5-1-1979

A Dubious Neutrality: The Establishment of Secularism in the Public Schools

Paul James Toscano

Follow this and additional works at: https://digitalcommons.law.byu.edu/lawreview

Part of the Education Law Commons, First Amendment Commons, and the Religion Law Commons

Recommended Citation
Paul James Toscano, A Dubious Neutrality: The Establishment of Secularism in the Public Schools, 1979 BYU L. Rev. 177 (1979). Available at: https://digitalcommons.law.byu.edu/lawreview/vol1979/iss2/1

This Article is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.
A Dubious Neutrality: The Establishment of Secularism in the Public Schools

Paul James Toscano*

I. INTRODUCTION

The sensitive environment of the public school forms a fertile medium for the conflict between church and state. Out of this fragile complexity of the church-state relationship spring a number of fundamental questions. What does the Supreme Court mean by the term “religion” when it is used in establishment and free exercise clause cases? Does it define the term consistently? Does religion refer only to some belief in God and the supernatural? Or does it refer to any belief system—whether theistic, nontheistic, atheistic, or antitheistic? When the Court mandates religious neutrality in the public schools, what precisely is it demanding? Is it merely asking government to treat religion in a neutral way—a hands-off policy? Or is it going further and asking that public schools maintain an intellectual environment entirely devoid of religious ideas and influence? In either case, is religious neutrality possible?

It is the purpose of this Article to explore these and other questions to determine whether the religious neutrality required in the public schools is real or illusory, and to suggest an alternative to the Court’s present religious neutrality doctrine.

II. THE MEANING OF RELIGION IN THE RELIGION CLAUSE CASES

In this century, beginning with Pierce v. Society of Sisters

* B.A., 1970, M.A., 1972, Brigham Young University; J.D., 1978, J. Reuben Clark Law School, Brigham Young University. Adjunct Faculty Member, Brigham Young University. Member, Utah State Bar.

1. U.S. CONST. amend. I. In the case of Cantwell v. Connecticut, 310 U.S. 296 (1940), the Supreme Court applied the first amendment to the states via the fourteenth amendment.

2. 268 U.S. 510 (1925). The Supreme Court invalidated a 1922 Oregon statute requiring “every parent, guardian or other person having control or charge or custody of a child between eight and sixteen years to send him ‘to a public school.’” Id. at 530. The Court brought suit to prevent the abridgement of its property rights since the enforcement of the statute would require a number of the Society’s parochial schools to close. The Court held that “the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.” Id. at 534-35.
and later in such cases as *Everson v. Board of Education,* United States v. Ballard, *Zorach v. Clauson,* Engel v. Vitale, United States v. *Seeger,* *Lemon v. Kurtzman,* and Wolman v. Walter, the Supreme Court of the United States has attempted to delineate the proper relationship between government and religion and to determine, under changing circumstances, what constitutes an impermissible establishment of religion or an impermissible abridgement of the free exercise thereof. Because of the ever-present conflict between the government's interest in providing compulsory education in the public schools and the interest of many parents in directing the religious upbringing of their children, it is not surprising that the Court has frequently found itself interpreting the religion clauses of the first amendment in a school setting. What is remarkable about these cases, however, is the conspicuous absence in them of a consistent formal definition of the term "religion."

This is not to say, however, that an informal definition has

---

This holding allows parents the right to seek reasonable alternatives to the public schools, thus making unconstitutional any state monopoly over school programs.


4. 322 U.S. 78 (1944). *Ballard* involved the use of the mails in the promotion of a religious program called the "I am" movement. The question of the truth or falsity of the religion as well as of the sincerity of its promoters was at issue. The trial court ruled that religious truth or error was not a justiciable question, but that the good faith of the adherents was. The court of appeals believed, however, that the sincerity question could not be severed from the truth issue; so it reversed the decision of the district court. The United States Supreme Court reversed the court of appeals, holding that religious doctrines may not be put on trial and that no one may be punished for his religious opinions, no matter how implausible they may be. Justice Douglas, writing for the Court, said, "The First Amendment does not select any one group or any one type of religion for preferred treatment." Id. at 87.


9. 433 U.S. 229 (1977). Citizens and taxpayers brought an action challenging the constitutionality of provisions of an Ohio statute authorizing the expenditure of public funds to aid students of nonpublic elementary and secondary schools. Of the 720 nonpublic schools in Ohio, only 29 were nonsectarian. Of the total students enrolled in nonpublic schools in Ohio, 92% attended Catholic schools and 4% attended schools sponsored by other sects.

A three-judge district court upheld the statute, and the citizens and taxpayers appealed. On appeal the Supreme Court upheld the expenditure of public funds for (1) purchasing secular textbooks to loan to students, (2) using standardized testing and scoring services identical to those used by public schools, and (3) providing diagnostic and therapeutic services to the students. But the Court declared unconstitutional the use of public monies for (1) purchasing instructional materials and equipment and (2) providing transportation for field trips.
not evolved. In fact, two such definitions have evolved: the first is applied in establishment clause cases, the other in free exercise clause cases.

A. The Meaning of Religion in Establishment Clause Cases

In establishment clause cases, the term "religion" is applied by the Court in a very narrow sense to mean theistic or traditional institutional religion (e.g., "old-time religion"). This usage was made clear in *Everson v. Board of Education*,¹⁰ the Supreme Court's first modern encounter with the establishment clause. There the Court set forth its doctrine of religious neutrality.¹¹ In doing so, Justice Black, writing for the majority, described the centuries immediately preceding the colonization of America as "filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."¹² The unhealthy league between the European states and religious sects led to the political persecution of the religious dissenters: "In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed."¹³ According to the Court, "freedom-loving colonials," shocked by these very practices, set forth in the establishment clause of the first amendment their conviction that church and state must be separate.¹⁴ Thus, the *Everson* Court stated that the establishment clause requires that all public institutions, including public schools, must be entirely divorced from the sectarian influences that had caused much civil strife in previous centuries.

The Court reaffirmed this position in *Lemon v. Kurtzman*.¹⁵

---

¹⁰. 330 U.S. 1 (1947). In *Everson* a New Jersey statute allowing parents of parochial school children to be reimbursed by the state for expenses incurred in transporting their children to church schools was challenged by a local taxpayer as violative of the establishment clause. The New Jersey high court found no violation of the establishment clause; the United States Supreme Court affirmed.

¹¹. See 330 U.S. at 8. "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches."

¹². Id. at 8-9.

¹³. Id. at 9.

¹⁴. Id. at 11-13. "In the words of Jefferson, the clause against establishment of religion by law was intended to erect a 'wall of separation between church and State.'" Id. at 16 (citation omitted).

¹⁵. 403 U.S. 602 (1971). The Rhode Island Salary Supplemental Act of 1969 provided state aid to church-related elementary and secondary schools. The Act was attacked as unconstitutional. To aid the decisional process, Chief Justice Burger suggested that
In handing down its decision, the Court fashioned its now-famous three-pronged test for determining religious neutrality. The test can be set forth in the form of three questions. First, does the law under attack have a secular purpose? Second, does the primary effect of the law avoid either advancing or inhibiting religion? Third, does the statute avoid creating an excessive government entanglement with religion? If each of these questions can be answered affirmatively, then the law is religiously neutral and constitutional. But if the answer to any one of the questions is negative, the law is an unconstitutional attempt to establish a religion.

In formulating this test, the Court again made no attempt to formally define what it meant by religion or religious; however, something of an informal or working definition was fashioned. Chief Justice Burger, writing for the majority, explained that the district court "concluded that the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.'" The Chief Justice explained that although public funds could be used to purchase secular textbooks for parochial school students, such funds could not be used to pay the salaries of parochial school teachers:

We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. . . .

The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith.

This reasoning suggests that any program, practice, or idea is religious, and therefore cannot be established by government, if

"[t]hree . . . tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive governmental entanglement with religion.'" Id. at 612-13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)). The Chief Justice noted that in the Court's decisions from Everson to Board of Educ. v. Allen, 392 U.S. 236 (1968), states had been allowed "to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials." 403 U.S. at 616. Since the use of the funds provided under the Rhode Island law was not limited to these allowable functions, and since any state supervision to ensure such use would cause excessive entanglement anyway, the Court held the Act unconstitutional.

16. See 403 U.S. at 616.
17. Id.
18. Id. at 617-18.
it is "an integral part of the religious mission"19 of a given sect, or if "it is subject to the direction and discipline of religious authorities," or if it is a part of "a system dedicated to rearing children in a particular faith."20 Religion in this sense means any program, practice, or doctrine emanating from any institution that holds itself out as a religion or church per se or that has a clearly articulated mission to promulgate what it or others consider to be a religious ideology. The Court in Lemon, as in Everson, prohibited the establishment of traditional, theistic, institutional religions as typified by, but not limited to, any one of the many Judeo-Christian sects.

B. The Meaning of Religion in Free Exercise Clause Cases

A broader definition of the term "religion"—one that includes nontheistic as well as theistic belief systems—is applied by the Court in free exercise clause cases. This broader application is especially clear in the conscientious objector cases.21

In 1940 Congress attempted to define religion in a provision exempting certain individuals from the draft.22 The law exempted from military service any person refusing to serve on grounds that such service conflicted with his "religious training and beliefs."23 Because this definition embodied the notion of special "religious training," it was seen to favor only adherents to traditional pacifist religious institutions that provided that type of training. For this reason, the exemption was amended in 1948 to include as "religious training and belief" an "individual's belief in relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views or a merely personal moral code."24 Thus, adherents to individual as well as institutional pacifist religions were covered by the amended exemption. The law, even with this amendment, still preferred

19. Id. at 616.
20. Id. at 618.
23. Id. See also United States v. Seeger, 380 U.S. at 171, 184.
theistic over nontheistic religious views. In *United States v. Seeger* 25 this preference was invalidated. Justice Clark's majority opinion stretched the language of the exemption, which only benefited theistic believers, to avoid "imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others." 26 A contrary finding would have forced the Court to invalidate the exemption altogether.

The Court has expanded the meaning of the term "religion" in the draft law to include even nonreligious beliefs. This broadened definition has been applied in other free exercise clause cases as well. 27

Even atheism and agnosticism are religious beliefs under this view of the first amendment: 28 "[I]t does not matter whether the belief called into question is called 'religious' or 'nonreligious' or even 'antireligious.' For it is the freedom of thought that the First Amendment guarantees—thought that comprehends religious and any other kind of beliefs." 29 Freedom of religion, then, at least

---

25. 380 U.S. 163 (1965). Although not a school case, *Seeger* does impact on the meaning of religion in the first amendment. The Universal Military Training and Service Act provided an exemption for conscientious objectors who were opposed to participation in war by reason of their "'religious training and belief,'" further defined at that time as "'an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but [not including] essentially political, sociological, or philosophical views, or a merely personal moral code.'" *Id.* at 165 (quoting 50 U.S.C. app. § 456(c) (1958) (current version at 50 U.S.C. app. § 456(c) (1976))). When presented with the task of interpreting the Act, the Court held that a religion is any belief that is sincere and meaningful that occupies "the same place in the life of the objector as orthodox belief in God holds in the life of one clearly qualified for exemption." *Id.* at 184. This interpretation "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others." *Id.* at 188.

26. *Id.* at 176.


28. In *Everson* the word "Non-believers" was capitalized and listed along with denominational religions: "[New Jersey] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or members of any other faith . . . ." 330 U.S. at 16. The effect of this usage is to imply that "Non-believers" form a religious group like any of the other more traditional religious groups and enjoy the full protection of the first amendment guarantees.

The Fifth Circuit Court of Appeals has held that the definition of religion embracing only those ideologies grounded on a belief in a Supreme Being was improper since the criterion excluded, for example, agnosticism or conscientious atheism. *Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) (per curiam).

29. Konvitz, *The Meaning of "Religion" in the First Amendment: The Torcaso Case*, 197 CATH. WORLDS 288, 291 (1963). It has been suggested that humanism is also a religion:

In some details humanism is not like other religions. There are no buildings labeled "Church of Humanism" in your neighborhood, and humanist missionaries will not knock at your door. There is no organized humanist priesthood,
as far as beliefs are concerned, has come to mean more than the freedom to hold traditional theistic views; it means the freedom of conscience.

C. Summary

Supreme Court interpretations have imbedded two concepts of religion in the first amendment. The first is "the popular or conventional notion of religion, as distilled and rationalized by the courts, that cannot be established" by government. The second concept is "religion" that can be freely exercised within the limitations set down in Reynolds v. United States, referring to any belief system—whether it is conventional or unconventional, whether theistic or nontheistic. This two-sided definition of religion is responsible for an element of inconsistency in the first amendment, emphasized by the following paraphrase of its language:

Neither a state nor the federal government shall make any law respecting an establishment of religion, nor shall such government inhibit, support, advance, or become entangled with any traditional religious organization or any organization holding itself out as a religion, nor shall such government promote in any way any doctrine, ritual, program, or ideology that is an integral part of the mission of such organization; nor shall such government abridge the freedom to hold and express any belief system whatsoever, be it theistic, nontheistic, atheistic, or antitheistic.

although the unofficial priests of humanism are in high and low stations everywhere. But in its most significant respects humanism now is a religion, even if it is not a religion of the ordinary kind.


31. 98 U.S. 145 (1878).

Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? . . .

. . . To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Id. at 166-67.
III. THE MYTH OF RELIGIOUS NEUTRALITY

The term "neutrality" refers to the state or condition of not being on either side or inclined to either party in a dispute. To be neutral is to abstain from taking sides. Religious neutrality refers, presumably, to something more than merely refusing to take up with religion; to be religiously neutral, one must further refuse to take up sides with irreligion. However, the Court's two-sided application of the term "religion" has resulted in the development of a theory of religious neutrality that is, in fact, biased toward secularism and against theism.

A. The Meaning of Religious Neutrality in the Religion Clause Cases

The Court's neutrality theory was first enunciated by Justice Black in Everson:

Neither a state nor the Federal Government can set up a church. Neither can pass laws to aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

This doctrine has changed little since it was promulgated in 1947. As late as 1970, in Walz v. Tax Commission, Chief Justice

35. Everson v. Board of Educ., 330 U.S. at 15-16 (citation omitted).
36. 397 U.S. 664 (1970). The Court rejected, by an eight to one vote, a challenge to New York's property tax exemption for property used solely for religious purposes. Chief Justice Burger, writing for the majority, said: "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Id. at 669.
Burger reaffirmed that, although government must not be rigid in its position on the separation of church and state in the schools, the Court's neutrality doctrine has not changed. The first amendment continues to "insure that no religion be sponsored or favored, none commanded, and none inhibited. . . . [The Court] will not tolerate either governmentally established religion or governmental interference with religion."37

Practically speaking, the Court's religious neutrality doctrine has had far-reaching consequences. Religious instruction, even for those pupils who desire it and whose parents desire it, may not be given in public school buildings during school hours,38 and possibly not even after school hours.39 Schools may not require school children to recite set prayers.40 In fact, school chil-

37. Id.
38. The United States Supreme Court had held that sectarian training on public school premises violates the first amendment.

The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the state is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 231 (1948).

39. Although this question has not been squarely met, it is doubtful whether a local school board could constitutionally allow public school facilities to be rented or leased to religious organizations even after public school hours in light of the Court's holdings in Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948), in which the Court forbade the state from permitting the use of tax-supported school facilities for religious purposes, and in Tilton v. Richardson, 403 U.S. 672 (1971), in which the Court found the use for religious purposes of buildings financed with federal funds unconstitutional.

40. Engel v. Vitale, 370 U.S. 421 (1962). The New York regents prepared a nondenominational prayer for use in public schools. The practice of reciting this prayer each morning was challenged by parents, who claimed it was contrary to the "beliefs, religions, or religious practices of both themselves and their children." Id. at 423. The New York Court of Appeals upheld the prayer, but the United States Supreme Court reversed. Justice Black, writing for the majority, noted that prayer is a religious activity and continued: [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.

. . . . The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer Americans can say . . . .

. . . . The Establishment Clause . . . is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon
dren may not be required to participate in any religious devotional exercises. Government funds may not be used for the purchase of any religious textbook or for the construction of any building in which religious exercises or instruction will be held. Tax funds for public schools may not be used to reimburse parents who send their children to parochial schools. And government may not require any of its officials (presumably including public school educators) to take an oath of office that requires them to affirm their belief in God.

These examples clearly illustrate that there is to be no traditional religious influence in the public schools and neither public funds, nor facilities, nor resources may be used to promote religious devotion or education.

religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion.

Id. at 425, 429, 430-31.

41. School Dist. of Abington v. Schempp, 374 U.S. 203 (1963). High school opening exercises involving the recitation of the Lord's Prayer as well as the reading of Bible verses were held unconstitutional. The Court rejected the theory that the opening exercises had a secular purpose, namely, the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." Id. at 223. The Court was not convinced "that unless these religious exercises are permitted a 'religion of secularism' is established in the schools." Id. at 225.

42. Tilton v. Richardson, 403 U.S. 672 (1971). Title I of the Higher Education Facilities Act of 1963 provided construction grants to private colleges for buildings and facilities to be used for secular purposes. The United States retained a 20-year interest in the facilities. The Act did not allow any sectarian use during this period. Since the college would own the building after 20 years, it could then do with it what it pleased. The Supreme Court declared the Act unconstitutional insofar as it allowed the government-paid-for buildings to be used for sectarian purposes after the 20-year period ended.


We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Id. at 495.

45. The Court has stated:

The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. . . .

. . . The constitutional standard is the separation of Church and State.


In Zorach New York allowed its public schools to release students during the school day, on the written request of parents, to attend religious centers off the school grounds
In the Court's view, religious neutrality means the absence of any traditional, theistic influence in the schools.

While the Court has claimed to apply its concept of religious neutrality evenly in all religion clause cases, the two-sided definition given to the term "religion" by the Court has caused lopsided results. The Court, it is true, evenhandedly prohibits government hostility toward any religion, theistic or otherwise. But when it comes to positive activity, it allows government to aid, advance, and support secularism, while denying any such govern-

for religious instruction and devotional exercises. Those not released stayed in the classroom. The churches made weekly reports of those students released but not attending the church program. There was neither religious instruction in public classrooms nor the expenditure of public funds. Taxpayers brought suit alleging that the scheme violated the establishment clause.

The taxpayers argued that the school supported a program for religious instruction, that classroom activities came to a halt while the students were released for religious instruction, and that the school was a crutch on which the churches leaned to implement their religious training. In rebuttal, the respondents argued that no student was forced to attend religious instruction, that each student was allowed to select the manner or time of his religious devotions, if any, and that the school authorities were neutral with regard to any religious questions. The New York Court of Appeals upheld the released-time program, and the United States Supreme Court affirmed:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. . . . The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

. . . The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree.

*Id.* at 313-14.

A major neutrality theory claiming to guarantee the “anti-hostile” posture of the state toward religion was fashioned by Professor Philip Kurland. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961), republished as P. KURLAND, RELIGION AND THE LAW (1962). Under the Kurland theory of religion-blind government, the state would be blind only to traditional or institutional religions, thus denying them benefits such as property tax exemptions. See Pfeffer, Book Review, 15 STAN. L. REV. 389 (1963) (P. KURLAND, RELIGION AND THE LAW). So long as secularism is regarded as neutral, any theory of neutrality amounts to the establishment of secular religion.
ment assistance to theism. A high school Bible club may possibly be constitutionally prohibited as an impermissible advancement of religion because it is based on traditional religious theology from which the public school must be totally separated.46 On the other hand, a high school meditation club, or an evolution club, or even a gay club may (at least theoretically) be permitted on first amendment grounds because it would be based on belief systems foreign to traditional theology and from which a public school, in the Court's view, need not be separated. The practical effect of the Court's double definition of religion and its biased concept of religious neutrality is to close the public school doors to theism, while leaving them open to every other "-ism" imaginable.47 The Court's use of the term "religious neutrality" in such decidedly nonneutral situations as these has exasperated many critics and led them to question the validity and fairness of the Court's mandate for religious neutrality in the public schools.48

46. See generally Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Bible club not permitted to conduct activities on school campus during school hours), cert. denied, 434 U.S. 877 (1977) (no final judgment).

Strong criticism of a completely secular public school system was voiced by Judge McDaniel in his dissenting opinion:

"I see the necessity for a reevaluation of the cases construing the Establishment Clause. With due respect for the sincerity of those who have authored the cases relied upon by the majority, it seems to me that their sweeping interpretations of the simple phrase that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." (U.S. Const., Amend. I) have distorted all out of rational proportion both what the framers of the Constitution intended and what is fundamental to the survival of an ethical society.

Id. at 30, 137 Cal. Rptr. at 60-61 (McDaniel, J., dissenting).

Judge McDaniel quoted extensively from an essay written by Frank Goble and published by the Thomas Jefferson Research Center of Pasadena, California. The essay implied that one cause of "American Disorder" is the advancement of moral ignorance as a result of divorcing religion and public education. Id. at 34-35, 137 Cal. Rptr. at 63-64.

47. Secularism gone overboard is explored in Sobran, William Ball v. ACLU et al., 31 NAT'L REV. 24 (1979).

Furthermore, the Court not only forbids government from aiding theism, but it also implies, in the name of religious neutrality, that traditional, theistic religion should not exert any influence on government or on government institutions (including public schools), thus relegating traditional religious beliefs and convictions to an inferior status in the political arena. By so doing, the Supreme Court has embarked upon a trend toward the establishment of national secularism, a trend that raises many troublesome questions. Should strongly held beliefs, especially with regard to education and curriculum, be restrained simply because the majority feels that such beliefs are religious? If so, how can religious ideas be avoided in American education? And if they are avoided, what kind of public education will result? Should the historic Reformation be taught solely as a political, social, and economic movement without any mention of its religious basis or theological origin? And if the theological questions are raised at all, how should they be treated? As meaningless? Irrelevant? Or superstitious? Can a religious question ever be treated in the schools as a serious question upon which reasonable men could differ? Can racial equality be taught without invoking a moral value and without explaining its religious source?\(^\text{49}\) Can any religion or ideology survive after two generations of school children have effectively been insulated from it? Is there hope for a society dedicated to peace and to justice if religious underpinnings are removed from future generations? “How far away from the Judaeo-Christian tradition must America move to make sure that it is not establishing religion effectuating as public policy a viewpoint that ultimately is traceable to the religions conviction of the Judaeo-Christian tradition?”\(^\text{50}\) How many issues must be removed from the democratic arena because they are religiously motivated? Should, for example, our senators and representatives disqualify themselves from voting in the halls of our legislatures simply because their views are born of religious, as opposed to secular, convictions?\(^\text{51}\) Is the state prohibited from imparting or...
from allowing churches or parents to impart to a child anything "that might influence his ultimate concerns and paramount beliefs"?52 How can any subject matter be religiously neutral when it is offensive to a person's religious convictions?

The purpose of these questions "is simply to note that in [its] . . . decisions the Court, under the pretext of disclaiming theological approaches, has fallen into a subjective theologism of its own, replacing the historic and venerable theologits of the Western traditions."53

B. The Tyranny of Judicial Bias

What appears to cause the Court to call neutral that which is partial and to cast its vote for secularism and against theism is its continued, tenacious allegiance to a number of historical, legal, and philosophical biases. Bias number one is the Court's theory that the establishment clause of the first amendment requires, in Jefferson's words, "a wall of separation between church and state."54 It is no secret, however, that the Constitution says nothing about a separation of church and state in so many words. In fact, evidence indicates that the Founders may never have intended such a separation.55 What they intended was that the first amendment prevent the federal government from establishing a national church and from interfering with the churches already established in the original states.56

But even granting, for the moment, that the first amendment was intended to erect a "wall of separation," the kind of separation required is not self-evident, especially when that phrase is applied in a school context. In fashioning an interpretation of the establishment clause, the Court has, since its decision in restrained from effectuating that belief in law because it was interpretable as grounded in religious opinion." Id. at 28.

52. Galanter, supra note 30, at 286.
53. Louisell, supra note 34, at 27.
55. "Both Jefferson and Madison felt government should show no preference for one religion over another. What is not clear is whether Jefferson would have approved of governmental aid to all religious [sic] on a nonpreferential basis." Church-State Wall, supra note 48, at 664.
56. "Madison, then, seems to have understood that the Constitution was intended to prevent federal intervention in state-level church-state relationships. The states, however, were left free to establish or disestablish as they saw fit." Id. at 653.
Everson, 57 opted for absolute separation. 58 Thus, in a school context the state is forced to champion secularism, leaving theism to fend for itself with whatever support it can muster in the private sector. But is this interpretation of the Constitution inevitable? Must the concept of separation of church and state, even if it were embodied in the first amendment, take so absolute and harsh a form? Does it really mean a separation of church and school? Must the church quit the field and abandon its functions (e.g., marriage, counseling, moral persuasion, and education) every time the state decides to tread on traditionally religious territory? Could not the "wall of separation between church and state" simply mean that the church should not govern and the state should not proselyte?

It is, of course, clear that the partiality of a church toward a particular worldview disqualifies it from performing the impartial functions of a free government, while the impartiality of government renders it unsuitable for professing a single religious or even moral ideology. Although there is a clear division between church and state functions, the division between church and school is not so obvious. Education is not, after all, government. Schools, even public schools, were never, nor are they now, responsible for creating, executing, and interpreting laws. It is questionable whether or not the Founders of this country ever intended the first amendment to eliminate from American classrooms the very religious

57. See note 10 supra.
58. In Zorach v. Clauson, 343 U.S. 306 (1952), the Court stated:

There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.

Id. at 312.

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court momentarily softened its absolutist position: "Our prior holdings do not call for a total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." Id. at 614. In the latter part of the opinion, however, the Court again reasserts that

[u]nder our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Id. at 625.
influences which they sought so resolutely to protect. If some theory of separation is indeed required by the Constitution, it would not necessarily demand the divorce from American public education of every and all spiritual and religious influence, thus abandoning public classrooms to an intellectual environment devoid of spirituality.

The Court's neutrality doctrine, in addition to being supported by this prejudice for an absolute separation of church and state, is supported by a second bias: Religion represents a threat to democracy. This concept was clearly implied in the majority's rationale in Everson. Justice Black directly asserted that the Founders wrote the first amendment to avoid further religious persecution in the new republic.

The Founders perhaps did not actually share Justice Black's aversion to established religions. Many of the new states had established churches and were intent on keeping them. That is why the language of the amendment forbids the Congress from making any law "respecting an establishment of religion." State-established churches were put beyond federal power; they could not be disestablished by the national government any more than a national church could be established by it. Therefore, the theory that religion is a threat to democracy is, at least in part, refuted by the historical fact that many of the Founders—who were indisputably democratic—could lay the foundation of a wonderfully free country while simultaneously protecting the established religions of the several states.

Moreover, Justice Black's implicit assertion that sectarian religions were totally responsible for the religious persecutions in

59. See generally Church-State Wall, supra note 48.
60. See id. at 666-67.

It was precisely because Eighteenth Century Americans were a religious people divided into many fighting sects that we were given the constitutional mandate to keep Church and State completely separate. Colonial history had already shown that, here as elsewhere zealous sectarianists entrusted with governmental power to further their causes would sometimes torture, maim and kill those they branded "heretics," "atheists" or "agnostics." The First Amendment was therefore to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters whom they could not convert to their faith. Now as then, it is only by wholly isolating the state from the religious sphere and compelling it to be completely neutral, that the freedom of each and every denomination and of all nonbelievers can be maintained.

Id. at 318-19 (Black, J., dissenting) (footnote omitted).
62. U.S. Const. amend. I.
Europe prior to the colonization of America simply ignores the fact that sects did not use the state to punish religious dissenters. Rather, the state used the concept of religious dissent as an excuse to punish those it considered religious and political agitators.63

The Holy Inquisition in Spain and the destruction of the monasteries in England were implemented not by religious institutions per se, but by political institutions in the name of religion. Historically, it was when the governments of Europe failed to assume an impartial posture with regard to religion, when they failed to be hospitable to all the new sects, that the favored sects flourished and the unfavored were persecuted.64 If anything is to be distilled from the religious persecutions preceding the colonization of America, it is that, when religious persecution comes, it is more likely to come from the state than from some rival sect. Thus, a greater threat to democracy is posed by a secular state that has abandoned its impartial posture than by a religious sect that tenaciously holds to its own biased worldview. It is arguable that the modern Court's partiality for the religion of secularism poses just such a threat.

It must be stressed here that in America today there does not exist one powerful church vying with an equally powerful state. Instead, there are a multitude of churches and religions, all vying with one another; all are subject to one federal and fifty state governments. Regardless of their past status and power, churches today arguably pose much less of a political threat to democracy than do unions or most large corporations. The danger to individual liberty in this country does not stem from religion. And yet the prejudice lingers on that theists are the natural enemies of democracy. But must one be a nontheist to be committed to democratic processes? Does a theistic view automatically preclude a healthy commitment to individual liberty? It is ironic that, in all their zeal and confidence, the religious zealots of the eighteenth and nineteenth centuries never attempted to abridge individual liberties by passing laws that compelled charity,


64. It was often the state that wished to pursue religious persecution because of the belief that "no state divided in religion could survive and that it was the magistrate's commission from God, from whom all legitimate authority flowed, to maintain the morality and orthodoxy of his subjects." J. STIPP, supra note 63, at 552.
equality of condition, or education. That work was done by humanitarians of the twentieth century who were acting out of secular and not traditional religious impulses. It bears repeating then that the danger of compulsion and the threat to individual liberty and democratic institutions arguably stems not from theism but from secularism.

The third bias undergirding the Court's tilted concept of religious neutrality is referred to as the "divisiveness doctrine." This was set forth in Chief Justice Burger's majority opinion in *Lemon v. Kurtzman*: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Accordin--

---

65. 403 U.S. at 622. For a comment on the Court's divisiveness teaching, see 30 Vand. L. Rev. 1059 (1977).


67. "[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969).

68. In *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969), Justice Fortas wrote for the majority:

But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from
divisiveness has been created in the public schools during the past twenty years in the name of such nondenominational causes as racial integration, 69 busing, 70 free speech, 71 free press, 72 war protest, 73 equal rights for women, 74 handicapped rights, 75 equal employment opportunities, 76 equal distribution of school funds, 77 hair length, 78 and even sports. 79 No one has seriously contended that any of these causes be abandoned on divisiveness grounds. Are religious causes any less important? Is it possible that the language of the first amendment, giving religious ideas an espe-

absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious society.

Id. at 508-09.

What Mr. Justice Fortas said about the value of freedom of expression of ideas in the schools—even at the cost of divisiveness or disturbance—should apply to religious ideas as well since they are the only ideas that are expressly protected in the Bill of Rights.

75. See Reid v. Board of Educ., 453 F.2d 238 (2d Cir. 1971).
cial, protected status, has come to mean that religious ideas are insignificant? Has religion been reduced to second-class citizenship in the arena of public opinion? Can any of the institutions of an open society remain faithful to their commitment to free government while interfering in any degree with the popular exchange of religious ideas? Was not the essential purpose of the Constitution and the Bill of Rights to protect the people from the state in precisely that moment when the state, in excess of its grant of enumerated powers, attempts to protect the people from themselves?

The contention that government should protect its citizens from the strife caused by terrorists, criminals, law breakers, hooligans, and thugs is entirely different from the contention that government should protect its citizens from the divisiveness caused by unpopular ideas, religious or nonreligious. The suppression of civil strife in the streets is not the same as the suppression of ideas in the schools. The state's interest in civil tranquility does not justify favoritism to the secular. The Court's divisiveness analysis is as flawed as its definition of religion and its concept of religious neutrality; it is tilted toward secularism and against theism.

The final bias supporting the Court's theory of religious neutrality is the assumption that the imbalance created by the government's preference for secularism has only insignificant effects on the attitude of school children toward religion—effects that are readily counter-balanced by the efforts of parents and religious institutions. But is this, in fact, true when school children are not only denied exposure to theism, but are compelled to approach all problems from a strictly secular, if not antitheistic, position? This imbalanced ideological exposure was made evident in the

80. M.J. Sobran wrote recently:

What the secularists are increasingly demanding, in their disingenuous way, is that religious people, when they act politically, act only on secularist grounds. They are trying to equate acting on religion with establishing religion. And—I repeat—the consequence of such logic is really to establish secularism. It is in fact, to force the religious to internalize the major premise of secularism: that religion has no proper bearing on public affairs.

...[I]n other words, as the state religion would be the worst of all combinations. Its orthodoxy would be insistent and its inquisitors inevitable. Its paid ministry would be numerous beyond belief. Its Caesars would be insufferably condescending.

Sobran, supra note 47, at 24.

81. Louisell, supra note 34, at 33-34.
case of *Epperson v. Arkansas*. In that case, an Arkansas statute prohibiting the teaching of the theory of evolution was invalidated. It was not clear from the case why the Arkansas Legislature enacted this statute, but it is plausible that, since the theory of special creation could not be taught in the public school, Arkansas lawmakers hoped to avoid an ideological imbalance by forbidding the teaching of an opposing view. Regardless of the legislature’s purpose, the statute was struck down. Justice Fortas, writing for the majority, said:

The overriding fact is that Arkansas’ law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis...

... The State’s undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment.

Secularism again triumphed over theism. In the face of this type of imbalance, it is doubtful whether children can exit the public school system with anything but a secular worldview.

It is argued, of course, that parents and churches are free to present the countervailing religious theories, so long as they do so beyond the boundaries of the public schoolhouse. But is this possible after state government has used its financial, technological, and human resources to support secular public education systems? Is it possible for those who prefer to pursue a different worldview for themselves and for their children to realize that

---

82. 393 U.S. 97 (1968).
83. *Id.* at 103, 107.
84. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court affirmed the right of parents to give religious training to children outside the state school facility:

In the *McCollum* case [333 U.S. 203 (1948)] classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

*Id.* at 315 (footnote omitted).
preference without considerable or even very great hardship when they are (1) compelled to contribute their financial resources to aid secular public schools, thus diminishing their own ability to afford alternatives; (2) deprived of the prime time, presently consumed by the public school system, in which to offer alternative educational programs; and (3) put in the unenviable position of attempting, without adequate training, skill, and assistance, to counteract the powerful and sophisticated machinery of the state's education industry in order to provide their children with adequate religious instruction? This imbalance is exacerbated by the fact that modern American education is becoming increasingly national in character, so that funds for educational purposes are available only on conditions antithetical or hostile to religion.  

By banning all "revealed," "redemptive," "theistic," or "supernatural" religions from the public school classroom and compelling children to attend public schools where those espousing secular and humanistic ideologies are able to do so uncontradicted by any equivalently asserted views, the Court is establishing religion as broadly construed in the free exercise clause cases. Such a posture forces religious dissenters to shoulder heavy burdens if they wish to counterbalance the secular position supported by government. The first amendment of the Constitution was, theoretically, intended to protect American citizens from just such burdens. Consequently, theists today are obliged either to send their children to public schools teaching secular ideologies or incur the substantial costs of sending them to private schools, while still being forced to contribute to the public school fund.

C. Summary

"Whatever the cause for the [Court's] tilt against religion, the concern that the Court is no longer guaranteeing neutrality but is actually throwing its weight toward a purely secular society and literally turning the establishment clause on its head is not a trivial one."  

As a result of the Court's posture, public school systems throughout the nation are allowed, if not required, to promote secularism without having to expose children to any contrasting theistic viewpoints. The United States Supreme Court

86. Louisell, supra note 34, at 34.
continues to assert that the first amendment mandates an absolute separation of church and state (including state schools), that religion presents the foremost threat to democracy, that political divisiveness born of religious differences is the only intolerable divisiveness, and that any secular bias in the public schools can be readily counterbalanced by the efforts of theists in the private sector. As long as the Court holds to these assertions, school children will continue to be indoctrinated with certain nontheistic religious ideas, even though that power is withheld from government by the first amendment.

Theists assert on the other hand that the power of government to promote the general welfare or to safeguard the well-being of its citizens cannot be extended to spiritual, emotional, or ideological welfare or well-being; that, although government may control some of the actions of its citizens or even provide for some of their needs, it should not have power to control the development of the organs of thought and faith—namely, the mind and the spirit; that, although it may be the duty of the state to provide school buildings, transportation, even teachers and textbooks of the people's choice, the state should not compel parents to send their children to schools to be inculcated with secular ideas which the parents find religiously offensive, even if the majority do not consider them religious ideas at all; and that the Constitution never empowered the national government or the government of any state to promote secularism or to mold the religious opinions of its youth, while simultaneously restricting the power of parents and churches to present, in a roughly equivalent manner, any contrasting religious points of view. In the final analysis, however, it is not secularism per se that is obnoxious to theists, but the failure of the Court to see that secularism, far from being neutral, is a religion in its own right.

IV. Secularism as Religion

The Court's attempt to achieve religious neutrality in the public schools has not resulted in the creation of a public education system devoid of ideologies—such would hardly be an environment conducive to education. While it may be possible to provide children with training in the acquisition of certain mechanical and rudimentary mental skills without invoking any

87. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).
ideologies, true education, above the skills level, is pervaded with values and moral questions. Education does more than explain what, how, and when. It attempts to explain why. And whenever educators begin to give their students the reasons behind a fact or an event, they immediately enter the realm of ideology.

It must be emphasized that all ideologies are fundamentally religious. They are grounded upon assumptions that are not susceptible of proof: they are matters of faith and preference. Of course, ideologies that rely upon the seen and unseen realities of this world for support (e.g., sensory experience, scientific data, theoretical constructs such as quantum physics, evolution, uniformitarianism, relativity, etc.) are different from those ideologies based on the unseen realities of another, spiritual world (e.g., special creation, redemption, union with the infinite, resurrection, angelic visitation, etc.). However, in spite of the obvious difference between the two, it must not be said that the former ideologies are scientific and unreligious and therefore permissible in public schools while the latter are mythical and religious and therefore impermissible under the establishment clause.88 For they are, in fact, both religious. This is always extremely difficult to recognize, especially for the secularist, who is dissuaded by religion and prefers to think that his own beliefs are scientific, objective, and demonstrable.89 Nevertheless, the unseen realities of this world (e.g., gravity, atoms, photons, relativity, etc.) can

88. In passing, it may be argued that science and religion (or more broadly speaking, objectively acquired knowledge and subjectively acquired knowledge) ought to coexist in any well-rounded education system. After all, the ancient religious myths do not function as substitutes for science; in many ways they are antidotes for it; because the myth-making imagination of man is free, it can enter into realms forbidden to his reason, which is confined to the narrow circle of human logic. Science, the product of reason, seeks only to describe the world within the confines of the limited vocabulary of human wisdom; on the other hand, religion and myth are free to roam the broad world of man’s faith and imagination; they are free to discover or create cosmological paradigms that give meaning and purpose to what might otherwise be dark, inscrutable, and dangerous. For though science may explain the physical causes that result in physical phenomena, only religious myth can relate the meaning that such phenomena have for man. Perhaps, to the antique mind, it was simply more sensible to probe into meanings than into physical causes. Perhaps, to the ancients, a scientific description might have appeared trivial and obvious. Whatever the reason for myth and religion, it should not be left to a free government to determine for a free people whether or not they will pursue education that fortifies their reason at the expense of education that fortifies their faith and imagination. That choice should be left to them.

89. “[W]hen men have honestly thought themselves free of all prejudice, are perfectly detached and impersonal in their judgments and impartial in their conclusions, all their thinking has actually been not merely colored but predetermined by their conditioning. They cannot escape that.” H. Nibley, THE WORLD AND THE PROPHETS 37 (1854).
occupy in the life of a secularist the same place as do the unseen realities of the spiritual world (e.g., angels, devils, God, salvation, etc.) in the life of a traditional theist. Compulsory public education that supports that secularist's explanation of the universe and ignores that of the theist amounts to a compulsory exposure not to ideological neutrality, but to an ideology with the indoctrinating power of religion in the conventional sense. Furthermore, the choice to promote one system of beliefs and to suppress the other is not itself a neutral choice, even if it is intended to bring about a neutral result. Any deliberate attempt to use the law to ban theism, while advancing nontheism is a law "respecting an establishment of religion" in the Everson sense, for it promotes one belief-system over another. When seen in this light, the state's preference for secularism, whether compelled by the local school board or by the United States Supreme Court, amounts to the establishment of religion contrary to the first amendment.

The argument is made that secularism is not a religion, although it has been so defined by the Supreme Court. Secular

90. In United States v. Seeger, 380 U.S. 163 (1964), the Supreme Court set forth its interpretation of the term "religious belief":

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God," was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God. Where such beliefs have parallel positions in the lives of their respective holders we cannot say that one is "in a relation to a Supreme Being" and the other is not.

Id. at 165-66.

91. "Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." Everson v. Board of Educ., 330 U.S. at 15.

"[T]he Court has unequivocally rejected the proposition that the purpose of the establishment clause is only to forbid governmental preference of one religion over another." Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 MINN. L. REV. 329, 331-32 (1963).

92. One commentator has noted:

As to public schools, the problem of neutrality may be stated as a problem of keeping the schools secular (i.e., ruling out any attempt to inculcate religious belief) and yet avoiding inculcation of secularism (i.e., a philosophy of life which leaves no place for religion). Such neutrality is not easy to achieve.

... Occasionally, advocates of strict church-state separation demand careful exclusion of all references to religion. Handling of such material on a basis of neutrality may not always be easy, but consistently to exclude it is to abandon neutrality at the outset.


ideas, it is contended, are premised on objective, verifiable, de-
monstrable data, while theistic notions are based on no data at
all; or at best, data that is subjective, mystical, and nonde-
monstrable. Those who make this argument fail to see that mysti-
cism, subjectivism, and faith undergird even the most objective
of our knowledge and data, as well as our information-gathering
methods. In the first place, all data must be interpreted: the
bones, the numbers, the photos, the readings taken on delicate
scientific equipment—all of the quantifiable and verifiable pieces
take on meaning only when they are arranged within the
meaning-giving framework of some hypothesis. Hypothesizing is,
itsel, a subjective, even mystical, process. Theories do not pro-
vide verification; they are that which must be verified. And they
can be verified only in terms of techniques which themselves are
predicated on even more fundamental hypotheses and theories.
For example, the theory that speed, distance, and time are re-
lated may be demonstrated mathematically; but mathematics is
itself a tool that makes sense only in terms of another, more basic
subjective theory.

In other words, proofs—no matter how objective they ap-
ppear—are not self-evident and can be rationally and logically
rejected by the mind. A scientist may reject the historical evi-
dence of the resurrection of Christ on grounds that it is not de-
onstrable, or he may reject the reality of ineffable noetic expe-
riences because they are not measurable, predictable, or verifiable.
But a mystic, on the other hand, can rationally refute the theory
of evolution on grounds that the data supporting it are illusory
or incomplete or that the data do not mean what researchers say
they mean. Both refutations are logical, but they are each based
on different, unprovable, a priori assumptions.

The syllogism, “all men are mortal; Socrates is a man; there-
fore, Socrates is mortal,” is as logical as its opposite, “all men are
immortal; Socrates is a man; therefore Socrates is immortal.”
Only the subjective assumptions differ. Such subjectivity under-
lies every rational process, no matter how objective the proce-
dures are that validate the process. Hence, the selection of a field
of study, the selection of experimental samples, the selection of
data, and the meaning ascribed to results are all either basically
subjective or significantly entangled with subjectivism. This pre-
cludes the subjective-objective dichotomy from serving as a via-
ble watershed to distinguish between public school courses
tainted with religious subjectivism from those that are not. 84

What the theist objects to, then, is not the objectivity or logic of a particular school of thought, but to the inability of the objectivist to see that all his objectivism is grounded on faith, on a priori assumptions with religious overtones, and that the results of objectivism have meaning only in the meaning-giving context of fundamental persuasions. 85 This merely demonstrates again that it is substantially unfair to exclude from the public school classroom traditional religious ideologies, while retaining nonreligious ideologies, for both rely upon principles that are matters of faith and preference rather than proof. The difference between them does not lie in their essential nature, but in the superficial fact that theistic ideologies have come to be viewed as religion in the public eye, while secular ideologies, though equally religious in origin and effect, are viewed as religiously neutral.

If all ideologies are fundamentally religious, then religious neutrality is not possible in an educational setting—at least not in an educational setting that attempts to treat any meaningful ideas. In its attempt to do the impossible, the Court has created a juridical base for ideological discrimination that tends toward a contracted, compelled, and conformist secular worldview:

One could fairly assert that there is no real neutrality in the public school in which theistic religion is simply banned. This nonneutrality is vividly emphasized in new and widespread programming in intergroup relations, now being purposefully advanced as a substitute for the old God-oriented ethical core.

94. One author has commented with insight on this dichotomy:

Schoolmen—ancient, medieval, and modern—have persisted in proclaiming to the world that there is aside and apart from that knowledge which has come to the human race by revelation and which is an object of religious faith, another type of knowledge—real, tangible, solid, absolute, perfectly provable knowledge—the knowledge (according to the prevailing taste of the century) of philosophy, science, or common sense. The exponents of this knowledge, we are told, are impartial and detached in their searching and their conclusions. I have met many students who have been convinced that anyone who experiences any doubt regarding the scriptures has only to remove his troubled mind from old legends and dubious reports to realms of clear light and absolute certainty where doubt does not exist. . . . Significantly enough, this gospel of hope [in the scientific method] is almost never preached by scientists but enjoys its greatest vogue in departments of humanities and social science. What the true scientists of our day are telling us, as they have told us before, is that no such realm, no such intellectual Hesperides, is known to them. One never knows which of our most cherished and established scientific beliefs may be next to go by the board.


95. See Giannella, supra note 48, at 565.
Though these programs are well-intentioned, they are, nevertheless, generally inculcatory in purpose and method. Their very point is to prescribe conduct. These prescriptions rest upon philosophical underpinnings, and the occasionally mystical character of these underpinnings does not render them neutral.

If a child is taught that he should have a certain social attitude because of “the fellowship of man” or because “this is what democracy wants of us,” let it not be said that these reasons are somehow “neutral.” To the contrary, the reasons are what they are meant to be: ultimate governors of conduct, points of recourse when the mandated attitudes are challenged, that which is the moral bank to back up the check drawn in favor of social precept.96

It is not even possible, then, to correct a child for cheating, let alone give philosophical explanations for moral actions, without injecting religion into the exercise. This is especially true when the teacher attempts to rationalize the need for honesty, integrity, etc. As soon as schools begin to explain why children must be fair, obedient, conscientious, knowledgeable, patriotic, or compassionate—whether the reason be theistic or nontheistic—“it becomes ‘religion’ within the meaning of the Torcaso case.”97 That is, it is an explanation that stems from a belief-structure protected by the first amendment of the Constitution.

In short, the “public schools must not, by studiously disregarding or ignoring religion, expressly or impliedly teach irreligion, for irreligion, no less than its denominational antithesis, is capable of being established.”98

V. AN ALTERNATIVE TO RELIGIOUS NEUTRALITY—RELIGIOUS BALANCE

America needs public school systems that will even-handedly serve the educational needs of a religiously heterogeneous nation, yet avoid inhibiting theism while advancing secularism. This goal cannot be achieved until the concept of religious neutrality is

96. Ball, supra note 48, at 530.
97. Konvitz, supra note 29, at 310.

As Professor Wilbur G. Katz observed recently, the complete elimination of religion from the curriculum of a school that is seeking to teach moral values amounts to an establishment of secular humanism. In recent years there have been repeated reminders that irreligion demands the protection of the free-exercise phrase; the irreligious must be equally willing to accept proscription of nonestablishment.

Id. at 4-5 (footnote omitted).
superseded by the concept of religious balance, which stands for the proposition that no ideology, religious or otherwise, should have a preferred status in the arena of public opinion or education.

Religious balance can only be achieved when and if the Supreme Court abandons its double definition of religion and promulgates a new definition that continues to distinguish between religious belief and religious practice, so that government can proscribe socially criminal behavior engaged in under the pretext of religion. The new definition must, however, avoid discriminating between theism and nontheism. It must not be used to prohibit government from aiding or supporting theism, while allowing and even encouraging government to freely sponsor secularism.

In formulating such a definition, one important caveat must be kept in mind. Any minority religious opinion is apt to be brushed aside by the majority on grounds that it is not really religious at all. For example, it is conceivable that a majority of Americans might see nothing wrong in requiring school children to salute the flag because, in the majority view, the flag salute is strictly a secular exercise, as are school health check-ups, vaccinations, use of audio-visual teaching equipment, and even compulsory attendance at school up to age sixteen. But what appears to be merely a civil requirement to one person may be a religious exercise or an antireligious exercise to another. What was to a Roman but a pinch of incense offered to a lifeless statue as part of a public ceremony was to an orthodox Jew or Christian a matter of deepest theological import. It is often forgotten that a religious view of things transforms actions and ideas, seemingly

---

100. See Jacobsen v. Massachusetts, 197 U.S. 11 (1905).
102. See Wisconsin v. Yoder, 406 U.S. 205 (1972). In Yoder a statute requiring compulsory attendance at public schools for all children through age 18 was declared unconstitutional insofar as it applied to children who were destined to remain cloistered in an antipgressive, agrarian, religious community whose very existence would be jeopardized if such children were compelled to attend public schools beyond the age of 14.
103. One commentator has noted:

The freedom to believe things that seem odd to our neighbors is a right we each demand for ourselves, and it is the role of the Court to insure this right for those who have not the political strength to protect themselves. The real strength of democracy lies in individual freedom, not cultural conformity governmentally imposed.

Cushman, The Holy Bible and the Public Schools, 40 CORNELL L.Q. 475, 498 (1955).
harmless and insignificant to the secular world, into matters of life and death or, more importantly, of eternal life and eternal death. The right to hold, express, preach, and live by one's religious views without molestation of any kind is at the heart of religious freedom and should not be abridged unless such freedom interferes with a compelling state interest of the highest priority.\textsuperscript{104}

104. In Wisconsin v. Yoder, 406 U.S. 205 (1972), Chief Justic Burger, writing for the majority, stated: "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." Id. at 215-16 (footnote omitted).

The Chief Justice asserted that individual Americans may not decide what conduct is religious, and therefore immune from governmental interference, and what conduct is not, especially when such conduct impacts on society in an important way. But, then, who is to decide? Government? Does not the first amendment prohibit government from making precisely that kind of determination? If ordered liberty precludes anything, it precludes government, not individuals, from determining what is religious conduct. That determination is precisely what the first amendment leaves to the people.

It will doubtless be argued that once religion is left to popular definition, then whenever individuals wish to place themselves beyond state regulation or control, they need only claim that their conduct is religiously motivated. If this were to happen, it is argued that the religion clauses would be transformed into a harbor for all sorts of dangerous, immoral, and antisocial behavior. But this is not the inevitable result of accepting as religion all the various definitions advanced by religious people. On the contrary, if this view were adopted, it would mean that the free exchange of all ideas, religious or irreligious, would be absolutely guaranteed, while the free exercise of religious conduct would be guaranteed in all cases, except where the state could show that such conduct conflicted with other fundamental individual rights or compelling state interests. This approach could have been applied, for example, in Theriault v. Carlson, 495 F.2d 390, cert. denied, 434 U.S. 871 (1974), to reach a more satisfactory result, at least jurisprudentially.

In Theriault a prisoner organized a religion undoubtedly to frustrate the efforts of prison authorities to control him. His theory was that, in the name of religion, he could enjoy greater autonomy in the prison system. A court, in denying him this extended autonomy, might very well declare that his religion was not religion within the meaning of the first amendment. But that kind of determination about the meaning of religion is precisely what the first amendment forbids. The problem for a court, then, is to prevent the religion clauses from being used as a shield for criminal and antisocial behavior while simultaneously resisting the temptation to define what is and what is not religious belief and religious conduct. A court could achieve both of these objectives simply by holding that religious belief is beyond governmental definition and control and that religious conduct is likewise protected, unless such conduct can be shown to interfere with the fundamental rights of others or the compelling interests of the state. In Theriault the state had a compelling interest to protect the lives, the liberty, and the property of its citizens by controlling and disciplining prisoners who had been found, by due process of law, to have posed a significant threat to those fundamental, self-evident values. Furthermore, though the prisoner might complain that his free exercise of religion was being abridged, it must be seen that this abridgement resulted not from any direct and impermissible attack upon his constitutional rights, but from the negative differential impact which the general deprivation of his liberty by due process of law had upon his religious freedom.
Any definition of religion must be consistent and broad enough to include any belief system that an individual can call a religion. Religion might be defined, then, as any belief, theory, or viewpoint that either (1) occupies in the mind of its adherent the place of a religion, or (2) addresses itself to a fundamental, a priori question that bears upon God, the purpose of the universe, the foundations of knowledge, the destiny of man, or that otherwise attempts to provide answers that are beyond proof—matters of faith or ideological preference. This is the religion that should not be established or abridged by government, except, of course, that the practice of criminal behavior in the name of religion could be prohibited on grounds that it interferes with a compelling state interest of the highest priority.

The application of such a definition of religion would prohibit both state and federal governments from advancing or inhibiting any meaningful belief structure whatsoever. The state could establish neither theism nor nontheism in the public schools; it could not interfere with the creation, development, promulgation, or systematization of any religious doctrine whether theistic, agnostic, atheistic, secular, ethical, humanistic, or otherwise. This interpretation would give Americans the breadth they need to have as many gods as they wish, from Yahweh, the tribal God of Israel, to such modern deities as science, social science, art, the Gross National Product; from quickie schemes for losing weight, getting rich, making friends, influencing people, becoming more efficient, to the latest sex goddess or god. Americans would be free to worship before the cross, the law, the prophets, the ticker-tape, the peace sign, the clenched fist, or the raised phallus. As reprehensible as any of these gods, rituals, or religious ideas may be to the adherents of rival sects, the religion clauses of the Constitution nevertheless guarantee Americans the right to believe in them, espouse them, teach their children about them, and preach about them in peaceable assemblies held in appropriate public places. Furthermore, the first amendment would prohibit government from imposing on public school children any ideology, however harmless it may appear to the majority.

Prisoners, obviously, are not free. They may not vote, travel from state to state, or attend camp meetings and revivals at their discretion. This is true not because of religious persecution or discrimination, but because they are prisoners, who have been deprived of their liberty by due process of law and who can expect their other liberties to be, consequently, restricted.
At first blush, the implications of such an interpretation and application of the concept of religion would appear to be utterly destructive of public education. Virtually all subject matter that embodies or incorporates to any degree whatsoever the teaching of any values, morals, viewpoints, hypotheses, theories, or assumptions (whether theistic or nontheistic), including physical science, social science, history, political science, biological science, health, physical education, civics, literature, and philosophy would be, under this view, religious subjects and, therefore, unsuitable for presentation in the public school classroom. Even such apparently nonideological subjects as grammar, writing, reading, arithmetic, basic mathematics, diction, personal hygiene, and those agricultural, mechanical, vocational, and homemaking skills presently taught in public school curricula could be objected to on religious grounds as growing out of philosophical predispositions about the nature and destiny of man that are essentially matters of faith or preference.

Such an interpretation and application of the meaning of religion in the first amendment could lead to the elimination from the public schools of any subject that remotely touches upon any ideology, from atheism to Zen. On the other hand, it could lead to an attempt on the part of public schools to teach all ideologies in a favorable light. Neither of these results is likely to be satisfactory. The first destroys free public education, to which Americans are by now deeply committed. The second presages not only parents' objections to the exposure of their children to ideologies that they find repugnant, but also the impossibility, given limited time and resources, of giving even the less objectionable ideologies an equal and impartial airing in the public schools.

There is a third possibility, however. On the basis of a compelling state interest in the education of its citizens, government could continue to provide secular education in the public schools, not on the grounds that secularism is religiously neutral, but on the grounds that secularism is the least offensive of all the religious ideologies to a majority of Americans. However, that it is the least offensive ideology would not nullify the fact that it is still a religion and that the government, in supporting and advancing it alone is, in effect, establishing a religion in violation of the first amendment. In order to remedy this unconstitutional result, the Supreme Court could recognize in the first amendment a requirement of religious balance, a requirement that government recognize the objections to secularism raised by minorities offended by it on religious grounds and offer them acceptable
alternatives to secular public education. Such alternatives might be provided in any of the following ways:

1. Public schools, in response to the objections of ideological minorities, could offer alternative course segments. For example, to those who object to sex education in a high school biology class, an alternative instructional segment could be prepared and offered on, for instance, the biblical account of the creation. Thus, while some students are studying the elements of human sexuality, other students will study the biblical account of the creation of the earth. When the two segments have been completed, the students will reconverge to complete the course in biology.

2. Public schools could provide alternative courses of instruction for those who object to secularism on religious grounds.

3. If the public school lacks the funds or the expertise to provide alternatives to secularism, the government should allow parent groups or religious institutions to provide the alternative instruction. There is no reason why the government could not aid those parents and churches who elect to further the religious education of school children. Since the offensive posture of the state in advancing a secular ideology in the public schools has forced the defensive posture of the religious minority, it is only fair to expect the offending party to help shoulder the minority’s burden, particularly if the minority is required to contribute toward secularism by way of compulsory taxation. The objection by the majority of taxpayers that state funds would be used to advance a minority theistic religion is offset by the objection of the minority of taxpayers that state funds are being used to advance the majority’s nontheistic religion.

4. If the offended minority feels that no alternative program can work to effectively counterbalance the secular influence of the public schools, then the offended minority should be allowed to withdraw altogether from the public schools and provide its children with completely private education.

VI. Conclusion

The religious question that first faced Americans was whether one Christian sect should be preferred over another. Later, the question changed to whether theism should be preferred over nontheism. Now the question is whether secularism should be preferred over theism. The cherished ideal of plural-
ism suggests that this last question, like the others, should be answered in the negative.

Only by giving the term "religion" the broadest and most inclusive meaning possible, by protecting as religion the greatest number of belief systems, and by refusing to establish any such belief systems (theistic or not) will the Supreme Court be able to protect the freedom of conscience of ideological minorities. Only by assuming such a posture will the Court make any inroads into the government’s double monopoly in education: a monopoly of resources and ideological content. This seemingly radical departure from the Court’s modern concept of religious neutrality is only a return to traditional values. This return will be impossible unless the Supreme Court recognizes:

1. that the establishment clause cannot continue to be interpreted to forbid only theism;
2. that neutrality under its present concept of religion amounts to partisanship, not true religious neutrality;
3. that all ideologies are at bottom religious because they are matters of faith and preference;
4. that all meaningful education embodies the teaching of ideologies and is therefore religious in nature;
5. that compulsory secular ideological education amounts to the establishment by government of a secular religion in the public schools;
6. that the establishment of secularism is just as unconstitutional an abridgement of the freedom of religion guaranteed by the first amendment as is the establishment of theism, and as such continues to pose a real threat to cherished values of individual liberty and commitment to ideological pluralism;
7. that, although neutrality is lacking in the public

---

105. In Keyishian v. Board of Regents, 385 U.S. 589 (1967), Justice Brennan, speaking for the Court said:


Id. at 603.


schools, the schools do teach a considerable body of knowledge that, though nonneutral and secular, is inoffensive to a majority of Americans, theists and nontheists alike;

(8) that the state's interest in education demands the continued maintenance of the public schools in the secular tradition, but that more liberal provision must be made to accommodate the needs of ideological minorities that are, on first amendment grounds, offended by secularism;

(9) that such minorities should be provided with ample opportunities, even at state expense, to offset the nonneutral secular curriculum advanced in the public schools through alternatives such as optional coursework, supplementary courses, released-time and dismissed-time programs, and parochial and private educational systems; and

(10) that aid to all religious minorities offended by secularism is not the establishment of religion, but is the avoidance of the abridgement of religious freedom.108

Thus, the establishment clause should not be applied in such a way that it effectively denies ideological minorities the protection of the first amendment. The Supreme Court should no longer accord the equal protection of the laws only to somatological minorities (e.g., those distinguished by race, sex, ethnic origin, physical or cerebral characteristics, or other bodily distinctions): the Constitution should protect ideological minorities as well. Such protection will guard against that brand of secular ideological conformity that is the hallmark of totalitarian governments of both the extreme left and the extreme right, and will serve to reaffirm the commitment of the American people to freedom of conscience and freedom of religion.

108. See generally Giannella, supra note 48, at 566.

When governmental welfare was not the order of the day, aid to religion was much less defensible. Today, when government benefits and entitlements are provided to nearly everyone, to deny only theists such aid is an unjustifiable discrimination that makes competition between theism and secularism virtually impossible.