jefferson an incredible hypocrite to support such strict separation on the federal level and then propose public schools which provide, perhaps even require religious indoctrination on the state level. For further discussion *see* DALLIN H. OAKS, THE WALL BETWEEN CHURCH AND STATE (1963).

30. *Everson* 330 U.S. at 1.

"established" religion.[31] Justice Black writing for the majority stated:

> [t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[32]

Despite this emphatic separationist language the Court found that the New Jersey statute did not violate the Constitution because the statute was designed to benefit the child rather than the parochial school.[33]

After *Everson* the Supreme Court maintained a strict separationist line, holding unconstitutional a program of release time for religious study in a public school.[34] Four years later, the Court weakened its hardline approach in *Zorach v. Clauson*[35] finding a released-time plan constitutional when, unlike *McCollum*, the religious instruction occurred off the public school grounds.[36] The Court reasoned that this plan was simply an accommodation of public schedules to the needs of religious citizens.[37] The importance of the Court's opinion in *Zorach* is that it signals the Court's recognition that a wall may be incapable, in practical application, of dividing such integrally related spheres as church and state. The Court, in *Zorach*, appears to recognize that the religion clauses, similar to other rights provided in the Constitution, cannot be applied in an absolute manner. The

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31. *Id.*
32. *Id.* at 15-16.
33. *Id.*
34. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).
35. 343 U.S. 306 (1952).
36. *Id.* at 315.
37. *Id.*

Court was concerned that the religion clauses not be interpreted in a way hostile to religion. Thus, the Court introduced an accommodationist approach to the Establishment Clause that would allow for the proposition that "[w]e are a religious people whose institutions presuppose a Supreme Being."[38]

However, the *Zorach* rationale was construed narrowly in later cases as the Supreme Court held state prescribed prayer[39] and voluntary Bible reading[40] unconstitutional in the public schools. The Court in *Schempp* articulated a definition for establishment which essentially stated that, if either the purpose or primary effect of the enactment is the advancement or inhibition of religion, then the enactment is unconstitutional.[41] Thus, a statute establishes religion if it has no secular purpose, or if it has the primary effect of advancing or inhibiting religion. In *Lemon v. Kurtzman*[42] the Court reaffirmed this test with an additional condition that the statute not create excessive entanglement between Church and State.[43]

Until the *Lemon* test the Supreme Court applied a strict wall of separation analysis to activities alleged to establish a religion. The Court reasoned that the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and degrade religion."[44] However, the Court did acknowledge, at least in one case, that the principle of separation was not an independent guideline and the accommodation of religion did not per se amount to an establishment of religion.[45] Since *Lemon* the Court has maintained a strict separation mentality while measuring establishment against three standards: 1) is there a secular purpose for the contested statute? 2) does the statute advance or inhibit religion? and 3) does the statute cause an excessive entanglement with religion?

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38. *Id.* at 313.
39. Engel v. Vitale, 370 U.S. 421 (1961).
40. School Dist. v. Schempp, 374 U.S. 203 (1963).
41. *Id.* at 222.
42. 403 U.S. 602 (1971).
43. *Id.* at 612-613.
44. *Engel*, 370 U.S. at 431.
45. *Zorach*, 343 U.S. at 312.

Unfortunately, in applying the *Lemon* test the Court has often forgotten its goal of preventing an establishment of religion, consequently creating in the classroom an atmosphere of hostility and intolerance towards religion. Two primary problems exist with the Court's application of the *Lemon* test: 1) the Court assumes that a "secular" purpose is nonreligious without defining secularism, and 2) the Court assumes that an advancement, inhibition or entanglement with religion necessarily establishes religion. A review of court decisions involving religion and education will illustrate these concerns.

III. APPLYING THE ESTABLISHMENT CLAUSE TO PUBLIC SCHOOLS.

A. Classroom Curriculum

The Supreme Court has decided two major cases involving classroom curriculum; both involve the evolutionary theory of human origin. In *Epperson v. Arkansas*[46] the Court held unconstitutional a state statute forbidding instruction in the public schools regarding the theory of evolution. While this case was decided before the *Lemon* test was fully developed, the Supreme Court stated that establishment is determined by whether the primary purpose or effect of the legislation is the advancement or inhibition of religion.[47]

In deciding that the purpose of the Arkansas statute was religious, the Court failed to define what constitutes religion or what would make the law secular. The majority's only guidance is that "there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."[48] The Court offers no evidence that this is true except that the law is similar to a Tennessee law that was couched in more religious language.[49] Failure to define the religion-secularism distinction assumes *ipso facto* that traditional creation is religious and modern evolution is secular.

As Justice Black points out in his concurring opinion, the Court has failed to address whether "forbidding a State to

46. 393 U.S. 97 (1968).
47. *Id.* at 107.
48. *Id.*
49. *Id.*

exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine."[50] In other words, the Court forbids inhibiting the instruction of evolution, a principle many feel is inapposite to traditional religion. This, at best, constitutionalizes hostility toward religion in the public classroom and, at worst, establishes a religion professing evolution over a religion professing creation. To resolve this conflict the Court must clarify the line between religion and secularism. Otherwise, the Court, as Justice Black notes, is "simply . . . [writing] off as pure nonsense the views of those who consider evolution an anti-religious doctrine."[51]

The religion-secularism distinction is amplified in *Edwards v. Aguillard*.[52] In *Aguillard* the Supreme Court held unconstitutional a Louisiana statute requiring that if evolution is taught then creation science must also be taught. The Court followed the *Lemon* test and inquired whether the legislature had a valid secular purpose for enacting this law.

The Court failed, however, to explicitly define religion or secularism. Justice Brennan, writing for the majority, explained that a religious intent exists if the legislature promotes a particular sect or promotes religion in general.[53] This, of course, begs the question, what is a sect or what is religion in general. The definition of religion may be found in the evidence the Court uses to hold that a religious purpose exists.

One item of evidence the Court uses to indict the legislative purpose is the finding that creation science leads one to the conclusion that a Supreme Creator exists.[54] Thus, one characteristic of religion may be a belief in the existence of a Supreme Creator. This cannot be determinative, however, since the Court did not rule that the teaching of creation science is per se unconstitutional.[55] Likewise, it contradicts the Court's earlier rulings that religion does not require a Supreme Creator to invoke First Amendment protection.[56]

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50. *Id.* at 113 (Black, J., concurring).
51. *Id.* at 113.
52. 482 U.S. 578 (1987).
53. *Id.* at 585.
54. *Id.* at 591-2.
55. *Id.* at 587.
56. United States v. Seeger, 380 U.S. 163 (1965); Torcaso v. Watkins, 367 U.S. 488 (1962); Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947).

The Court also inferred that religious motivation must exist because historically, certain religions opposed evolution.[57] Thus, whether a view is religious may depend on how history has defined that view. This is a fairly dangerous criteria since it would exclude "modern" religions from constitutional protection. Moreover, it is unhelpful because the Court fails to expand on what historical criteria are used to distinguish between religious and secular precepts.

Justice Powell, in a concurring opinion, hints at the criteria necessary to define something as secular. He explains that although "the statute is limited to the scientific evidences supporting the theory [this] does not render its purpose secular. . . . Whatever the academic merit of particular subjects or theories, the Establishment Clause limits the discretion of state officials to pick and choose among them for the purpose of promoting a particular religious belief."[58] Thus, Justice Powell requires more than scientific evidence to prove something is secular. Secularism, according to Justice Powell, requires that the science not be used to promote a particular religious belief. Yet, there is no real evidence to support that Arkansas used creation science to support a religious belief.

Justice Powell's reasoning helps to winnow out the contradictions inherent in the Court's approach to the Establishment Clause in education-related cases. If the Court does not define what constitutes a religious belief, then a religious belief is whatever anyone desires. For example, a secular humanist will find the teaching in public school of any concept which leads to a belief in a Supreme Creator as unconstitutionally establishing a religion of deism. Likewise, a fundamentalist Christian will find any teaching which leads to a belief that mortality is the end of existence as unconstitutionally establishing a religion of atheism.

Clearly, this reasoning survives when applied to the majority's analysis in *Aguillard*. The Court in *Aguillard* finds that creation-science is offered to promote the belief that a Supreme Creator exists. This promotion is evident, the Court reasons, from the background of those who support creation-science and the obvious conclusion that a Supreme Creator exists which one must infer if creation-science is true. Because the existence of a Supreme Creator is clearly a religious pre-

57. *Aguillard*, 482 U.S. at 591.
58. *Id.* at 604 (Powell, J., concurring).

cept, the state's support of creation-science to advance this precept is an establishment of religion. However, one could invalidate evolution through the same analysis.

Evolution, the argument begins, is offered to promote the belief that man is alone in the universe. This promotion is evident from the secular humanists, atheists and agnostics who support evolution and from the natural conclusion one must infer if evolution is true. One might object claiming that one could also conclude that a Supreme Creator through evolution made the universe.[59] However, this is still a religious belief. Either way, evolution is used to support a religious tenet. Again, one might object, explaining that evolution, unlike creation-science, is not provided to support the belief which may be its logical conclusion. Nonetheless, evolution does support a religious belief even though it is not intended. Under *Lemon* an effect of establishing religion violates the Constitution though the violator did not intend that effect.[60] Also, the purpose for teaching evolution would then be to obtain knowledge. Without guidelines it is unclear why knowledge is a secular pursuit. Indeed, a major tenet of Christianity is that truth will set one free.[61] The only difference between evolution and creationism is that one traditionally has been associated with "religion" while the other has not. An analysis of lower court decisions will substantiate this reasoning.

The Sixth Circuit determined that the plaintiff-parents had no right to remove their children from a program which the parents viewed as establishing a religion of human secularism.[62] In *Mozert v. Hawkins County Board of Education* the plaintiffs are seven families who object to the teaching of material the parents find offensive to their religious beliefs.[63] The plaintiffs claim that requiring their children to read and discuss literature that promotes evolution, secular humanism, futuristic supernaturalism, magic and false views of death violates the First Amendment's free exercise clause. The Court, applying a standard of coercion, found that absent some re-

59. *Aguillard*, 482 U.S. at 591 n.11.
60. *Id.* at 583.
61. *John* 8:32.
62. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
63. *Id.* at 1060-1.

quirement of acquiescence or participation no violation had occurred.[64]

It is important to note that in this case, unlike *Epperson* and *Aguillard*, the plaintiffs are claiming a violation of the First Amendment's Free Exercise Clause and not a violation of the First Amendment's Establishment Clause. Nonetheless, the Court rejected a "balancing" approach to the plaintiffs' dilemma because this would violate the Establishment Clause.[65] This reasoning leads to some complex definitional quandaries.

The Sixth Circuit rejected the district court's suggestion that the school district should balance the "offensive" material with material which correlates with the parents' views.[66] The Sixth Circuit presented two reasons for this rejection: 1) the balance would be impossible, and 2) such a balance would violate the Establishment Clause.[67] The Court reasoned that the balance would be impossible because the plaintiffs' views included intolerance for any view that undermined plaintiffs' philosophy. The Court acknowledges, however, that testimony was presented "that an occasional reference to . . . objectionable concepts would be acceptable."[68] It was the repeated and unrefuted references which constituted the plaintiff's contention of Constitutional violation.[69] Thus, the Court's claim of impossibility is unwarranted.

The Court also worried that any balancing would violate the Establishment Clause. The Sixth Circuit reasoned that "the Supreme Court has clearly held that it violates the Establishment Clause to tailor a public school's curriculum to satisfy the principles or prohibitions of any religion."[70] The Court fails to define what constitutes religion. Conceivably, the plaintiffs felt that secularism, supernaturalism and the other "isms" were religions. Surely, the Establishment Clause cannot be read to allow "tailoring" to one set of religions while excluding another set. It is highly ironic that the courts forbid the mention of Christianity in a textbook in order to counterbalance the repetitious references to other religions because to do so "would lead

64. *Id.* at 1063-4.
65. *Id.* at 1064-5.
66. *Id.*
67. *Id.*
68. *Id.* at 1064.
69. *Id.*
70. *Id.* (quoting Epperson v. Arkansas, 393 U.S. 97, 106 (1968).

to a forbidden entanglement of the public schools in religious matters."[71] The Sixth Circuit is not alone in its schizophrenia.

The Seventh Circuit has forbidden the teaching of creation-science as a violation of the Establishment Clause.[72] In *Webster v. New Lenox School District* the plaintiff was a school teacher who countered the teaching of evolution with the teaching of creation science. Some students objected to this as a violation of the Establishment Clause. The school district superintendent relied on *Aguillard* and directed the plaintiff, Ray Webster, to cease teaching creation-science because the "teaching of this theory had been held by the federal courts to be religious advocacy."[73] Mr. Webster brought suit claiming censorship under the First Amendment.[74] While it is not clear whether the plaintiff raised the issue of establishment, the Court clearly accepts as legitimate the superintendent's professed concern that the plaintiff's actions violate the Establishment Clause.

The Seventh Circuit concludes that, "[e]ducators do not offend the First Amendment . . . so long as their actions are reasonably related to legitimate pedagogical concerns."[75] The pedagogical concern is that Mr. Webster's subject matter created Establishment Clause violations.[76] The Court failed to explain how Mr. Webster's actions established a religion. Mr. Webster's stated reason for teaching creation-science was to "explore alternative viewpoints."[77] The Court failed to offer any criteria for distinguishing a religious viewpoint from a secular one. The Court simply held that "the school board has successfully navigated the narrow channel between impairing intellectual inquiry and propagating a religious creed."[78] There is no explanation of how evidence indicating that the Earth is not four billion years old establishes a religious creed. Likewise, there is no explanation of why evidence propagating the evolution of man is considered secular. The definitional problems the *Webster* case illustrates are even more salient

71. *Id.* at 1065.
72. Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).
73. *Id.* at 1006 (footnote omitted).
74. *Id.*
75. *Id.* at 1008 (quoting Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 27 (1988).
76. *Id.*
77. *Id.* at 1006.
78. *Id.* at 1008.

when compared with *Moore v. Gaston County Board of Education*[79]

In *Moore*, the plaintiff, a student teacher, was fired for expressing his belief that, *inter alia*, evolution was a valid theory, God did not exist, nor did heaven or hell, and that certain parts of the Bible could not be taken literally.[80] The District Court held that "[t]o discharge a teacher without warning because his answers to scientific and theological questions do not fit the notions of the local parents and teachers is a violation of the Establishment Clause of the First Amendment. It is an 'establishment of religion,' the official approval of local orthodoxy . . . "[81] The Court reasoned that allowing the teacher to respond in a manner which comports with those who "complain the loudest" establishes the religion of those complainants.[82]

The Court failed to adequately address what constitutes religion. The Court indicated that religion is that sphere of life which cannot be proved and therefore requires one to walk by faith.[83] This is a frail standard by which to judge between the religious and the secular. There are times when science requires belief in what is not proven.[84] Additionally, there are myriad instances of "proven" principles being disproved,[85] thus one can rarely know when something is actually proven. Even accepting this as a valid distinction, plaintiff's statements made in class cannot be proven, all require faith and therefore are, according to the Court, religious dogma. Remarkably, the Court allows the teacher to discuss personal religious views, religious views so offensive to some students that the students actually tried to walk out during the discussion.[86] Either the Court is advocating that teachers be permitted to discuss religious principles at least when interrogated regarding those principles, or the Court is asserting that the plaintiff's views

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79. 357 F. Supp. 1037 (W.D.N.C. 1973).

80. *Id.* at 1038.

81. *Id.* at 1043.

82. *Id.*

83. *Id.*

84. Evolution between species is one example. Science has yet to find the "missing link."

85. Blood-letting as a way to cure disease, the finding of Eve see Begley, *Eve Takes Another Fall*, NEWSWEEK, March 2, 1992, at 58, the make-up of the smallest particle and the big-bang theory are also examples of proven scientific principles eroding under further study.

86. *Id.* at 1038.

are non-religious and as in *Mozert* the school district cannot proscribe conduct simply because it is offensive.

Given the court's concern that, "[r]eligious or scientific dogma supported by the power of the state has historically brought threat to liberty and often death to the unorthodox . . . " it is safe to assume that the Court did not feel Mr. Webster's views were religious in nature. The Court can reach this conclusion because they reason from the premise that Mr. Webster's comments amounted to little more than inferences from Darwin's theory of evolution and to postpone regarding this theory is to postpone education.[87] The Court assumes that Mr. Webster's statements are not religious without explaining why. An analysis of the Bible reading cases further illustrates the definitional dilemma arising from the Court's application of the Establishment Clause to public schools has caused.

B. Bible Reading

One of the earliest Supreme Court cases applying the Establishment Clause to Bible reading activities is *School District of Abington Township v. Schempp*.[88] In *Schempp* the Court consolidated two cases in which the states passed laws requiring Bible reading at the start of each day.[89] Attendance at the Bible reading sessions was not mandatory, the children took turns reading from any version of the Bible they chose, there were no comments made, no questions asked and no explanations given.[90] The states also required recitation of the Lord's prayer at the beginning of each day, though attendance was not mandatory.[91] Plaintiffs objected to this exercise claiming it violated the First Amendment.[92]

The Court held that this practice did indeed violate the First Amendment's Establishment Clause. The Court reasoned that while state power cannot be used to handicap religion, the First Amendment requires abstention "from fusing functions of Government and of religious sects."[93] Additionally, the Court explained that "the place of the Bible as an instrument of reli-

87. *Id.*
88. 374 U.S. 203 (1963).
89. *Id.* at 205.
90. *Id.* at 207.
91. *Id.*
92. *Id.*
93. *Id.* at 219 (quoting Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 227 (1948).

gion cannot be gainsaid," thus concluding that this exercise was religious in nature and constituted an establishment of religion in violation of the First Amendment.[94]

The Court again failed to define religion. The Supreme Court concluded that reading the Bible itself was not violative of the First Amendment, and in fact the Court said, "the Bible is worthy of study" for secular purposes.[95] Additionally, the secular goals set out by defendants, "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature," were not found to be religious.[96] Thus, if reading the Bible is constitutional and studying morals is constitutional, one can only conclude that what is unconstitutional about these exercises is the use of the Bible to promote morals.

The Court concluded that "even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible."[97] Moreover, Justice Brennan adds, referring to the secular purposes served through these exercises, "it would seem that less sensitive materials might equally well serve the same purpose."[98] Justice Brennan concluded that the First Amendment forbids "the use of religious means to achieve secular ends where nonreligious means will suffice."[99] Justice Brennan even suggests that "less sensitive means" might be found in speeches and messages of great Americans.[100]

What the majority and Justice Brennan fail to explain is why these means are less sensitive. For example, one might use the Declaration of Independence in order to promote morals. Yet, Jefferson, in this great writing, assumes that inalienable rights are endowed by a "creator." Surely those who seek a "complete and permanent separation of the spheres of religious

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94. *Id.* at 223-4.

95. *Id.* at 225.

96. *Id.* at 223-224.

97. *Id.* at 224. The Court adds that allowing nonattendance and the use of different versions of the Bible contradicts any professed secular purpose. The Court fails to explain this reasoning. It would seem that the state is simply acknowledging that different versions of the Bible also contain moral teachings and literary value, and that some may be offended by these teachings and thus are entitled to absent themselves.

98. *Id.* at 280 (Brennan, J., concurring).

99. *Id.* at 280-1.

100. *Id.*

activity and civil authority"[101] would object to Jefferson's supposition. If one looks at the speeches and messages of great Americans reference to a god or supreme creator are pervasive.[102]

The Court similarly failed to explain why using the philosophy of a great American to promote morals is not religion but using the Bible for the same purpose establishes religion. Some will disagree regarding the influence or legitimacy of any historical figure's personal beliefs. If the school requires the study of these beliefs to promote morals and contradict the materialism of our times, one may question whether this constitutes "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion?"[103] This question is impossible to answer when the Court fails to define religion. This contradiction is shown again in *Wallace v. Jaffree*[104] in which the Court found unconstitutional a statute allowing voluntary prayer in the public schools.

C. School Prayer

In *Lee v. Weisman*[105] the Court held that graduation prayers directed by state officials violated the Establishment Clause. The majority found that the government involvement in religion was pervasive and that the students were forced to submit to subtle coercive pressure.[106] The Court displayed the type of thinking which leads one to believe that the Court either draws its definition of religion too narrowly or fails to define religion at all.

The Court expressed sympathy for a civic religion but balanced that against the principle that "all creeds must be tolerated and none favored."[107] The Court's analysis sounds good but does not work in practice. One can argue coherently that "nonprayer" and "nonreligion" are creeds and are favored over traditional creeds. The Court states that graduation is "one of life's most significant occasions"[108] and that the students are

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101. *Id.* at 217 (citing Everson v. Bd. of Educ., 330 U.S. 1, 31-32 (1947).

102. *See supra* note 9 and surrounding text.

103. *Schempp*, 374 U.S. at 221 (quoting Engel v. Vitale, 370 U.S. 421, 430-1 (1962)).

104. 472 U.S. 38 (1985).

105. 120 L. Ed. 2d 467 (1992).

106. *Id.* at 480, 484.

107. *Id.* at 482-483.

108. *Id.* at 486.

susceptible to the psychological coercion inherent in maintaining respectful silence.[109] Yet, the Court, apparently, believes that proscribing prayer at a graduation ceremony does not send a message to these students that creeds which engage in prayer are not to be tolerated. The court simply cannot have it both ways. If students feel this ceremony is one of life's most significant occasions, then clearly they will wonder why religion, an otherwise significant portion of their lives, is affirmatively excluded. Moreover, if students are susceptible to the psychological coercion of something as cordial as maintaining respectful silence, they will obviously be susceptible to the direct coercion of an affirmative ban of such a universal symbol of religion such as prayer.

The Court's quandary is highlighted when it tries to explain why students may be "subjected during the course of their educations to ideas deemed offensive and irreligious, but [are] denied a brief, formal prayer ceremony that the school offers in return."[110] The Court points out that this conflict confuses the speech and religion clauses of the First Amendment.[111] The Court concludes that "[t]he explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce."[112] What the Court fails, or refuses, to realize is that history also clearly teaches that in the hands of government what might begin as a tolerant expression of ANY view may end in a policy to indoctrinate and coerce.[113]

In *Wallace*, an Alabama statute authorizing the public school teachers to hold a one-minute period of silence for meditation was amended to include "for meditation or voluntary prayer."[114] The Court ruled that the addition of the term "voluntary prayer" clearly had the religious purpose of advancing

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109. *Id.* at 484.

110. *Id.* at 483.

111. *Id.* The court fails to explain why irreligious ideas, which clearly incorporate atheism, are nonreligious. The mere fact that someone is amoral does not mean the person has no moral philosophy.

112. *Id.*

113. A few examples will suffice, the French Revolution, the words of Karl Marx, and the reigns of Lenin, Stalin and Hitler.

114. *Wallace*, 472 U.S. at 40.

prayer in the public schools.[115] The Court reasoned that the term "meditation" includes prayer and thus the addition of the term "voluntary prayer" is either unnecessary or added for the purpose of endorsing religion.[116] The Court invalidated a third alternative, that the term "voluntary prayer" was added to accommodate the free exercise of religious beliefs, because there existed no burden prohibiting the exercise of such beliefs. This reasoning ignores the acknowledgment made by the Court that "for some persons meditation itself may be a form of prayer."[117] Thus, the addition of "voluntary prayer" may have been added to clarify any misperception regarding whether or not traditional forms of prayer were permissible. In other words, the statute was meant to remove a perceived burden.[118]

Regardless of the purpose behind the term "voluntary prayer" the Court is hypocritical in its definitions of religion. Clearly, the Court ruled that a state cannot set aside a moment of silence for the stated purpose of prayer. This, the Court reasoned, endorses prayer.[119] However, the Court concludes that "[w]e do not imply that simple meditation or silence is barred from the public schools; we simply hold that the state cannot participate in the advancement of religious activities in any guise."[120] The Court's inference is that the term prayer connotes religion but the term meditation or silence does not. The term "prayer" added to this statute presumably pushed children toward prayer. Incredibly, the term meditation does not appear to push a student toward meditation, although the Court acknowledged that meditation is a type of prayer.

Even a moment of silence arguably encourages children to meditate or pray. Justice O'Connor suggests that a moment of silence is not inherently religious because a child is not required to join in the prayer and the child is left to his or her own thoughts.[121] However, one could reasonably argue that requiring children to be silent is endorsing meditation-an activity that can be characterized as religious. Even if it were true that a moment of silence does not establish religious activities

115. *Id.* at 59-60.
116. *Id.*
117. *Id.* at 59 n.47.
118. *Id.* at 87 (Burger, J., dissenting).
119. *Id.* at 60.
120. *Id.* at 48 n.30.
121. *Id.* at 72-3 (O'Connor, J., concurring).

because one is not forced or encouraged to participate, this is also true of a moment of silent prayer. The Court has defined prayer as religious probably because society traditionally considers prayer a religious activity. Yet, the Court defines meditation and a "moment of silence" as secular even though today both serve the functions of traditional prayer.

In each of the above cases the Court, as in the days of Jefferson and Mann, confronts religion as an obstacle to the effective facilitation of the public school system. Yet, the Court, rather than seeking some common ground as Jefferson and Mann sought, has striven to completely exclude religion from the public school arena.

D. Incorporation Doctrine

One might attempt to explain these different approaches to the same problem in terms of the incorporation doctrine. In other words, Jefferson and Mann did not have the First Amendment mandating a "wall of separation" between church and state because the Fourteenth Amendment either was unavailable or had not yet been interpreted to "incorporate" the First Amendment, thus, making the First Amendment applicable to the states. Since this "incorporation" the Court has been much more absolute in its rejection of religious precepts in the public schools. The incorporation reasoning alone, however, does not provide an entirely satisfactory explanation for the Court's almost universal rejection of religion in the public school setting.

While the incorporation doctrine adds a new twist to an old debate, it need not completely eradicate the usefulness of historical references. Historical references provide evidences that the Establishment Clause has not been interpreted to preclude religion from all aspects of public life. For example, in *Bradfield v. Roberts*[122] the Supreme Court held that a federal government contract with the Catholic Sisters of Charity to run a hospital did not violate the Establishment Clause. However, the Court has struck down as violative of the Establishment Clause statutes that provided supplements for the salaries of teachers of secular subjects in nonpublic elementary

122. 175 U.S. 291 (1899).

schools.[123] The distinction between these two cases cannot be explained by reference to the Establishment Clause.

Moreover, it cannot reasonably be argued that the ratifiers expected the Establishment Clause to mean that religion and the public classroom must be completely bifurcated, especially given the pervading notion that religion was necessary to the advancement of civil society. The First Congress, it should be remembered, passed the Northwest Ordinance indicating that a relationship between religion and schools was acceptable in the same session they passed the Bill of Rights containing the Establishment Clause language. Additionally, the First Congress passed a law requiring the opening of Congress with an invocation. By analogy, it borders on the inane to argue that the Establishment Clause is intended to eradicate all aspects of religion from public life. Thus, the question once again becomes "when does an establishment of religion take place?"

The ratifiers of the Fourteenth Amendment, through which the First Amendment became applicable to the states, enjoyed many of the activities in public schools, prayer, Bible reading and religious oriented instruction, that today's courts have found to violate the Establishment Clause. The question remains, why does modern society interpret the Establishment Clause to require absolute separation of religion and the classroom? While analyzing modern thought as reflected in case law, one must look beyond the Establishment Clause application to the Establishment Clause interpretation and how and why that differs with historical perspectives.

In fact, a closer look at the Court's decisions reveals that they are not much different from the approach Jefferson and Mann espoused. In essence, Jefferson articulated universal principles of a religious nature and labeled them non-sectarian. Today, the Court chooses those virtues not necessary to the success of public education and labels them religious. The Establishment Clause is a tool that can be used to issue decrees on what is and is not appropriate for public school curriculum. The problem, of course, is that this no longer resolves the dilemma of whose religion receives airtime in the public schools. Society has become so pluralistic that universal precepts are no longer self-evident. Therefore, alienation is inevitable.

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123. Lemon v. Kurtzman, 403 U.S. 602 (1971).

IV. ALTERNATIVE APPROACHES

The preceding sections display an incredible dilemma. Public schools are necessary to promote cultural adhesion and foster individual growth, thus creating a more productive society. Moreover, the schools want and need to promote a free market-place of ideas. Morals or values are a fundamental part of any culture and are necessary to the well-being of the individuals within that culture. Yet, parents entrust their children to the schools with the understanding that the schools will not promote values inconsistent with those of the parents. Additionally, the schools must be careful not to violate the Establishment and Free Exercise clauses of the First Amendment, which protect all individuals from invasions upon the freedom of conscience.[124] Thus, to effectively accomplish their purpose the schools must articulate morals and values consistent with the cultural goals of the school and yet not violate the First Amendment. The courts can overcome this dilemma in four ways: 1) define religion in a universally acceptable way, 2) overturn the incorporation doctrine and allow the states more flexibility, 3) define those values necessary to the culture as non-religious, or 4) define "establishment" as something more than mere presentation, thus allowing a wider variety of morals and viewpoints to be taught.

The first and second options are unlikely to occur in the near future. The definition of religion is clearly cultural and the culture is in a state of continuous flux. Consequently, even assuming a definition could be articulated, it would likely be brittle and shatter when held against the changing tide of societal norms. Overturning the incorporation doctrine would be difficult because it has been a part of American jurisprudence and American culture for such a long time. Should the Court seek to advance this goal, it would allow the states more control and promote greater cultural commitment. The danger in this approach is that minority religious views would be subject to the whim of the majority.

The third option is the one the courts have chosen as exemplified throughout this paper. Justice O'Connor articulates this point well when she states,

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124. *Wallace*, 472 U.S. at 39 (1985).

> it is inevitable that the secular interests of government and the religious interests of various sects and their adherents will frequently intersect, conflict and combine. . . . Chaos would ensue if every such statute were invalid under the Establishment Clause. For example, the State could not criminalize murder for fear that it would thereby promote the Biblical command against killing."[125]

What Justice O'Connor and the courts have refused to acknowledge is that the only reason the biblical command against killing does not violate the Establishment Clause is because, on a fundamental level, unjustified homicide breaches virtually everyone's moral code. Thus, no one complains that religion has been established. This is similar to Jefferson's approach to divisive sects-find some principle upon which the sects will not divide.

The problem of defining a precept as non-religious is that eventually the definer steps outside the universal moral code, someone disagrees and then uses the First Amendment to have the precept excluded from public discourse. Today, that universal moral code contains fewer and fewer shared precepts, increasing the likelihood that the definer will step into the realm of the offensive. A societal alienation is inevitable.

This alienation occurs because whoever defines the values necessary to the culture, labels those values "non-religious" providing those values with access to the public domain. However, those values labeled "religious" are excluded from the public domain and thus values necessary to specific segments of the population may be excluded. This alienates those segments, inevitably reshaping society's cultural makeup. As Justice Clark explained, "[w]hen government, . . . allies itself with one particular form of religion the inevitable result is that it incurs 'the hatred, disrespect and even contempt of those who held contrary beliefs.'"[126] Aside from alienation, labeling certain morals or methods as religious and thus excluding them also results in intolerance and a restriction of the free-marketplace of ideas that is necessary to public schools.

The Court, in refining the purpose of the First Amendment religion clause, explains that "the political interest in forestalling intolerance extends beyond intolerance among Christian

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125. *Wallace*, 472 U.S. at 69-70 (O'Connor, J., concurring in the judgment).

126. *Schempp*, 374 U.S. at 221-2 (quoting Engle v. Vitale, 370 U.S. 421, 431 (1962).

sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain."[127] Yet, the Court has repeatedly been intolerant of traditional, religious views, presented in any form in the public schools. Consequently, those who follow traditionally defined religions are excluded, in the name of tolerance, while the hesitant and uncertain are permitted to preach or at least share their doubt with children in the public schools, all the while demanding the exclusion of traditional religion.

Intolerance towards traditional, religious views is reflected in the moral breakdown occurring throughout the nation. According to the National Crime Survey, almost three million crimes occur on or near school campuses every year.[128] One-fourth of major urban school districts now use metal detectors.[129] Almost one-third of the students in 31 high schools in Illinois said they had brought a weapon to school for self-protection at some time during their high school career.[130] One in twenty said they had brought a gun.[131] Clearly, the above statistics reflect a lessening respect for life and property which is a primary Judeo-Christian value. One look at the pervasiveness of drug use, teenage pregnancy, or political corruption and one can sense the result of an increasing intolerance for traditional values such as respect for one's body, abstinence, and honesty.

Some might claim that the courts are only alienating the intolerant, and, by definition, a tolerant society will necessarily eliminate or alienate such a segment of its population. However, while it is true intolerant people exist, it can hardly be said those who request that creation-science be taught when evolution is taught, or that the Bible be used as a source of moral reference when other books are so used, or that a moment be permitted for prayer when a moment is permitted for meditation are intolerant fanatics. Those who attempt to exclude such practices are closing the free-market on ideas that have influenced history and still continue to pervade society.

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127. *Wallace*, 472 U.S. at 54.

128. Tom Morganthau et al., *It's Not Just New York*, Newsweek, March 9, 1992, at 25.

129. *Id.*

130. *Id.*

131. *Id.*

America's classrooms are propounded as free-markets where ideas can be explored, compared, and bartered. Yet, those who follow traditional religions are told to check their ideas at the schoolhouse door. This, in effect, closes the door on examination of the bedrock principles that caused the founding fathers to act. In philosophical, political, and literary discussions, students and teachers should be permitted to refer to traditional, religious viewpoints for understanding and instruction. These viewpoints pervade history and many modern communities throughout America. When these views are excluded, students are denied an opportunity to understand what makes their world work. This is not an apology for the teaching of religious doctrine in the classroom. It is a call for freedom to compete. Many ideas involving societal structure involve religiously oriented suppositions, for example, the idea that "we are endowed by our Creator with certain inalienable rights." Communities that value these ideas should be permitted to present them to their children. Under the current approach to the Establishment Clause, they cannot.

The fourth option, redefining establishment, would prohibit the courts from intervening until the violation was more harmful, thus allowing local communities to work out their value systems and the way those values are presented in public schools. For example, the mere presentation or existence of a religious view should not violate the First Amendment. A single comparison of the Establishment Clause and the Free Speech Clause will illustrate. Justice Jackson has stated that "[i]f there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by work or act their faith therein."[132] The Court has ruled that funding certain political speech does not violate the First Amendment.[133] If funding political speech does not "prescribe what shall be orthodox in politics," then funding religious speech does not dictate what shall be orthodox in religion.[134]

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132. Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

133. Buckley v. Valeo, 424 U.S. 1 (1976).

134. For further comparison of Freedom of Speech jurisprudence and freedom of religion jurisprudence see Michael W. McConnell, *Political and Religious Disestablishment*, 1986 B.Y.U. L. REV. 405.

Returning some control of the definition of religion to local communities is a desired result because it promotes cultural adhesion. This would allow a definition of religion according to values indigenous to a particular community. There is a reason people may choose to live in Boise, Idaho over Harlem, New York or vice versa. Individuals will gravitate towards areas where values most closely resemble their own. Perhaps some school districts will resolve to exclude religion in a manner consistent with the last thirty years of Supreme Court decisions. If so, it will be because the community has made that decision, not because the decision was forced upon them by five people in Washington D.C. Thus, alienation will be less likely and community adhesion will be more probable. Compare this outcome with that of an Afro-centric curriculum. If people have a right to control their cultural destiny, they should likewise have the right to control their moral destiny.

The short-coming with returning control to the local level is that individuals within communities may be alienated. This is the precise result the Bill of Rights was intended to prevent. However, the individuals need not feel alienated. The Courts could still enjoin coercion. Individuals would still be free to worship (or not worship) how they pleased. The only people truly excluded are those who are intolerant of the community's values. Society permits this type of exclusion, else a criminal justice system would be non-existent, and the civil rights movement would have been impossible. History shows that such a result would not promote intolerance. For examples one need look no further than the disestablishment movement in the states during the early nineteenth century or the evolution towards non-sectarian schools in the mid-nineteenth century, all of which occurred without the help of the Establishment Clause and the Supreme Court.

V. CONCLUSION

In failing to provide a concrete definition of the terms "religion" and "secular," the courts are free to conclude that in public schools a person may not teach evidence substantiating the traditionally religious view of a Supreme Creator, but one may teach a world-view that excludes the existence of a Supreme Creator or an after-life. Likewise, the courts are free to conclude that the legislature may not proscribe a theory that humankind evolved from an amoeba, but neither may the legislature balance such instruction with evidence which supports the

traditionally religious view of a Supreme Creator. Moreover, this vague approach permits the courts to reason that forbidding the view that mortality is the end of existence violates academic freedom and "postpones education," whereas permitting views which depend on the existence of eternity is unconstitutional.

Admittedly, religious instruction as well as the definition of religion are at once pervasive and personal. For this reason it is imperative that the paradox regarding religious instruction in public schools be resolved, to some extent, on the local level where a consensus can be reached and community values can be preserved. If a change occurs, it is a change the community chooses rather than a change externally imposed. To do otherwise eviscerates the meaning of "community."