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The Lemon in *Smith v. Mobile County*: Protecting Pluralism and General Education

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I. INTRODUCTION

The Victorian days when we could be taught absolute truths have vanished forever. Relativism, in its humility, has qualified information to the point that it can no longer stand up as truth. Neither patriarchal determination or post-modern deconstruction meets the needs of a pluralistic society desiring to pass on values in their fullness. Can education balance its need to teach with authority and still respect diversity?

The answer lies with understanding moral authority in a pluralistic society.[1] If this paper is successful in communicating the nature of moral authority, the reader will realize:
That the *Lemon* test, designed to separate government activity from religion, has completely lost its utility. A new method of separation must be found. That moral authority is the defining element of religion. That the institution of Madison's political theory in education, as opposed to the Jeffersonian vision, will provide a viable system of general education that doesn't require a suspension of First Amendment rights.

A. The Lemon Test

The Supreme Court developed the *Lemon* test to protect First Amendment rights. The Lemon test requires: 1) a primary

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*. Special thanks go to Dean Cameron who painfully and patiently worked through the initial spew, delaying decision until failure was no longer the only option. I would like to acknowledge Daniel Witte for his footnotes and a common vision. Also, thanks to the members of the BYU Journal of Education and Law for the uncompensated time and effort they have contributed.

1. By moral authority I mean the authority to say truth. Moral authority is the answer to the question, "Who says?" When a child is taught that the earth is round, the authority for the answer is Science. When a child is taught that homosexuality is a legitimate alternative lifestyle, the authority for the answer must be named, for many obviously disagree. The answer to the question, "Who says" distinguishes religions from each other. It also defines different schools of thought; *see* Part V, Section A.

secular purpose; 2) a neutral effect; and 3) no entanglement between church and state.[2] The courts have had difficulty in establishing bright line rules or principles to provide the law with consistency. The decisions have been ad hoc; holdings are all over the map. Enormous amounts of time, energy, and money have been expended in litigating constitutional issues regarding what may be taught and done in a public school. "For the past forty years, church-state controversies have generated a steady stream of educational litigation, and there are no signs of diminishing legal activity in this domain."[3] Until these resources otherwise expended are made available for the central concern of educating, the system will continue to be a political and philosophical battle ground rather than a place of sanctuary and learning for children.

These resources can become available only after constitutional tensions between the rights of parents, children, teachers, and governmental interests have been settled. The constitutional conflict will be resolved if one of two things occurs: 1) the United States comes to a genuine consensus as to curriculum, disciplinary standards, and religious influence in education; or 2) the State relinquishes its role as the primary server of public education.[4]

A genuine consensus has been sought by the courts in order to resolve the constitutional tensions inherent in public education. Because the Lemon test functions as a consensus locating mechanism, it has been applied over the last twenty-six years in an attempt to ease the constitutional tensions between parents, children, teachers, and the state.[5] Although the Lemon test may have seemed appropriate in its early applications, the issues raised in *Smith v. Bd. of Sch. Comm. of Mobile County*

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

3. MARTHA M. MACCARTHY AND NELDA H. CAMBRON-MCCABE, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS at 53 (Allyn and Bacon, 3rd ed. 1992).

4. The possibility of determining consensus is beyond the scope of this paper. However, this concept fits snugly with the ideas espoused in this paper. For more information on consensus in education, see AMY GUTMANN, DEMOCRATIC EDUCATION 5-18 (Princeton Univ. Press 1987) (Gutmann proposes that for a theory of education to be consistent with democratic government, policy decisions regarding education should be the result of democratic consensus (i.e. Congress). Educational practices must reconcile competing claims by parents, the state, and individual students. She concludes that political majorities should decide educational policy as long as that policy is not repressive or discriminatory).

5. *See* Note, *The Establishment Clause, Secondary Religious Effects and Humanistic Education*, 91 Y.L.J. 1196, 1224 (May, 1982).

challenge the very concept of consensus in education.[6] By protecting the least common denominator of religious beliefs, the courts dilute the values and beliefs of the preceding generation.[7]

In fact, the Lemon test's inability to deal with the issues raised by *Mobile County* reveals the impossibility of achieving a consensus in education in a pluralistic society. Because public education contains conflicting constitutional rights, courts are left to sacrifice the rights of one party to the benefit of others.

B. Thesis and Organization of Paper

Because education inherently teaches through selectivity and value preference, content regulation is a regular part of the process. Such content regulation violates the First Amendment and will continue to do so as long as public education is tied to the Constitution. *Mobile County,* by challenging the very test the Supreme Court has used to mitigate the effects of this violation, reveals the underlying flaw of the current compulsory public education system. An analysis of this decision reveals why the U.S. government cannot substantively exclude the proliferation of educational viewpoints and remain true to its own Constitution.[8]

Part II provides some background of public education principles and case law leading up to *Lemon v. Kurtzman.*[9] Part III illustrates the Supreme Court's inconsistency in applying the *Lemon* test to resolve Establishment Clause violations. Part IV takes a closer look at the issues raised in *Mobile County.* It identifies the arguments used by both the district and the circuit courts in reaching their conclusions. Part V addresses the futility of using the *Lemon* test to resolve the issues raised in *Mobile County.* In addition, Part V explores the two big First Amendment questions raised by *Mobile County.* Questions from which the circuit court hid. These questions are: 1) what defines a religious belief? and 2) how can religious beliefs be protected in education?

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6. 827 F.2d 684 (11th Cir. 1987).

7. Secular humanism can only teach those widely held beliefs and values common to nearly all and/or validated by conventional wisdom.

8. A voucher system may be the only way preserve a general education system without violating the constitution. *See* Section VI. B. 2. (a).

9. 405 U.S. 602 (1971).

II. PRE-LEMON SEPARATION OF CHURCH AND STATE

A. Justifications for Public Education

From the inception of public education, the writings of Thomas Jefferson have been cited extensively by scholars and the courts in defense of government participation in the field of education. Not surprisingly today's educational system is a close approximation of his vision. An examination of Jefferson's views yields a better understanding of the government's interest and purpose in providing public education. Thomas Jefferson developed and advocated ideas that public education was necessary: 1) to provide free education for all;[10] 2) to prepare the individual for autonomy;[11] and 3) to maintain a free state through the (moral and analytic) education of the people.[12]

1. *Universal Education*

"The full significance of Jefferson's prescriptions for the education required of a new nation turns on the attainment and maintenance of liberty."[13] Both his concern for universal education, and his belief that a student should be taught in a way that prepares him or her for autonomy are based on the premise that they increase the liberty and happiness of the people.[14] Yet for Jefferson, the necessity of education to the maintenance of the republic went much deeper.[15] He wrote, "[t]o maintain

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10. ADRIENNE KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 262 (Oxford Univ. Press 1964)

11. HAROLD HELLENBRAND, THE UNFINISHED REVOLUTION: EDUCATION AND POLITICS IN THE THOUGHT OF THOMAS JEFFERSON 9-14 (U. of Del. Press, London and Toronto 1990); *accord* THOMAS JEFFERSON, *Letter to Gov. Tyler, May 26th, 1810, reprinted in,* JOHN C. HENDERSON, THOMAS JEFFERSON'S VIEWS ON PUBLIC EDUCATION 319-320 (N.Y. 1890) (reprinted AMS Ed. 1970) (Jefferson wrote: "I have indeed two great measures at heart . . . 1. That of general education, to enable every man to judge for himself what will secure or endanger his freedom. 2. To divide every county into hundreds, of such size that all the children of each will be within a central school in it").

12. ROBERT HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 14 (Yale Univ. Press 1962); *see generally,* THOMAS JEFFERSON, TOWARD THE GENERAL DIFFUSION OF KNOWLEDGE.

13. JENNINGS L. WAGGONER, THOMAS JEFFERSON AND THE EDUCATION OF A NEW NATION 16, *citing* Dumas Malone.

14. HAROLD HELLENBRAND, THE UNFINISHED REVOLUTION: EDUCATION AND POLITICS IN THE THOUGHT OF THOMAS JEFFERSON 60 (U. of Del. Press, London and Toronto 1990).

15. ROBERT HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 14 (Yale

that a State has not the right to insist upon its youth acquiring a certain amount of useful knowledge, would be to maintain a doctrine respecting the freedom of the individual will which might lead to lawlessness and anarchy. Society has rights and responsibilities as truly as have individuals."[16] Jefferson borrowed from Montesquieu the perspective that a republic was only as stable as society was virtuous.[17] Jefferson, along with early pioneers in public education, accepted Montesquieu's assertion that, "the primary aim of republic education is to develop the moral condition of public virtue, whatever that might be."[18]

2. *Educating for Autonomy*

One of the most influential ideas on Thomas Jefferson was the "affectionate pedogogy" of Locke.[19] "Affectionate pedagogy" describes a philosophy whereby the elders selectively filter the information and experiences of the student, eventually teaching the student methods whereby they could teach themselves and effectively filter information on their own.[20] This philosophy was especially adapted to a culture that believed that by nature and by right, people were born to be free. "Parents and mentors who wished to educate a charge well and transform him into a free agent . . . had to know when and how to yield authority to the youngster's maturing 'self-critical ability' without utterly sacrificing those 'well-defined limits' that child raising for autonomy nevertheless [requires]."[21]

Locke had an immense influence on Thomas Jefferson. Jefferson took the idea of educating for autonomy and applied it to the establishing of the Republic. For Thomas Jefferson, the proper development of the individual for the making of deci-

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Univ. Press 1962).

16. JOHN C. HENDERSON, THOMAS JEFFERSON'S VIEWS ON PUBLIC EDUCATION 350 (N.Y. 1890) (reprinted AMS Ed. 1970).

17. PAUL D. CARRINGTON, *The Theme of Early American Law Teaching: The Political Ethics of Francis Leiber*, 42 J. LEGAL EDUC. 339, 350-51 (1992).

18. *Id.* at 351.

19. JOHN LOCKE, SOME THOUGHTS CONCERNING EDUCATION 158-162 (John W. and Jean S. Yolton eds., Clarendon Press 1989).

20. HAROLD HELLENBRAND, THE UNFINISHED REVOLUTION: EDUCATION AND POLITICS IN THE THOUGHT OF THOMAS JEFFERSON 14 (U. of Del. Press, London and Toronto 1990).

21. BLUSTEIN, PARENTS AND CHILDREN: THE ETHICS OF THE FAMILY 133 (Clarendon Press: Oxford Univ. 1982).

sions preserves the freedom of the state. "Affectionate pedagogy" geared the education of the young to achieve an end result of individual autonomy. For Jefferson that meant the creation of fully functional patriots in the Republic. The reason Jefferson believed the state must educate for autonomy was twofold. First, the essence of democratic republic was the opportunity for free people. Second, the state required men with autonomy sufficient to "judge for himself what would secure or endanger his freedom."[22] Educating for autonomy was the principal justification for public education because it increased political equality. Because it increases the individual's influence on the democracy, educating for autonomy continues as the primary purpose in public education.

3. *Education for the State: The Perpetuation of a Democratic Form of Government*

The perpetuation of a democratic state rests on the education of its children.[23] A pioneer of the current public education system, E.P. Cubberley, wrote, "all children of the state are equally important and are entitled to have the same advantages."[24] Because the children in the state are members of the state, the Constitution requires that the basic rights of children be upheld.[25] In his opinion for *Wisconsin v. Yoder*, Chief Justice Burger wrote, "providing public schools ranks at the very apex of the function of a State."[26]

The State's interest in public education extends beyond its own preservation to the protection of its children. Although natural parents may have a stronger emotional bond, the state has clearly asserted a legal supremacy capable of pre-empting parental responsibility for the sake of the child. For example, children of fanatics and extremists can be taken by the state. "These children, solely because of their parents' beliefs, do not receive the same legal protections from harm, (for instance, in-

22. ROBERT HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 178 (Yale Univ. Press 1962).

23. In addition, the level of education children obtain will determine the degree of freedom of which a particular democracy is capable.

24. E.P. CUBBERLEY, SCHOOL FUNDS AND THEIR APPORTIONMENT 18 (Teachers College: Columbia Univ. Press 1905).

25. Tinker v. Des Moines Ind. Comm. Sch. Dist. No. 21., 393 U.S. 503 (1969).

26. 406 U.S. 205, 213.

ferior health care and an inferior education) that other groups of children receive."[27] Who is to protect them if not the state? Some, possibly witnesses to poor parenting, believe that short of taking the children from their parents, compulsory education is the most effective method society has of providing children with equal protection and opportunity in this life. However, the Court has recognized in *Parham v. J.R.* et al. *No. 75-1690* the American distaste for an education system that trumps parental authority.[28]

The basic arguments for more centralized state control of curriculum return us to the philosophy of Thomas Jefferson. These arguments include giving all children an equal start, protecting their constitutional rights, and insuring the state's survival as a democracy.[29]

B. Constitutional Challenges in Public Education

"From colonial days until the mid-twentieth century, religious (primarily Protestant) materials and observances were prevalent in many public schools."[30] On the other hand, sectarian schools received government funding throughout the nineteenth century.[31] Early in the twentieth century the widespread movement for compulsory education began in an effort to provide equal opportunity to all children. From its inception, however, that goal and the process for achieving that goal have been challenged through extensive litigation. The system continues to experience difficulty in balancing the conflicting inter-

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27. JAMES G. DWYER, "*The Children We Abandon: Religious Exemptions to Child Welfare and Education Laws as Denials of Equal Protection to Children of Religious Objectors,*" 74 N.C. L. Rev. 1321 (1996).

28. Parham v. J.R. *et al.* No. 75-1690 (1979) (The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition).

29. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979) (observing that "the importance of public schools in the preparation of individuals for participation as citizens has long been recognized"); *See also* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681-83 (1986) (describing one objective of education as "the inculcation of fundamental values necessary to the maintenance of a democratic system").

30. MACCARTHY AND CAMBRON-MCCABE, *supra* note 3, at 28.

31. Wallace v. Jaffree, 472 U.S. 38, 103-104 (1985) ("As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. . . . It was not until 1897, when aid to sectarian education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools."; *See* Act of June 7, 1897, 30 Stat. 62, 79; *cf.* Quick Bear v. Leupp, 210 U.S. 50, 77-79(1908).

ests involved, those being the interests of the State and the constitutional rights of parents, teachers, and students, seemingly unaware of the company with which it is thrown by its suspension of constitutional rights.

1. *Establishment Clause Violations*

Justice Jackson comments in *West Virginia Bd. of Educ. v. Barnette* on applying Establishment Clause interpretation to opinions of politics, nationalism, and religion.[32] After *Barnette,* because someone did not believe in flags, no one could be required to salute the flag or recite the pledge of allegiance. Deeply held beliefs could no longer be practiced or exercised at school because they conflicted with other deeply held beliefs.

In *Everson v. Bd. of Educ. of Ewing Tp.,* the Supreme Court relaxed its interpretation of the Establishment Clause, allowing funds to be used for the reimbursement of the costs of bussing children bussed to parochial schools.[33] However, by 1954, the Supreme Court was interpreting the establishment clause to mean that "a wall of separation between church and state" should be built.[34] Oblivious to the fundamental connection between religion and education, the court began the process of purging from education its very soul.

The Supreme Court continued building on that wall of separation with its creation of the Lemon test. The Lemon test has been followed or used with slight modifications for twenty-six years to determine Establishment Clause violations.[35] Unfortunately, the Supreme Court has not achieved consistency within the walls of its own court, sometimes deciding Establishment Clause cases without even using the Lemon test.[36] The 1985 Supreme Court decision in *Wallace v. Jaffree* kept the Lemon test alive by using it to strike down statutes that permitted time for students to pray.

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32. 319 U.S. 624, 642 (1943).
33. 330 U.S. 1 (1947).
34. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
35. The Lemon test requires: 1) primary secular purpose; 2) a minimal secular effect; and 3) no entanglement between church and state.
36. Wallace v. Jaffree, 472 U.S. 38 (1985).

2. *Free Exercise claims*

Pre-Lemon decisions have followed a trend of shifting responsibility for the child's education from the parent to the state. In 1925, the Supreme Court invalidated an Oregon statute that required children from age eight to sixteen to attend public schools. The Court wrote, "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[37]

By 1972, the Court's view of who retained ultimate responsibility to educate the child had clearly shifted. *Wisconsin v. Yoder* illustrates well the difficulties the courts face in balancing the various interests.[38] In this case, the Supreme Court had to determine whether Amish youth would be compelled to attend public schools even though it violated their religious beliefs. Because the Amish have a history of good behavior, the courts *allowed* them their own autonomy. The Court held, "A State's interest in universal education however highly we rank it is *not totally free* from a balancing process when it impinges on fundamental rights, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest in parents with respect to the religious upbringing of their children."[39] The Court has shifted responsibility for the education of its children from the parents to the state.[40] In 1925, parents had "the right coupled with the high duty."[41] Now, the state is mostly, but "not totally[,] free from a balancing process when it impinges on fundamental rights."[42]

The simple conclusion derived from *Yoder* is that parents do not have the right to determine whether their children are educated, but they do have some control over where such education takes place.[43] The degree of control a family can exercise is determined largely by their wealth. Those parents who cannot afford a school of their choice are thus given a chance to choose

37. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).
38. 406 U.S. 205, 214 (1972).
39. *Id.* at 214.
40. *See* Comment, "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment,*" 1996 B.Y.U. L. REV. 183 (vol. 1).
41. *Yoder*, at 233.
42. *Id.* at 214.
43. *Id.* at 211-212.

between home-schooling or submitting to state-determined curriculum and standards.[44] State-determined morality continues to be in a state of flux. Though the courts are reluctant to define religion, the Court has, through the use of the Lemon test, created a situation where it must determine what constitutes a bona fide religious belief.

III. THE *LEMON* TEST

The Lemon test has been defined and refined by many cases. It has been favored then disfavored, twisted, sweetened, and abandoned by the Supreme Court.[45] However, it remains the law for lower courts.

A. Lemon v. Kurtzman

The Supreme Court continued building its "wall of separation" between church and state with its 1970 articulation in *Lemon v. Kurtzman.*[46] Since then, the Lemon test has been followed or used with slight modifications for twenty-six years in determining constitutional violations.[47]

1. *Secular teachers in sectarian schools*

When Rhode Island instituted a program which provided salary supplements for teachers of secular subjects in nonpublic schools, the Supreme Court ruled that such statutes operated to the benefit of parochial schools. This case exposed the difficulty in determining Establishment Clause violations solely by whether the benefit went to a sectarian or a secular organization. In providing a more objective decision, the Court developed a three prong test that would determine constitutionality on a more pragmatic level. This test was designed to thwart the specific harms that occur when First Amendment rights are violated rather than enforcing the principle of pure separation.[48] By combining the cumulative criteria developed by the

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44. Seventeen states have still not authorized home-schooling, thus holding the less affluent hostage to state-determined morality.

45. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Scalia, J., dissenting).

46. 403 U.S. 602 (1971).

47. Lynch v. Donnely, 465 U.S. 668, 678-79 (1984) (O'Connor, J., concurring) (advocating another modification).

48. *Lemon*, at 612.

court over many years, the Supreme Court settled upon a form of analysis which is now known as the Lemon test.[49] The three prongs the Court "gleaned from [its] cases" require that in order for a statute to be constitutional, it must have: 1) a primary secular purpose; 2) a neutral effect; and 3) no excessive entanglement between church and state.[50]

In other words, for a statute to be constitutional, it must be drafted to solve a secular problem. The consequences that come as a result of the statute must be neutral as to sectarian interests. Finally, the no excessive entanglement between church and state prong ensures that even if the statute is for a primary secular purpose and has a neutral effect, the statute will not put people in a position where their activities or decisions could affect a sectarian organization or group. In *Lemon*, two statutes which provided for the payment of secular teaching in private schools were struck down under the excessive entanglement requirement of the third prong.

B. *The Living Dead*

The Lemon test has undergone a confused refining during its twenty-six year existence. It has been used, then not used, then used again, then cast aside.

1. *Dead in 1984*

In *Lynch v. Donnely,* "The city of Pawtucket, R.I. annually erect[ed] a Christmas display in a park owned by a nonprofit organization and located in the heart of the city's shopping district."[51] The district court held that although the display had an important secular purpose, it could not pass the third prong of the Lemon test.[52] In other words, the display had a religious effect. When the circuit court affirmed the injunction, it held the display did not have a secular purpose.[53] Both the district court and the circuit court applied the Lemon test to resolve Establishment Clause violations. The Supreme Court in *Lynch,* however, asserted that the purpose of the Lemon test is "to pre-

49. *Id.*
50. *Id.* at 612-13.
51. 465 U.S. 668, 668 (1984).
52. Donnely v. Lynch, 525 F. Supp. 1150, 1168 (1981).
53. Donnely v. Lynch, 691 F.2d 1029, 1032 (1982).

vent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other."[54] At the same time, however, the Court has recognized that "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable."[55] Because the Lemon test creates a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship," the Court in *Lynch* declined to use it in coming to their conclusion.[56] The Lemon test had apparently already been abandoned by the Supreme Court as the legal test.[57] Once again, the Court had relegated the Lemon test back to its role as "no more than a helpful signpost" in dealing with Establishment Clause challenges.[58]

2. *Alive in 1985*

The Supreme Court decision in *Wallace v. Jaffree* kept the Lemon test alive by striking down statutes that permitted time for students to pray.[59] In *Jaffree,* the state drafted three statutes, each with slightly more religiosity, to test the limits of the *Lemon* test. Determining the difference between religious and secular silence proved to be a difficult thing for the court.[60]

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54. *Lynch,* at 672, *citing Lemon,* at 614.

55. *Id.*

56. *Lemon,* at 614.

57. Marsh v. Chambers, 463 U.S. 783 (1983) (non-use of the Lemon test to resolve Establishment Clause case).

58. Hunt v. McNair, 413 U.S. 734, 741 (1973); *see also* Wolman v. Walter, 433 U.S. 229, 265-66 (1977); *accord* Marsh v. Chamber, 463 U.S. 783 (1983).

59. 472 U.S. 38 (1985).

60. Separating the secular from the religious can be a very fine line. For example, in Allegheny v. A.C.L.U. Pittsburgh Chapter, 492 U.S. 573 (1989) the Supreme Court used the Lemon test to distinguish which parts of a Christmas display were permissible. The Court determined that the display of creche in the city violated the establishment clause. However a menorah and a Christmas tree next to each other did not violate the establishment clause. The Court felt that the menorah and the Christmas tree had achieved a sufficient cleansing from being purely religious symbols and therefore had secular value. Clearly, the separation point delineated by such an application of the Lemon test is not determined by the meaning of the object or activity, but by society's commercial use of the object or activity. This case is also an illustration of the fact that the Lemon test has been utilized in resolving establishment and free exercise clause conflicts beyond the limited scope of public education.

3. *Dead in 1992*

In *Lee v. Weisman*, parents, administrators, and local clergy came together to develop a "nonsectarian" prayer.[61] These citizens, once again of Rhode Island, tried to comply with the court's interpretations and application of the Lemon test without giving up personal values and beliefs. The school went to great lengths to provide a prayer at graduation which did not violate the separation of church and state. The Supreme Court, however, wisely held "that [the] school could not provide for 'nonsectarian' prayer to be given by clergyman selected by the school."[62] A prayer that must pass a government standard or test, even a good faith effort to accommodate, lacks the constitutional protection of the First Amendment. The First Amendment was designed to protect an individual's right to worship after the dictates of one's own conscience. A prayer designed so generically as to offend no one, has little chance of appeasing the God of someone.

The Court in *Lee v. Weisman* elected to not use the Lemon test in reaching its conclusion on this issue.[63] Instead, the Court balanced the interests based on accommodation and coercion principles. The Court ruled that the accommodation principle does not "supersede the fundamental limitations imposed by the Establishment Clause, which guarantees at a minimum that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[64]

4. *Alive in 1993*

Lamb's Chapel v. Center Moriches Union Free School District provides another instance of deep judicial differences regarding the use of the Lemon test.[65] Justice Kennedy refused to be "diverted by Justice Scalia's evening at the cinema."[66] Nevertheless, he affirmed the validity of the Lemon test in *Lamb's*

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61. 505 U.S. 577 (1992).
62. *Id.*
63. *Id.* at 577.
64. *Id. citing* Lynch v. Donnely, 465 U.S. 668, 686-88 (1984).
65. 508 U.S. 384 (1993).
66. *Id.* at 395, note 7.

Chapel, writing, "we return to the reality that there is a proper way to inter an established decision and Lemon, however frightening it might be to some, has not been overruled."[67] For his part, Justice Scalia wrote the following:

> As to the Court's invocation of the Lemon test: Like some ghoul in a late- night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in Lee v. Weisman, conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so . . . The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it, when we wish to uphold a practice it forbids, we ignore it entirely, Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him. For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.[68]

5. *Dead in 1994*

In *Board of Education of Kiryas Joel Village School District v. Grumet,* the Court went to lengths to avoid basing its decision on the Lemon test.[69] In a concurring opinion, Justice Blackmun wrote to "note [his] disagreement with any suggestion that today's decision signals a departure from the princi-

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67. *Id.*
68. *Id.* at 398-400.
69. 512 U.S. 687 (1994).

ples described in *Lemon v. Kurtzman*"[70] He continued, "Indeed, the two principles on which the opinion bases its conclusion that the legislative act is constitutionally invalid essentially are the second and third Lemon criteria."[71] Though the Lemon test has not yet been expressly overruled, one must wonder just how alive it is when the Court refuses to use the Lemon test by name, even when the Court uses Lemon test principles.

6. *Alive in 1996*

A New Jersey school district, seeking to preserve the right of students to pray at graduation, instituted a policy whereby the students could choose whether or not a prayer would be included at graduation. The Third Circuit Court concluded in *American Civil Liberties Union. of New Jersey v. Black Horse Pike Regional Board of Education* that the Lemon test precluded a majority from using state machinery to impose a religious act on a minority.[72] The Court noted that, "[t]he Lemon test has been the subject of critical debate in recent years, and its continuing vitality has been called into question by members of the Supreme Court and by its noticeable absence from the analysis in some of the Court's recent decisions."[73] But the court followed the Lemon test. The Court acknowledged that, "nevertheless, Lemon remains the law of the land, and we are obligated to consider it until instructed otherwise by a majority of the Supreme Court."[74]

7. *Summary*

The Court's recent inconsistency in following the Lemon test implicates the judiciary in its "outcome determinative" behavior.[75] Clearly, the *Lemon* test embodies no principle of actual separation of church and state. Rather, it is a "useful tool" for minimizing the effects of First Amendment violations.[76]

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70. *Id.* at 700.
71. *Id.*
72. 84 F.3d 1471 (1996).
73. *Id.* at 1484.
74. *Id.*
75. Interview with Daniel Witte, Author of "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*," in Provo, UT. (Mar. 28, 1997).
76. Recall Justice Scalia's remarks, *see supra*, note 68 and accompanying text.

Although religious fundamentalists may rejoice at the setting aside of the Lemon test in favor of principles of accommodation and coercion, the prospect of losing the influence of the Lemon test in public education has alarmed others. Julian Kossow expressed dismay at the prospect of losing the effect of separation attempted by the Lemon test, fearing that in the absence of the Lemon test, fundamentalist beliefs will be forced upon the populace.[77] He writes, "The Rehnquist Court's thrust toward accommodation of religion is simply too threatening to the millions of Americans who do not follow the majority's creed. The wall of separation . . . may crumble under the weight of too many decisions like Bowen, Zobrest, and Rosenberger."[78] Fundamentalists, on the other hand, look forward to the possibility of being free, once again, to pray at school.

Whether the *Lemon* test lives or dies, it has existed to minimize the infringement on freedom of conscience, for the nature of public education is to "foist beliefs upon Americans of different faiths."[79] This holds true whether it be athiests offended by the praying of others, or fundamentalists offended by the absence of prayer. Conservatives and liberals alike should be put on the alert by such disregard for the *process* by which First Amendment freedoms are preserved. The efforts by the Court to minimize the effects of the First Amendment violations in public education would be commendable, had the *Lemon* test not become the Court's tool for preserving public education and its suspension of First Amendment rights.

C. *Mixing Establishment and Free Exercise Clause Violations in Public Education*

Because parents' claims against public education can be based on either Establishment or Free Exercise Clause Violations, they have sometimes been further reclassified. Jane A. van Galen identifies "home schoolers as either pedagogues or ideologues."[80] Pedagogues evolved when "disaffection developed

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77. JULIAN R. KOSSOW, *Preaching to the Public School Choir: The Establishment Clause; Rachel Bauchman, and the Search for the Elusive Bright Line*, 24 FLA. ST. U. L. REV. 79, 104-5 (1996).

78. *Id.*

79. *Id.*

80. Doctoral dissertation, University of North Carolina, 47 Dissertation Abstracts International 1683-A (November, 1986).

during the late 1960s with schools as rigid, authoritarian, bureaucratic institutions [that were] unable to provide effective learning experiences for children."[81] Ideologues believe that "schools do not give enough attention to traditional subject matter and are concerned that the schools promote values and beliefs that are not consistent with their religious doctrine and political and social perspectives."[82]

Either motive should be sufficient grounds for escaping public schools. Parents clearly have an interest in teaching their children values and in procuring for their child the best possible opportunities this life has to afford. If public education substantively violates either clause alone, the state's interest in education could more easily prevail. Parents with insufficient time or money cannot get their child away from the offending material at a public school, *and* they cannot get the offending material changed. In *Edward v. Aguillard,* the Supreme Court wrote,

> Students [in the public schools] are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. [sic] Furthermore, the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.[83]

The curious mix of Establishment Clause violations and Free Exercise violations, occurring in public education in those cases that have parents who fundamentally disagree with curriculum or environment, presents the most severe threat to the First Amendment rights of parents. This threat is the subject of *Smith v. Board of School Commissioners of Mobile County.*[84]

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81. STEPHEN G. GILLES, *On Educating Children: A Parentalist Manifesto,* 63 U. CHI. L. REV. 937 (1996).

82. *Id.*

83. 482 U.S. 578, 584 (1987).

84. 827 F.2d 684 (11th Cir. 1987).

IV. SMITH V. BD. OF SCH. COMM'RS OF MOBILE COUNTY

A. *The Facts*

1. *Procedural history*

Alabama, seeking to allow its students to begin each school day with a prayer, passed three slightly different statutes, each permitting just a little more worship than the one before it.[85] By determining just how much prayer would be permitted, Alabama sought to secure as much freedom to pray as the Courts would possibly allow. Ishmael Jaffree brought a suit seeking a declaratory judgment that classroom prayer activities conducted in the Mobile public school system violated the Establishment Clause of the First Amendment. In addition, he sought an injunction against classroom prayer.[86]

When Douglas T. Smith and others filed a motion to intervene in the Jaffree action alleging an injunction against religious activity in the public schools would violate their right to free exercise of religion, the district court allowed them in as defendants. Subsequently, the appellees filed a request for alternate relief. If Jaffree won on his injunction against prayer, Mr. Smith and the State of Alabama requested that an injunction be enforced "against the religions of secularism, humanism, evolutionism, materialism, agnosticism, atheism, and others."[87]

The district court summarily determined that Jaffree was not entitled to relief because the Establishment Clause of the First Amendment did not prohibit states from establishing a religion.[88] The Eleventh Circuit swiftly overruled this decision in *Jaffree v. Wallace*.[89] Whereupon the district court addressed the two tougher issues it had bypassed in its first attempt. The first issue was whether teachers and students had free speech rights that protected their prayers in a public school. The second issue was whether teaching the religion of secular humanism in public schools violated the Establishment Clause of the First Amendment.

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85. ALA. CODE ANN. §§ 16-1-20.1; 16-1-20.2; and 16-1-20.3 (1982).

86. Jaffree v. Bd. of Sch. Comm'rs, 554 F. Supp. 1104 (S. D. Ala. 1983). *Aff'd in part, rev'd in part sub nom.*

87. *Id.*

88. *Id.* at 1128.

89. 705 F.2d 1526 (11th Cir. 1983), *cert denied sub nom.*

2. *Issues addressed*

The district court entered a consent decree by Governor Wallace and the Mobile County Board of School Commissioners in favor of the appellees.[90] At a bench trial the appellees' evidence focused on various textbooks which unconstitutionally established the religion of secular humanism. The district court found that forty-four of these textbooks violated the Establishment Clause of the First Amendment. The court then permanently enjoined the use of them in Alabama public schools.

The principal issue addressed by the circuit court was whether the use of purely secular textbooks in Alabama public schools constituted a violation of the Establishment Clause by advancing secular humanism or by inhibiting theistic religion. Two important issues were not addressed by the Eleventh Circuit Court: 1) whether secular humanism is a religion (i.e., what defines a religious belief), and 2) whether religious beliefs can be protected in public education. These issue will be addressed in Parts V and VI of this paper.

B. *The Court's Analysis*

The Eleventh Circuit Court began each section of its analysis with a short description of how the district court ruled. Directly after describing the district court's ruling, the circuit court set out its own finding on which law to apply to the facts. For example, the first paragraph stated, "The district court found that secular humanism constitutes a religion within the meaning of the First Amendment."[91] The circuit court then noted that not even the Supreme Court had established a comprehensive test for determining what constitutes a religious belief for the purposes of the First Amendment and that the circuit court need not do so at this time. The circuit court first decided what test to apply in determining whether the plaintiff's First Amendment rights were being violated. It then applied that test to the home education textbooks and to the history and social studies textbooks.

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90. Smith v. Bd. of Sch. Comm'rs, 655 F.Supp. 939, 988 (S.D. Ala. 1987).
91. *Mobile County*, at 689.

1. *The test*

The circuit court chose the *Lemon* test.[92] The *Lemon* test had the most judicial weight in determining whether government was neutral toward religion in a particular activity.[93] In addition, the court asserted that the *Lemon* test was "objective."[94] In determining which test to use, the circuit court asserted that it need not attempt the formation of a legal definition of religion.[95] However, it did treat secular humanism as if it were a religion for the purpose of deciding this case. The court focused on the second prong of the *Lemon* test, because the parties agreed that there was no question that the books had a secular purpose or that there was excessive government entanglement.

2. *Home Economics textbooks*

The district court determined that students were required to accept as true certain tenets of humanistic psychology.[96] This finding was based on the fact that the books assumed that self-actualization was the goal of every human being. The district court ruled that such a "relativistic and individualistic approach constituted the promotion of a fundamental faith claim when only the temporal results of a man's actions could be regarded in determining the morality of an action."[97] According to the district court, "[t]his belief strikes at the heart of many theistic religions' beliefs that certain actions are in and of themselves immoral, whatever the consequences, and that, in addition, actions will have extra-temporal consequences."[98]

The circuit court cleverly used the accommodationist principle outlined in *Lynch* to overcome the factual similarity be-

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92. The Lemon test states: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be that neither advances nor inhibits religion . . . ; finally the statute must not foster 'an excessive government entanglement with religion.'" Stone v. Graham, 449 U.S. 39, 40-41 (1980) citing Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971) (citations omitted) (Governmental action violates the establishment clause if it fails to meet any of these three criteria).

93. *Mobile County*, at 689.

94. *Jaffree*, at 56, n. 42 "The effect prong [of the Lemon test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."

95. *Id.*

96. Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. 939, 951-58 (S.D. Ala. 1987).

97. *Id.* at 986-87.

98. *Id.* at 987.

tween the textbooks and tenets of secular humanism.[99] The principle of accommodation, stated simply, "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."[100] The circuit court determined that the government's duty to accommodate religion was not overcome by the fact that the teachings of the textbooks coincided with tenets of secular humanism.[101] Therefore, unless the government's actions amounted to an endorsement of a particular religion, the Establishment Clause of the First Amendment was not violated.[102] The circuit court concluded that the government's attempt to inculcate the children with good values, habits and independent thought "was an entirely appropriate secular effect," and a fundamental objective of public education.[103]

3. *History and Social Studies textbooks*

Although the factual complaints concerning the history and social studies textbooks were different, the circuit court dismissed them by relying on the same underlying premise, the second prong of the Lemon test. Because the textbooks effectively removed any mention of the religious influences on American history, the district court found that the textbooks promoted secular humanism.[104] Once again, the circuit court found that the coinciding of religion (in this case secular humanism) with the secular teachings of the government in public education did not offend the second prong of the Lemon test. The court found that the primary purpose of the textbook was secular. The circuit court ruled that the message conveyed by the choice of a particular text over another was one of quality, relevance, or other nonreligious reasons as opposed to one of endorsement of a religion.[105]

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99. *Lynch*, 465 U.S. at 672. (holding that the government has a duty to accommodate religious beliefs and practices where they don't infringe on third parties).

100. *Lynch*, 465 U.S. at 672.

101. *Ball*, 473 U.S. at 393; *accord* Nyquist, 413 U.S. at 771; *accord* Harris v. McRae, 448 U.S. 297, 319 (1980); *See also Lynch*, 465 U.S. at 682.

102. *Id.* at 681.

103. *Citing* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 692-93 (1986) (*quoting* Ambach v. Norwick, 441 U.S. 68, 77 (1979).

104. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

105. *Mobile County*, 827 F.2d at 693-94; *Cf.* Board of Ed. v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring) ("School officials must be able to choose one book over another, without outside interference, when the first book is deemed more

The circuit court concluded by distinguishing *Epperson v. Arkansas* on which the district court had relied.[106] In *Epperson v. Arkansas*, a statute forbidding the teaching of evolution was ruled unconstitutional. The district court ruled that omission of material based on religious content constituted a First Amendment violation. The circuit court noted that, "selecting a textbook that omits a particular topic for nonreligious reasons is significantly different from requiring the omission of material because it conflicts with a particular religious belief."[107] The circuit court continued its emphasis of the second prong of the Lemon test in debunking this argument. Because the books had a secular purpose, they in no way violated the Establishment Clause of the First Amendment.

V. ANALYSIS OF THE LEMON TEST AND ITS UNDERLYING LEGAL THEORY

As background for understanding the flaws of the court's analysis in *Mobile County,* Part V discusses the important issue sidestepped by the Eleventh Circuit; namely, what defines a religious belief. Section A provides a definition of religious belief. Section B then illustrates how this definition exposes the flaws in the court's analysis of the Lemon test.

A. *Moral Authority: Defining Religious Belief*

This section lays out the underlying principles alluded to in my critique of *Lemon v. Kurtzman.* They provide the foundation for the forthcoming solution to the paradox of educating in a pluralistic society. These three principles are: 1) the assertion of moral authority defines religion; 2) a position of moral authority is a fundamental element of inculcative education; and 3) censorship is inescapable in education, or in other words, moral neutrality is a myth.

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relevant to the curriculum, or better written, or when one of a host of other politically neutral reasons is present[;] these decisions obviously will not implicate First Amendment values.").

106. 393 U.S. 97 (1968).

107. *Mobile County,* 827 F.2d at 694.

1. *Religion is defined by moral authority*

Religion involves the worship or admiration of that which is good. In defining that which is good, mankind has many differences. These differences translate into the world's many religions. The religious is differentiated from the moral by accrediting some diety as the source of goodness. The moral merely consists of that which is "of or relating to principles of right and wrong, conforming to a standard of right behavior."[108] Authority is defined in Barron's Legal Dictionary as, "the permission or power delegated to another."[109] Moral authority then, is the permission, power, or right to say what is true or correct—to define the standard. As postmodern thought has further exposed, or possibly created, the pluralistic and relativistic nature of man and society, the power and authority to declare that which is moral has vanished. One may safely say what is truth for one's own self. No adult, however, can authoritatively decree that which is right or wrong for another adult outside of an understood context.[110] Religion provides consenting groups of individuals with a common context for interpreting right and wrong.

In essence, traditional religion is the acceptance by an individual of a moral authority posited outside of the self. For example, the Catholic faith sets forth certain tenets, which constitute assertions as to what is right and wrong. Those who accept these tenets may rightly be considered Catholics. They have chosen to give moral authority to the Catholic Church. The freedom to give moral authority to entities of one's own choosing is protected by the Constitution.[111] The Constitution's protection of religion is certainly not limited to the size of the organization. Even small denominations or religious sects have their mode of worship protected by the Constitution.

The dictionary defines a sect as, "a dissenting religious body, a religious denomination, or a group adhering to a distinc-

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108. THE NEW MERRIAM-WEBSTER DICTIONARY 477 (1989).

109. BARRON'S LEGAL DICTIONARY 36 (3rd ed. 1991).

110. For example, a relationship, such as membership in a church, is created by mutual consent. Authority for that organization determines right and wrong within the context of that organization. However, the context of this life is beyond any unconsented control. At least, that is the presumption upon which the Bill of Rights is based.

111. Though this freedom is not present for all under the current public education system, it was intended for all Americans by Madison. *See* Part VI. Section A. *infra*.

tive doctrine or leader."[112] A dissenting religious body is a group of individuals who have removed the moral authority from the denomination to which it was originally granted, and given it to a new entity. A second definition characterizes a religious denomination by a particular world view.[113] The third definition involves granting moral authority to another individual or distinctive doctrine.[114] Thus, a sect could be composed of a single individual who has given moral authority to a distinctive doctrine.

The Constitution protects principles of religious freedom, so that all citizens may worship according to the dictates of their own conscience.[115] The Constitution, however, does not limit this principle by requiring the formation of a traditional church, a numerical minimum of believers, or even that the moral authority be given to three letters ordered G-O-D. An athiest does not forfeit his or her constitutional rights when he or she cannot or does not believe in God.

Religion is the power or freedom to give personal recognition to a person, to a doctrine, or to an organization, of that person's, that doctrine's, or that organization's authority to be or to say truth. Religion is by definition dispositive. Even that moral authority which asserts for itself that everyone's perspective is valid, invalidates all perspectives that claim dispositive truth. Moral authority is the answer to the question, "Who says?" As such, it is the defining element of religion.

2. *Secular humanism has moral authority*

"The public schools in this country are organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion," stated Justice Black in *Everson.*[116] While public education has been justified in the past by this assumption, con-

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112. *Supra* note 107, at 655.
113. *Id.*
114. *Id.*
115. Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) ("The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion").
116. *Everson*, 330 U.S. at 23-24.

flicts that have arisen over the last fifty years in teaching even basic subjects, such as science and history, provide evidence that this premise is simply not true.[117] Even basic science and history courses run into conflicts between belief systems claiming authority for truth.

In 1973, the Court began to face difficulties determining the line of separation between church and state with the *Lemon* test. In *Committee For Public Education And Religious Liberty v. Nyquist,* the Supreme Court clarified the neutrality prong.[118] In *Nyquist,* a New York statute providing tax breaks to families whose children attended a nonpublic school was deemed to violate the Establishment Clause. In four different opinions, the Justices came together just enough to clarify the neutrality prong. They modified it in *Nyquist* to mean, "the action in question must . . . have a primary effect that neither advances nor inhibits religion."[119] In the field of education, where any one thing is taught to the exclusion of another, the possibility of neutrality is itself suspect.[120]

Assuming for the sake of argument that teaching from a purely secular perspective could lack moral authority, the child's time and mental energy are limited resources. The opportunity costs of a child expending those resources in learning from a source that (for the sake of argument) lacks moral authority is the time and mental energy that could be applied in learning the religion and culture of his or her family.[121] Secular humanism has moral authority.[122] In other words, it declares truths. Because our society is pluralistic, it cannot tolerate the

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117. Note, *Freedom of Religion and Science Instruction in Public Schools,* 87 Yale L.J. 515, 523-26 (1978) (teaching evolution in public schools undermines belief in many major religions).

118. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); *accord* Edwards v. Aguillard, 482 U.S. 578 (1987) (Louisiana statute mandating equal treatment for Creation-Science and Evolution-Science is ruled unconstitutional); *see also* Malnak v. Yogi, 592 F.2d 197 (1979).

119. *Id.* at 773.

120. *Supra* note 116.

121. "The cost of choosing to use resources [such as time or money] for one purpose . . . [sacrifices other] alternatives[s] for using those resources." DAVID H. HYMAN, ECONOMICS 14 (2d. Instructor's Ed. 1992). Furthermore, when we "allow [state mechanisms] to decide who can best provide a child intellectual stimulation [we] [] chill the propagation and perpetuation of disfavored political, philosophical, and religious views." *In re* J.P., 648 P.2d 1364, 1376 (Utah 1982).

122. ARONS AND LAURENCE, *The Manipulation of Consciousness: A First Amendment Critique of Schooling,* 15 Harv. C.R. C.L.L. Rev. 309, 316-317 (1980). *Cf. The Humanist Manifesto II,* 33 HUMANIST 4-10 (Sept. - Nov. 1978).

government's use of secular humanism in dominating the teaching of its youth anymore than it could tolerate a state church.

Public education is based on the premise that secular teaching can lack moral authority. This premise, however, is flawed. Inculcative teaching must contain a source of moral authority, for at the moment education becomes divested of moral authority, it loses its capacity to teach.

3. *The position of moral authority inherent in education*

Three traditional ideas regarding the government's proper role in education posit moral authority in different places. Amy Gutmann termed these three ideas as "the family state," "the state of families," and "the state of individuals."[123] In the family state, moral authority is given exclusively to the government.[124] In the state of families, moral authority is given exclusively to the parents.[125] The state of individuals simply denies the right of parents or government to choose what moral authority will shape a child's development.[126] Jonathan Marks remarks concerning Gutmann's analysis, "[t]he problem remains: education cannot and should not be morally neutral."[127]

Two basic functions occur in the process of inculcative education. First, the learning individual accepts that the teacher will provide accurate and meaningful knowledge. Second, the teacher determines what will be provided as accurate and meaningful knowledge. The first function deals with the location of moral authority. The second deals with the censoring effect moral authority has in educating.

Inculcative education requires the simple submission of an individual to an accepted authority. In effect, a position of moral authority determines what is to be taught and how. Inculcative education contains moral authority passing on its discernment. In other words, a censorship which a student has voluntarily accepted.

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123. GUTMANN, *supra* note 4, at 22.
124. *Id.* at 22-28.
125. *Id.* at 28-33.
126. *Id.* at 33-41.
127. Jonathan Marks, *Amy Gutmann's Democratic Education*, 86 MICH. L. REV. 1140 (1988) (book review).

Plato wrote, "The first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad; and we will desire mothers and nurses to tell their children the authorized ones only. Let them fashion the mind with such tales[.]"[128] Plato envisioned what would clearly be a "family state" according to Gutmann's classifications. This quote, however, illustrates well the censorship inherent in education. The process of developing a curriculum involves the passing on of discernment in the form of what information is deemed worthwhile, or in Plato's view, "establishing a censorship."[129] When this concept is combined with the realization that any perspective is to some extent fiction, then the truth of substantive relativism in a pluralistic society comes to light. Any position attempting to assert authority can only assert a subjective authority and not an objective truth.[130]

Authority to control information must be asserted in order to educate.[131] Efforts by the government to control the information that teachers would have selected to teach, or in other words, to free the student from the teachers' censoring, does not free a student from censorship. Censorship may not be censored without simply recreating the location at which the censorship occurs. Academic freedom is not challenged by censorship. The absence of a teacher's freedom to censor challenges academic freedom. Censorship is an inevitable aspect of education. The question is where the censorship lies, and who gets to determine that line. The fight within education is the same fight that divided the people in the days of Madison: Who gets the requisite moral authority to determine what is relevant, what it true?

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128. PLATO, REPUBLIC, 62 (B. Jowett trans., Dolphin Books ed. 1960).

129. *Id.*

130. The exception to this rule arises through the development of organizations. Truth can be objectively determined within the declared value system of a particular organization.

131. The attempt at teaching objective truth in a pluralistic society which possesses a wide variety of values and many positions of moral authority opens one up to charges of censorship, blasphemy, or superstition. Teaching inherently includes a degree of censorship. Inculcative teaching involves the passing on of valued information from some authoritative position to be accepted as truth. Even analytic teaching involves a censorship. The difference in analytic teaching is that the students, being sufficiently informed of choices, choose their own particular position to accept as authoritative. They may even, as with secular humanism, set themselves up as authoritative.

B. *Citrus Gone Sour: The Lemon Test*

There is no need to investigate beyond *Mobile County* to uncover the failings of the Lemon test. The functionality of the Lemon test should have been placed on trial by the issues raised in *Mobile County*. To adequately address the complaint brought forth in *Mobile County*, a court must define religious belief and it must adopt a disinterested test to measure the constitutionality of the textbooks. The court refused to define religious belief and the test it used was based on the very principle [the religiosity of secularism] that was at issue.

1. *Judicial malpractice*

The Eleventh Circuit Court begins the discussion in *Mobile County* by noting that, "the Supreme Court has never established a comprehensive test for determining the 'delicate question' of what constitutes a religious belief for purposes of the First Amendment."[132] From the very first paragraph of the discussion, the Eleventh Circuit had no intention of trying to define religion. Yet, determining what is religious, and therefore protected by the First Amendment, is the substantive issue of *Mobile County*. The court continues, "we need not attempt to do so [define a religious belief] in this case[.]"[133]

The plaintiffs allege that secularism is a religion. The court's neglecting to establish a legal definition of religion prevents that charge from ever receiving a hearing. The court writes, "The effect prong [of the Lemon test] asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[134] If government identification with religion conveys such a message of government endorsement or disapproval of religion, then "a core purpose of the Establishment Clause is violated."[135] Because the court still has no usable definition of religion, the court simply adjudicates the case as if secularism were a religion. But the plaintiff's charge that secularism is a religion. If there is judicial malpractice, applying a test of secu-

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132. *Mobile County*, 827 F.2d at 689.
133. *Id.*
134. *Jaffree*, 472 U.S. n. 42 at 56; *quoting Lynch*, 465 U.S. at 690.
135. *Ball*, 473 U.S. at 389.

larism to determine whether a religion of secularism (secular humanism) is sufficiently secular would certainly qualify.

The court's test should not be the "secular nature" of the textbooks. If secularism is a religion, then by substitution, the court's opinion reads, "[f]ocus exclusively on the secular (substituting secular for religious) component of any activity would inevitably lead to its invalidation under the Establishment Clause."[136] Clearly, if secularism is a religion, the court has made a stark endorsement for the religion of secular humanism. Continuing with the substitution, the courts explanation reads, "[r]ather, the message conveyed is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making. This is an entirely appropriate (substitute religious for secular) effect."[137] Recall Scalia's dissent referring to the Lemon test as a monster. How was this little monster ever formed? Perhaps the devil is its father. Of course, I refer to a purely secular devil that wears all-red superman suits and carries a full-size fork.

How can a charge incriminating secular humanism as a religion be resolved with the second prong of the Lemon test? By charging that secularism is a religion, the complaint accuses the test itself of being in violation of the Establishment Clause. The Lemon test was not a problem for the court to overcome, rather it was the court's method of reaching the conclusion it desired while sidestepping difficult issues.[138]

The problem for the Eleventh Circuit Court came from the implications of logical conclusions. If secular humanism is a religion, virtually nothing requiring a position of moral authority could be taught in a public school without violating the Establishment Clause. Although the court in *Mobile County* attempted to escape this conclusion, the nature of moral authority sheds light on why this conclusion holds true. If secular humanism is not a religion, then the court has established a position of moral authority that is in direct opposition to theistic religion. When the court decided that it would, for the purposes of this

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136. *Lynch*, 465 U.S. at 679-80.

137. *Mobile County*, 827 F.2d at 692.

138. Recall Scalia's dissent in *Lamb's Chapel*, *supra* note 68 and accompanying text.

trial, treat secular humanism as a religion, it backed itself into a corner.

2. *Endorsement of religion*

The court employed a clever twist on *Lynch*-ian principals in the way it treated secular humanism as a religion. In *Lynch,* the Supreme Court ruled that an impermissible advancement of religion must amount to an endorsement of religion.[139] Ironically, the very case the district court used to find a violation of the Establishment Clause is now applied by the circuit court to determine the absence of any violation. The circuit court states, "[the] mere consistency with religious tenets is insufficient to constitute unconstitutional advancement of religion."[140] Thus, just because secular humanism is secular does not mean that the secular nature of the textbooks advances secular humanism. However, as clever as this analysis may be, it misses the central characteristic of how a religion is endorsed.

The court noted, "[i]t is true that the textbooks contain ideas that are consistent with secular humanism; the textbooks also contain ideas consistent with theistic religion."[141] In fact, the textbooks provided a list of ideas which were consistent with both.[142] The court failed to recognize, however, that it is not the *number* of commonalities that determines whether or not a religion is being endorsed. Whether a religion is endorsed is determined by the *source* that is accredited with providing meaning to those ideas.[143] The district court attempted to illustrate this distinction with its argument that "if, in so doing it [the State] advances a reason for the rule, the possible different reasons must be explained evenhandedly." It concluded that "the state may not promote one particular reason over another in the public schools."

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139. *Lynch,* 465 U.S. at 681.

140. *See Epperson,* 393 U.S. at 107 (*quoting* Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952) ("The state has no legitimate interest in protecting any or all religions from views distasteful to them").

141. *Mobile County,* 827 F.2d at 692.

142. Smith v. Bd. of Sch. Comm'rs, 655 F. Supp. at 988.

143. For example, a textbook may teach that smoking is bad without endorsing Mormonism. However, when a textbook instructs that smoking is bad because a Mormon prophet said that God said so, then the textbook has accredited a specific source with the meaning to those ideas.

From a Christian perspective, neutrality is not even a possibility. Christ said, "He that is not with me is against me; and he that gathereth not with me scattereth abroad."[144] What does it mean to be with Christ from a Christian perspective? Christ said, "I seek not my own will, but the will of the Father."[145] In the Lord's Prayer, he prayed, "Thy will be done in earth, as it is in heaven . . . For thine is the kingdom, and the power, and the glory, for ever. Amen."[146] In other words, a Christian seeks two things: one, to do the will of the Father on this earth; and two, to give God the honor and the credit in everything. Those who do not give God the credit are not with Christ and such an individual, "scattereth abroad."[147]

This principal is understood by Jonathan Marks in his book review of *Democratic Education.* He writes, "Neutrality among virtues is itself controversial. Indifference among virtues offends supporters of moral education as much as instruction in only one view of the good life represses those who favor a different view."[148] The court clearly should have realized that neutrality is impossible when choosing between positions of dispositive moral authority.

Now that local government is tied by the 14th Amendment to the Constitution, Jefferson's model of public education clearly violates First Amendment freedoms. Madison's solution to pluralism, however, if applied provides general education without violating constitutional rights.

VI. MADISON'S SOLUTION APPLIED TO EDUCATION

Current educational practices are based on a Jeffersonian model.[149] Contrasting the oppressive destination of Jefferson's vision of public education with the freedoms gained by applying Madisonian principles to education emphasizes the consistency and constitutional harmony that would be gained by separating government from education.

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144. *Matthew* 12:30 (King James).
145. *John* 5:30 (King James).
146. *Matthew* 6:10-13 (King James).
147. *Supra* note 144.
148. Marks, *supra* note 127.
149. *Supra* note 15.

A. *Madison's Freedom of Conscience*

Because the Madisonian solution is not even possible without individual freedom of conscience, Madison fought zealously for a supreme protection for individual conscience. This zeal is manifest in Madison's lifelong advocacy of free press, religion, and education.[150]

Neal Riemer said that in Madison's treatment of pluralism in a democracy he achieved "a creative breakthrough to the dilemma of pluralism, a successful resolution of a troubling problem."[151] In Madison's days, conventional wisdom knew there could only be one true faith and that it was the duty of the ruler to uphold that faith.[152] Madison's problem was simply how to reconcile the condition of religious diversity with these two propositions. "There is only one true faith," every group said, "and it's ours!"[153]

The attempt to reconcile liberty and authority drove Madison and his politics until his death. This is evidenced by his efforts in the creation and ratification of the Constitution. This is also evidenced by Madison's politics in the early years of the Republic. In his letters and speeches refuting Calhoun's theory, Madison illustrated that Calhoun's theory contained only two logical consequences, anarchy or tyranny.[154] In other words, Madison reasserted freedom in politics by diminishing control of any specific faction.

> Is a bill of rights a security for religion? Would the bill of rights in this state exempt the people from paying for the support of one particular sect, if such a sect were exclusively established by law? If there were a majority of one sect, a bill of rights would be a poor protection for liberty. . . . This freedom arises from the multiplicity of sects which pervades America, and which is the best and only security for religious liberty in any society.[155]

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150. For Madison, "free" would have meant a separation from governmental involvement, not a negligible price tag.

151. NEAL RIEMER, *cited in* THE POLITICAL THEORY OF THE CONSTITUTION 4 (Kenneth W. Thompsen ed., 1990).

152. *Id.* at 5, n. 40.

153. *Id.* at 6.

154. *Id.* at 10.

155. ROBERT A. RUTLAND, THE POLITICAL THEORY OF THE CONSTITUTION 157 (Kenneth W. Thompsen ed., 1990). *See also* note 7, PAPERS OF JAMES MADISON 11:130.

B. Two Paths to Freedom

The principle difference between Jeffersonian and Madisonian models in the area of education arises in the way they view the path to freedom. For Jefferson, the path is restricted in order to preserve wisdom and virtue. For Madison, the path must be free, even though that freedom risks a loss in virtue. Jefferson's censorship lines are determined by the state in order to develop individuals to perpetuate freedom. Madison's lines of censorship are determined freely by faction in order that the government be perpetuated free of tyranny.

1. Jefferson's Model of Education

Jefferson's revolutionary perspective regarding education leads to extensive and potentially Orwellian power placed in the government. Over the last century, Jefferson's ideas on education have been cited and followed. Both his concern for universal education and advocacy of educating for autonomy are based on the premise that this type of education increases the liberty and happiness of the people as a whole. Madisonian ideas on education do not differ. However, in Jefferson's model for achieving these ends, the necessity of education has a deeper and more troubling purpose. He believed with other founders that public education was a necessary part of government in order to sustain the republic.

> As for the future, they did not propose to leave it to chance . . . Concern with reforming the American public to ensure that it would contain an ample supply of virtuous men in the future had, of course, occupied the Patriot constitution makers, who had provided for educational and religious institutions that were designed to inculcate virtue.[156]

Jefferson believed that schools were, "the ultimate check on the checks and balances in republican constitutions."[157] If edu-

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156. HAROLD HELLENBRAND, THE UNFINISHED REVOLUTION: EDUCATION AND POLITICS IN THE THOUGHT OF THOMAS JEFFERSON 190-91

157. *Id.*

cation is indeed the "ultimate check," it seems somewhat inconsistent and dangerous to place this check in the hands of the very government on which it is, at least theoretically, a check and a balance. Because Jefferson's ideas on education are for the maintenance of the state, personal liberties are much sacrificed on the way to personal autonomy.[158] Concerning educating for autonomy, Blustein wrote, "Although children and youths could not be granted complete autonomy before they came of age, educators had to nurture a 'self-critical ability,' so that the next generation could gain the freedom, not to break away completely, but rather to agree wilfully with their elders' basic principles."[159] Blustein's ideas conform closely with Jefferson's. His revolution wasn't so much a change in the nature of the order as it was a change on how the cream got to the top. Waggoner writes, "most importantly, Jefferson hoped the establishment of a system of public schools, as proposed in the bill, (Toward the General Diffusion of Knowledge), would elevate the mass of people to the moral status necessary to insure good government and public safety and happiness."[160] Jefferson believed that in order to guarantee a republican form of government, the government would, of necessity, be required to take on the duty to educate the populace.

However, free governments, by their very commitment to freedom, cannot guarantee perpetuation. If the democratic government has a duty to educate the populace, the rationale is that this duty is for the people to be better able to participate in the legislative process. However, to control the education of those participating in the legislative process, the government would clearly also have to control the media.[161] When a free government ensures goodness, safety, perpetuation, and happiness, it does so only at the expense of the freedom to be bad, dangerous, and miserable. Hellebrand noted this irony in Jefferson's educational ideas when he wrote, "Always suspicious of government's tendency to usurp people's prerogatives, Jefferson nonetheless championed schools and social legislation that

158. Ironic that the man who penned the phrase, "government by the people," espoused ideas that, when followed to their logical conclusion, over time actually lead to a people by the government, especially with the Fourteenth Amendment in place.

159. BLUSTEIN, *supra* note 21, at 132.

160. WAGGONER, *supra* note 13, at 23.

161. This obvious First Amendment violation is beyond the scope of this paper.

sought to impress on the minds and hearts of Virginia the stamp of his own peculiar strain of republicanism."[162]

2. The Madisonian Solution

In forming the Union, Madison and the framers faced a paradox previously unsolved in the governments of the world. To control the force of a powerful faction requires that some greater power be posited in a checking entity. What then was to check the control of the greater power? The world had not developed a system to avoid oppression from one of two extremes: on the one, that individual rights were easily abused in the anarchy of weak government; on the other, that in retaining power sufficient to control competing interests, government became tyrannical in the absoluteness of its power. The great American solution advocated by Madison presented a method of countering power, not with greater power, but with power dispersed sufficiently to pre-empt the possibility of power sufficient to control others. The threat of having one central entity possessing power to control the exercise of individual development was bypassed by the dispersing of that power to as many units of opinion that the people cared to assert.

Applying Madison's solution to education reveals how a plurality of interests in education can be validated without infringing on constitutional rights. Madison began by defining "faction." "By faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united or actuated by some common impulse of passion or of interest, adverse to the rights of other citizens, or to the permanent or aggregate interests of the whole."[163]

Applying Madison's working definition of faction to education, society is divided into a number of factions regarding choice of curriculum, standards, and methods of teaching. Madison continued, "There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects. There are again two methods of removing causes of faction: the one, by destroying the liberty which is essential

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162. HELLEBRAND, *supra* note 11, at 13. In other words, Jefferson, in principle at least was foreshadowing the famous revolutionary maxim of Fidel Castro, "within the revolution, everything; against the revolution, nothing." (quoting GREGORY H. FOX AND GEORGE NOLTE, *Responses*, 37 Harv. Int'l L.J. 231, 236.

163. THE FEDERALIST NO. 10, at 78 (Clinton Rossiter ed., 1961).

to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests."[164]

The modern method of public education, or Jeffersonian model, attempts to cure causes of faction by standardizing education. The standard has been formed by the Lemon test. Currently, it is dictated by secular humanism. This model has destroyed the liberty essential to the existence of factions and differences by replacing individual choice with a government standard. Secular humanism and its political correctness provides a standard of opinions, feelings, and values which public schools attempt to inculcate into the citizenry from childhood.

Madison dismisses the first method, of controlling faction with a greater powered faction, as counterproductive in that the liberty for the greatest faction (the state) is only obtained through the loss of freedom for lesser factions (groups of parents with common values). Madison dismisses the second method, of developing a consensus and uniformity, as unrealistic. Even Orwell's Big Brother State could never stamp into humanity the same opinions, passions, interests, and agendas.[165]

3. *Of Evil Bedfellows*

This essay does not aim to find fault with the intentions of the judiciary. After all, can it really be evil to desire the education and happiness of everyone, even for all the children? Yes. When the process by which that dream is pursued violates the principles by which that dream exists, the benevolence of a nice government does nothing to ease the violence to freedom. The good intentions of the courts do not alleviate the type of constitutional violations currently perpetuated by public schooling. Freedom is not a result or destination. It is in the journey. It is the agency of man, preserved in its independence, only curbed by the state when choices would harm third parties. The lack of individual choice in the educational processes designed by "nice" governments and "mean" governments differs only slightly, if at all. The following examples have four common goals: 1) they advocate free education; 2) they advocate compul-

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164. *Id.*

165. GEORGE ORWELL, 1984 (1949). However, it should be noted that the government in that novel did set up a system to try. That system did succeed on specific individuals.

sory education; 3) they advocate state provided education; and 4) they recognize the role of education in providing the child with the desired cultural values.

Adolph Hitler wrote:

> It is of paramount interest to the state and the nation to prevent these ["splendid people"] from falling into the hands of bad, ignorant, or even vicious educators. The state, therefore, has the duty of watching over their education and preventing any mischief. . . .it must not let itself be . . . talked into neglecting its duty and denying the nation the food which it needs and which is good for it; with ruthless determination it must make sure of this instrument of popular education, and place it in the service of the state and the nation.[166]

Karl Marx and Frederick Engels wrote:

> Do you charge us with wanting to stop the exploitation of children by their parents? To this crime we plead guilty.
>
> But, you will say, we destroy the most hallowed of relations, when we replace home education by social [education].
>
> The bourgeois clap-trap about the family and education, about the hallowed co-relation of parent and child . . . [is] disgusting . . . .
>
> The proletariat will use its political supremacy to wrest, by degrees, all capital from the bourgeoisie, to centralize all instruments of production in the hands of the state . . . .
>
> [I]n the most advanced countries the following [methods] will be found pretty generally applicable: [ten items listed]. . . .
>
> 10. Free education for all children in public schools. . . .[167]

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166. ADOLPH HITLER, MEIN KAMPF 242 (Ralph Manheim trans., Houghton Mifflin Co. 1971) (1925) (Incidently, page 426 contains the passage, "Science, too, must be regarded by the folkish state as an instrument for the advancement of national pride. . . ."); *cited in* Comment, "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment,*" 1996 B.Y.U. L. REV. 183, 244 n.209 (vol. 1).

167. KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO 33-34, 39-40 (Paul M. Sweezy trans., Modern Readers Paperback 1968) (1952); *cited in* Comment, "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment,*" 1996 B.Y.U. L. REV. 183, 245 n.211 (vol. 1).

Saddam Hussein wrote,

> [W]e find it inadequate to give the young the same kind of general attention given to society at large. To enable our youth to participate actively in the transformation process, we must . . . allocate for them a special programme in addition to the general one. . . . With the correct fashioning of our youth as a result of this approach, we shall safeguard the future and ensure [their] full utilization . . . in the service of the revolutionary aims.[168]

He wrote that because, "youth have no social awareness or political affinities . . . the Party and the State should be their family, their father and mother.'"[169] Daniel Witte comments, "Saddam Hussein implemented his philosophy by enacting 'laws for . . . compulsory education.'"[170]

Of course, it was our own Justice Warren who wrote,

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values . . .[171]

Surely our democratic government reflects cultural values. It must never, however, be given the power to define and stan-

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168. SADDAM HUSSEIN, SOCIAL AND FOREIGN AFFAIRS IN IRAQ 55-61 (Khalid Kishtainy trans., 1979) (1976); *cited in* Comment, "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment,*" 1996 B.Y.U. L. REV. 183, 246-47 n.212 (vol. 1).

169. EFRAIM KARSH & INARI RAUTSI, SADDAM HUSSEIN: A POLITICAL BIOGRAPHY 176-77 (1991) (footnote omitted); *cited in* Comment, "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment,*" 1996 B.Y.U. L. REV. 183, 247 n.212 (vol. 1).

170. Comment, "People v. Bennett: *Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment,*" 1996 B.Y.U. L. REV. 183, 247 n.212 (vol. 1).

171. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

dardize those cultural values. Madison notes that the diversity of opinion, passion, and interest is the mainstay of the democratic republic. He did not note uniformity or standardization as having any such virtue. He wrote, "The diversities in the faculties of men . . . is not less an insuperable obstacle to a uniformity of interests. The protection of these [diverse] faculties is the first object of government."[172] Madison thus concludes that the cause of faction cannot be removed, and still preserve freedom. This conclusion mirrors the necessary condition of censorship in education. Once the existence of faction and the presence of censorship are accepted, the proper management of their strengths becomes the purpose of government. Because government cannot decree what aspects of faction or censorship are positive or negative, it must only provide structure that allows the citizenry to determine what faction and line of censorship are positive. Government must also avoid the prevention of faction; it cannot determine the educating lines of censorship.

VII. CONCLUSION

Education is vital to the perpetuation of a free state. Separation of religion from government is likewise vital to conditions of freedom. The failure of the early developers of general education to understand the connection between religion and education contributed to the rise of public education. Public education has become a special case for the courts. The courts have repeatedly carved out constitutional exceptions to keep the system running. Although the courts have tried to balance conflicting interests, it is an exercise in futility. Nearly the entire Bill of Rights has been suspended for the purpose of maintaining public schools.

The courts have used the *Lemon* test to minimize the effects of the violations of fundamental rights that occur in public education. However, over the years it has become increasingly inadequate. *Mobile County* put the *Lemon* test on trial. Using a test based on secularism to measure the religious nature of secularism puts juice on a wound from which many are already bleeding constitutional rights. Faced with the dilemma of ending public education, the court evaded the issues.

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172. *Supra* note 162.

The process of education gives an individual a voice, a set of beliefs, and an understanding of the multitude of other voices with equal claim to choice. Through this process, education facilitates the individual's passing from dependence through independence to autonomy and interdependence. The process by which beliefs, terministic screens, and cultural values are developed must not be under the responsibility and control of government.

Censoring education will be provided. This will occur, be it on the street, by parents, by private schools, or by religious schools. It will declare truths and credit some authority for those truths. The credit must go somewhere. Secular humanism merely relocates the moral authority from some theistic Supreme to the cumulative thoughts and ideas of man. Many individuals will surely choose a school teaching from that perspective. However, this cannot be the standard. The central purpose of Madison's solution provides power sufficient to protect an individual's freedom of conscience without creating power great enough to destroy the individual's freedom of conscience. Madison's basic theories concerning freedom of religion locate the decision making power in the hands of the smallest possible individual unit. They illustrate which educational philosophies secure the protections embodied in the Constitution.

A religious belief is that which contains moral authority. Religious beliefs can be protected in education by (voucher system) retaining within the family as much choice as possible. Can a system be developed that maximizes the educational opportunities for children while minimizing individual loss of choice?

The answer lies with understanding moral authority in a pluralistic society.[173]

Thomas Marvan Skousen

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173. Moral authority is the answer to the question, "Who says?" The answer really doesn't matter because there is no way of proving that which in actuality is a choice. Nor is this answer relevant. Who gets to answer that question? The answer to that is vital. The answer is clearly, unequivocally, any living individual . . . and never, never, never, never any government.