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Education For Economic Security Act: The Secular Humanism Ban And Equal Access Act

EDUCATION FOR ECONOMIC SECURITY ACT: THE SECULAR HUMANISM BAN AND EQUAL ACCESS ACT

In 1983, the National Commission on Excellence in Education reported that the quality of American education, especially in mathematics and science, had declined during the past twenty years.[1] Recognizing the detrimental effect of an inferior educational system on the American economy, security, and quality of life,[2] Congress enacted the Education for Economic Security Act (EESA)[3] in 1984 to improve scientific education.[4] The first six titles of the EESA authorize federal funding to improve education through various programs including training and awards for teachers, merit scholarships, a variety of innovative projects, and the elimination of asbestos hazards in school buildings.[5] The last two titles of the EESA, however, do not address the Act's stated purpose of improving the quality of science and mathematics instruction.[6] Rather, Titles VII and VIII address the social problems of racial

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1. *See* S. REP. No. 151, 98th Cong., 2d Sess. 2, (Report of National Commission on Excellence in Education entitled "A Nation at Risk, The Imperative for Educational Reform" described deterioration of American education), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2306, 2307.

2. S. REP. No 151, 98th Cong., 2d Sess. 1, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2306. According to the report of the Senate Committee on Labor and Human Resources, the crisis in education includes shortages of math, science, computer, and foreign language teachers, skilled technicians, and well-trained scientific personnel. *Id.* at 2307. The decline in the quality of mathematics and science education threatens the ability of Americans to perform the work necessary to sustain the technological revolution. *Id.* at 2306-08.

3. 20 U.S.C. §§ 3901-4074 (1985) (Education for Economic Security Act).

4. *See* 130 CONG. REC. S6675 (daily ed. June 6, 1984) (statement of Sen. Stafford) (referring to need to improve mathematics and science instruction).

5. 20 U.S.C. §§ 3911-4037 (1985) (EESA). Title I of the EESA authorizes the National Science Foundation to award grants to the following organizations and individuals: state and local educational agencies and institutions of higher education for the joint establishment of teacher institutes; institutions of higher education or local educational agencies for implementation of teacher training and for development of instructional material and programs; individuals who plan to teach math, science, or engineering and who need scholarship aid. *Id.* at §§ 3911-3954. Title II authorizes the Department of Education to provide financial assistance to state and local educational agencies and to institutions of higher education to improve teaching skills and instruction in math, science, computer learning, and foreign languages. *Id.* at §§ 3961-3973. Title III authorizes National Science Foundation grants to institutions of higher learning and permits local educational agencies to pay 50% of the cost of educational partnership programs between the business and educational communities. *Id.* at §§ 3981-3988. Title IV authorizes the President to make annual awards for excellence in teaching to elementary and secondary school teachers. *Id.* at §§ 4001-4003. Title V provides federal assistance to states and local educational agencies for the identification and abatement of asbestos hazards in schools. *Id.* at §§ 4011-4021. Title VI provides grants to schools to implement innovative programs designed to improve student achievement, competence, motivation, and attendance and to provide incentives and professional development for teachers. *Id.* at §§ 4031-4037.

6. *Id.* at § 3901. *See infra* notes 7-14, 116-22, 142-49, 174-81 and accompanying text (discussing purposes of Titles VII and VIII of EESA).

integration[7] and control of controversial extracurricular student activities[8] in public schools.

Title VII of the EESA authorizes funding for magnet schools[9] and prohibits the use of magnet school funds for teaching secular humanism.[10] The purpose of magnet schools is to achieve voluntary racial desegregation by providing a superior curriculum in particular subject areas such as science and music.[11] The specialized curriculum acts as a magnet, attracting students who otherwise would attend more segregated neighborhood schools. While Title VII promotes desegregation to improve the quality of education,[12] the secular humanism ban in Title VII does not appear to be aimed at improving education. Title VIII, moreover, applies entirely to student activities outside the classroom.[13] Title VIII provides that public secondary schools which receive federal assistance, and which allow noncurriculum related student groups to meet on school premises, may not refuse equal access to any student groups based on the content of speech during meetings of these student groups.[14]

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7. *See* 20 U.S.C. § 4053 (purpose of Title VII of EESA is to provide financial assistance to local educational agencies for operation of magnet schools to eliminate minority group segregation and discrimination); *infra* notes 11, 12 and accompanying text (discussing of purpose of magnet schools).

8. *See* U.S.C. § 4071 (Equal Access Act applies to noncurriculum-related student group meetings); *infra* notes 13, 14, 142-49, 179-84 and accompanying text (discussion of provisions of Equal Access Act).

9. 20 U.S.C. §§ 4051-4062 (1985).

10. *Id.* at § 4059 (1985) (EESA).

11. *See* 20 U.S.C. § 4055 (magnet school offers special curriculum attracting substantial numbers of students of different races). In 1972 Congress passed the Emergency School Aid Act (ESAA), which authorized federal funding for school desegregation programs including magnet schools. 130 CONG. REC. S6680 (daily ed. June 6, 1984) (statement of Sen. Moynihan). In 1981, Congress repealed ESAA after including desegregation programs in block grants to states. *Id.* Block grants represented a congressional effort to reduce the paperwork, regulation, and cost involved in the administration of specialized programs by providing federal payments to state governments for more generally specified purposes. Donnelly, *Block Grants: An Old Republican Idea,* 39 CONG. Q. WEEKLY 449 (1981). Block grants allow state or local officials to decide how to allocate funds for specific programs within a general area. *Id.* Because the spending provisions of block grants were not as specific as ESAA provisions, many states reduced funding allocations for desegregation programs. 130 CONG. REC. S6680 (daily ed. June 6, 1984) (statement of Sen. Moynihan). Funding for ESAA programs dropped from $149.2 million in 1981 to $25.2 million in 1982. *Id.* One of the stated purposes of Title VII of the EESA was to restore funding for school desegregation. *Id.*

12. *See* 130 CONG. REC. S6676 (daily ed. June 6, 1984) (statement of Sen. Eagleton) (magnet school funding will help to ensure equal opportunity for quality education); *id* at S6681 (statement of Sen. Hatch) (magnet school program is designed to promote academic excellence for students of all races). *See also* Brown v. Board of Education, 347 U.S. 483, 493-94 (1954) (segregated schools provide inferior educational opportunities for minority students).

13. *See* 20 U.S.C. § 4071 (1985) (EESA) (equal access provision only applies to meetings of student groups during noninstructional time).

14. 20 U.S.C. § 4071 (1985) (EESA); *see infra* notes 142-49, 181 and accompanying text (discussion of purpose of Equal Access Act).

In addition to failing to address the goals of the EESA, Titles VII and VIII are controversial because of their first amendment implications. Title VIII, the Equal Access Act, originated as an attempt to counteract federal court decisions that had prohibited student-initiated, religious group meetings on school premises because the courts viewed these meetings as a violation of the Establishment Clause.[15] Title VIII counteracts the courts' interpretation by construing the first amendment's free speech guarantee to protect student religious groups from discrimination by school authorities.[16] The controversy over Title VII stems from the Title's ban on using magnet school funds to teach secular humanism. Commentators have suggested that opponents of secular humanism regard the ban as a justification for censoring ideas that conflict with the tenets of some religious groups.[17] Both the secular humanism

15. *See* S. REP. No. 357, 98th Cong., 2d Sess. 5-11, (review and discussion of federal court decisions regarding access of student religious groups to public schools), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2351-57. The Senate Judiciary Committee heard testimony indicating that many school administrators are confused by recent decisions of federal courts. *Id.* at 2357. These administrators believe that the Establishment Clause prohibits students from engaging in religious speech on school premises. *Id.* at 2352. *See infra* notes 142-49, 178-81 and accompanying text (discussing protection of student's rights as purpose of Equal Access Act). The original equal access bill, sponsored by Senator Denton, protected only religious activities, applied to both elementary and secondary schools, concerned extracurricular activities before, during and after school hours, and provided for a private right of action. 1984 U.S. CODE CONG. & AD. NEWS 2348. As enacted, Title VIII differs from Senator Denton's original bill in that it concerns religious, political, philosophical and other activities, applies only to secondary schools, governs only extracurricular activities before and after school hours, and has no specific enforcement provisions. *Id.*

The term Establishment Clause refers to the following portion of the first amendment: "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. In 1940, the United States Supreme Court held that the religion clauses of the first amendment applied to the states through the fourteenth amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Courts have regarded religious meetings on school premises as an unconstitutional endorsement of religion by school authorities. *See* Bender v. Williamsport Area School District, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 106 S. Ct. 1326 (1986); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). *See infra* notes 148, 161-66, and accompanying text (discussion of cases in which courts banned or permitted schools to ban religious meetings of student groups).

16. *See* S. REP. No.357, 98th Cong., 2d Sess. 21-24, (discussion in Senate Judiciary Committee's Report concerning legal basis for viewing student religious meetings as protected speech), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2367-70; Widmar v. Vincent 454 U.S. 263 (1981). According to the Senate Committee, the *Widmar* case held that the Free Speech Clause protects student religious speech from infringement by school authorities unless the school shows that student speech of this type substantially interferes with school discipline or invades the rights of others. S. REP. No. 357, 98th Cong., 2d Sess. 24, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2370.

17. *See* Remes, *Equal Access Act, 'Humanism' Ban Extend an Invitation to Litigation*, Nat'l L.J., June 24, 1985, at 17, col. 2. Remes contends that the aim of the secular humanism ban is to enable fundamentalists to compel local school boards to eliminate from the curriculum ideas that fundamentalists deem unacceptable. *Id.* Remes also maintains that fundamentalists think that teaching autonomy and free thought undermines family and religious authority. *Id.*

ban and the Equal Access Act may invite litigation concerning the controversial issue of the role of religion in the public schools.[18]

In enacting Title VII, Congress did not define secular humanism.[19] Instead, Congress delegated the authority to administer Title VII to the Department of Education[20] which, in turn, delegated the responsibility for defining secular humanism to local school districts.[21] Since fundamentalist groups probably will use the secular humanism ban in Title VII to challenge magnet school curriculums,[22] the meaning of the term secular humanism will become important to lawyers and courts if these challenges result in lawsuits.

Webster's Dictionary defines humanism as a Renaissance philosophy that affirms man's dignity, worth, and capacity for self-realization through reason and that often repudiates supernaturalism.[23] Those who profess to be humanists acknowledge many different kinds of humanism,[24] but humanism's

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18. *Id.* at 16, col. 1, 18, col. 2.

19. 130 CONG. REC. H7742 (daily ed. July 25, 1984) (statement of Rep. Perkins). Several months after passage of the EESA, Senator Daniel Patrick Moynihan, one of the sponsors of the Magnet School Amendment, said, "I have no idea what secular humanism is. No one knows." Rosenbaum, *Of 'Secular Humanism' and Its Slide into Law,* N.Y. Times, Feb. 22, 1985, at 16, col. 5.

20. 20 U.S.C. § 4054 (1985).

21. 34 C.F.R. § 280.40(d) (1985). In support of its decision to delegate the responsibility for determining what constitutes secular humanism to local school boards, the Department of Education referred to the legislative history of the EESA. 50 Fed. Reg. 21, 197 (1985). During the Senate debate on the magnet school provision, no senators questioned or explained the secular humanism ban. 130 CONG. REC. S6675-82 (daily ed. June 6, 1984). In the House of Representatives, discussion of the term secular humanism was brief. 130 CONG. REC. H7742 (daily ed. July 25, 1984). Asserting that education is a local concern, Representative Perkins explained that only teachers and local boards should decide whether any subject matter, including evolution, is secular humanism. *Id.*

22. *See* Mackay-Smith, *Schools Are Becoming the Battleground in the Fight Against Secular Humanism,* Wall St. J., Aug. 6, 1985, at 31, col. 3. One conservative group, Concerned Women for America, which provides legal services for parents suing school districts that allegedly advocate secular humanism, predicted that in 1986 parents will challenge up to 3000 school districts for teaching secular humanism. *Id.* at col. 4. Concerned Women for America claims a membership of 500,000, which exceeds the combined memberships of the National Organization for Women, the League of Women Voters, and the National Women's Political Caucus. Ostling, *Jerry Falwell's Crusade,* TIME, Sept. 2, 1985, at 48, 57. The leader of Concerned Women for America is Beverly LaHaye, whose husband, Tim LaHaye, is a fundamentalist Baptist minister, political lobbyist, and founder of the American Coalition for Traditional Values. *Id.* at 51, 57. Tim LaHaye contends that humanists are not qualified to hold government positions. *Id.* at 52.

Fundamentalists comprise the right wing of the evangelical movement, which is larger and more moderate than the fundamentalist movement. *Id.* at 49-50. The primary characteristics of fundamentalism are a belief in the inerrancy and historical accuracy of the Bible and a militant resistance to any idea that conflicts with the fundamentalist interpretation of Biblical teachings. *Id.* at 49.

Although the secular humanism ban in the EESA applies only to magnet schools, many opponents of secular humanism view the ban as supportive of their position against secular humanism in all public schools. Mackay-Smith, *supra* at 31, col. 3.

23. WEBSTER'S NEW COLLEGIATE DICTIONARY 556 (1975).

24. Kurtz, *Preface* to THE HUMANIST ALTERNATIVE: SOME DEFINITIONS OF HUMANISM 6 (P. Kurtz ed. 1973).

central tenets include a belief in the theory of evolution[25] and a rejection of absolute values perceived through divine revelation.[26] Humanists espouse an ethical system valuing free thought,[27] the scientific method, democracy, and freedom.[28] Humanists also believe that human beings have an obligation to develop international solutions to the worldwide problems of security, conservation, population control, technological development and direction, and education.[29] Humanism has links to many other philosophies including communism, pragmatism, personalism or spiritualism, and existentialism.[30]

Secular humanism, as distinguished from humanism, has not been defined clearly. However, when applied to humanism the term secular apparently denotes an absence of religion or theism.[31] Since most humanists do not subscribe to a belief in the traditional idea of God,[32] the term secular humanism seems redundant. Whether secular humanism differs from humanism is unclear except that fundamentalist Christians apparently use the term secular humanism to connote an affirmative opposition or hostility to Christian beliefs.[33]

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25. *See* deFord, *Heretical Humanism,* in THE HUMANIST ALTERNATIVE, *supra,* note 24, at 81 (humanism is based on concept of evolution). *See also* Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications,* 10 TEX. TECH. L. REV. 1, 29 & 42 (evolution is cornerstone of secular humanism).

26. *See* deFord, *Heretical Humanism,* in THE HUMANIST ALTERNATIVE, *supra* note 24, at 87 (ethics is product of human experience); Zimmerman, *Aren't Humanists Really Atheists?, id.* at 84 (absence of absolute values is major trait of humanism); Lamont, *Naturalistic Humanism, id.* at 129 (naturalistic humanism rejects supernaturalism and metaphysical idealism); Whitehead and Conlan, *supra* note 25, at 30 (humanism is secular because it denies tenets of theism).

27. *See* Kurtz, *epliloque* to THE HUMANIST ALTERNATIVE, *supra* note 24, at 182 (free thought is essential characteristic of humanism).

28. *See* Zimmerman, *supra* note 26, at 84 (democracy, freedom, and scientific method are humanistic values); Lamont, *supra* note 26, at 129 (man's supreme ethical aim is working for human welfare using methods of reason, science, and democracy).

29. Blackham, *A Definition of Humanism,* in THE HUMANIST ALTERNATIVE, *supra* note 24, at 36. Humanists believe that the proper goal of education is to promote autonomy and an open society. *Id.*

30. 4 ENCYCLOPEDIA OF PHILOSOPHY 72 (1967). Communism is humanistic in its goal of abolishing man's self-alienation which Communists see as the product of private property and capitalistic society. *Id.* The pragmatic concept that man is the measure of everything is humanistic. *Id.* Personalism or spiritualism is a humanistic philosophy because it affirms man's capacity to relate to the eternal or transcendent. *Id.* Existentialism's emphasis on the human subjective universe is humanistic. *Id.*

31. *See* P. Kurtz, IN DEFENSE OF SECULAR HUMANISM at vii (1983) (Secular humanism holds that people can live ethical lives and make significant contributions to social justice and human welfare without believing in theistic religion); J.P. VON PRAAG, FOUNDATIONS OF HUMANISM 34 (1982) (Secular humanism is geared toward earthly happiness and fulfillment of human potential); J. HITCHCOCK, WHAT IS SECULAR HUMANISM? 10-12 (1982) (Secular humanism rejects absolute moral values and practical effect of belief in God).

32. *See generally* THE HUMANIST ALTERNATIVE: SOME DEFINITIONS OF HUMANISM (P. Kurtz ed. 1973). *See also* EHRENFIELD, THE ARROGANCE OF HUMANISM 5 (1978) (humanism rejects mythologies of power including God); McKown, *What is Secular Humanism? A Religion, a World View or a Philosophy?,* Birmingham News, July 21, 1985 at E3, col. 1 (secular humanists disbelieve in supernatural).

33. *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1535, n.4 (9th Cir.) *cert.*

Detractors describe secular humanism as an atheistic, anti-Christian[34] philosophy that advocates the redistribution of wealth, control of the environment, disarmament, creation of a world-wide socialist government, and the destruction of American patriotism and the free enterprise system.[35] Critics of secular humanism claim that this philosophy has permeated the public educational system[36] through a variety of programs including sex education,[37] Effective Parenting Information for Children (EPIC),[38] and values clarification.[39] These types of programs, according to opponents of

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denied, 106 S. Ct. 85 (1985). The plaintiff in *Grove*, a fundamentalist Christian seeking removal of a book from a high school curriculum, asserted that secular humanism is "a religion dedicated to affirmatively opposing or showing hostility toward Christianity." *Id. See also* Whitehead and Conlan, *supra* note 25, at 31 (secular humanism actively rejects, and seeks to eliminate, theism).

34. *See Department Proposes Rule to Curb Teaching of 'Secular Humanism'*, Washington Post, Jan. 10, 1985, at A19, col. 6 [hereinafter cited as *Department Proposes Rule*]. An aide to Senator Orrin G. Hatch, the senator who insisted on including the secular humanism ban in Title VII of the EESA, described secular humanism as an "atheistic philosophy." *Id.*

35. *Department Proposes Rule*, Washington Post, *supra* note 34 at A19, col. 4.

36. *See* Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1205-11 (1982). Many educators have endorsed humanistic education as a method for schools to meet the need for moral instruction while avoiding the political and legal pitfalls of more traditional forms of moral education. *Id.* at 1205. Instead of teaching a predetermined set of values, humanistic education teaches a methodology for resolving moral problems. *Id.* at 1205. Some programs, such as values clarification, emphasize the cognitive development of children while others, such as sensitivity training or role playing, stress emotional development. *Id.* at 1205-06. Humanistic education conflicts with many religious dogmas with respect to basic assumptions about the innate nature of man, the spiritual aspect of human beings, and the existence of an external standard of morality. *Id.* at 1208-09.

37. *See* HITCHCOCK, WHAT IS SECULAR HUMANISM? 106-08 (1982). Many Christian parents believe that compulsory sex education courses in the public schools expose their children to secular humanist ideas. *Id.* at 106. These parents contend that these courses undermine religious beliefs by imparting information without moral guidance. *Id.* at 107. Some parents also object to sex education either because some of the leading authorities in the field and heads of organizations, such as Planned Parenthood, have humanist connections or because parents feel that the sex experts implicitly promote extramarital sex. *Id.* at 107-08.

38. *See* TIME, *supra* note 23, at 55; Mackay-Smith, *supra* note 23, at 31, col. 5. Effective Parenting for Children (EPIC) is a three-part program for parents, teachers, and children and is designed to teach children self-awareness, responsible behavior, and decision-making in order to prevent problems like alcoholism, child abuse, and teenage pregnancy. TIME, *supra* note 22, at 55; Mackay-Smith, *supra* note 22, at 31, col. 5. Although President Reagan has praised EPIC, conservative critics maintain that EPIC negates absolute values and therefore is consistent with secular humanism. TIME, *supra* note 22, at 55; Mackay-Smith, *supra* note 22, at 31, col. 5.

39. *See Department Proposes Rule, supra* note 34, at A19, col. 5. According to Ed Darrell, aid to Senator Hatch and a press spokesman for the Senate Labor and Human Resources Committee, secular humanism "is a almost a term of art. You get into value education and a bunch of touchy-feely stuff that came out in the 70's. Conservatives object because these things may get in the way of a Christian education." *Id.* Values clarification focuses on the process of valuing. Note, *supra* note 36 at 1205 n.48. Theorists in values education assume that no particular abstract value system is correct for every individual and maintain that real valuing occurs only when one freely chooses, publicly affirms, and consistently

secular humanism, deny absolute moral values and convey a belief in sexual permissiveness, abortion, suicide, and socialism.[40]

While controversy exists concerning the religious nature of secular humanism, in *Torcaso v. Watkins,*[41] the United States Supreme Court included the term secular humanism in a partial list of nontheistic religions[42] to illustrate that the first amendment protects nontheistic beliefs as religions.[43] The *Torcaso* decision held that a Maryland law requiring all public office holders to declare a belief in God was unconstitutional because the law invaded an individual's freedom to disbelieve in God.[44] Thus, by including secular humanism in a list of religions, the Supreme Court in *Torcaso* implied that secular humanism is a religion.[45]

Some lower federal courts, however, have interpreted *Torcaso* to mean that a philosophy is not a religion unless it lays claim to ultimate truth and is supported by a formal group.[46] In *Malnak v. Yogi,*[47] for example, the

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acts upon a value. *Id.* Values clarification exercises stimulate student discussion of the ramifications of various solutions to hypothetical moral dilemmas. *Id.* at 1206-07. Some critics believe that encouraging children to examine and question values undermines parental and religious authority and encourages children to regard all values as relative instead of absolute. J. HITCHCOCK, WHAT IS SECULAR HUMANISM? *supra* note 37, at 106. *See also supra* note 38 (conflict between humanistic education and religion).

40. Mackay-Smith, *supra* note 22, at 31, col. 3.

41. 367 U.S. 488 (1961).

42. *Id.* at 495 n.11. In addition to secular humanism, the *Torcaso* opinion listed Buddhism, Taoism, and Ethical Culture as examples of religions that omit a belief in God from their teachings.. *Id.* The Supreme Court cited two lower court decisions holding that nontheistic philosophies were religions for tax exemption purposes. *Id.; see* Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127, 128 (D.C. Cir. 1957) (held, Ethical Society qualified for tax exemption under statute granting exemption for buildings used primarily for "public religious worship" because worship means performing religious services, not necessarily paying homage to supernatural); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394, 409 (Cal. Dist. Ct. App. 1957) (with respect to tax exemption for property used solely for religious purposes, question is whether activities of humanistic group are analogous to activities of theistic churches). In *Washington Ethical Society,* the court limited its holding to the narrow question of whether the Society qualified for the tax exemption, not whether the Society is a religious society. 249 F.2d at 129.

43. *See* Torcaso, 367 U.S. at 495 (government cannot constitutionally impose requirements that aid all believers as opposed to nonbelievers or that aid all religions based on belief in God as opposed to religions with other beliefs).

44. *Id.* at 496. In *Torcaso,* the State of Maryland refused to grant Torcaso a commission to serve as a notary public because Torcaso was unwilling to say that he believed in God. *Id.* at 489.

45. *See id.* at 495 n.11 (Supreme Court cited secular humanism as example of nontheistic religion); *supra* note 42 (discussing *Torcaso).*

46. *See* Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring). In *Malnak,* Judge Adams interpreted the *Torcaso* court's reference to secular humanism as alluding to the philosophy of the plaintiff group seeking tax exemption in *Fellowship of Humanity v. County of Alameda. Id.* at 206; *see Torcaso,* 367 U.S. at 495 n.11; Fellowship of Humanity, 153 Cal. App. 2d 673, 315 P.2d 394 (Cal. Dist. App. 1957). According to Judge Adams, the District of Columbia Circuit and the California District Court of Appeals recognized respectively the Washington Ethical Society and the Fellowship of Humanity as religious groups for tax exemption purposes primarily because these groups functioned like churches in holding regular

Third Circuit held that New Jersey high schools had violated the Establishment Clause by offering a course that effectively advanced a religion and religious concepts.[48] The concurring opinion in *Malnak* explained that the course contained several indicia of a religion including a religious ceremony, an organized group of supporters, and a comprehensive system of beliefs addressing ultimate questions such as the meaning of life.[49] The concurrence asserted that while *Torcaso's* reference to secular humanism suggested that an organized group of secular humanists might be a religious organization, the *Torcaso* Court did not declare that humanism is a religion.[50] The *Malnak* concurrence noted that a state establishes a religion when the state advances the teachings of a comprehensive belief system, but not when the state merely endorses isolated precepts of a religion.[51]

Other courts have made a similar distinction between government activity that supports a religion and government activity that merely disseminates knowledge.[52] In *Grove v. Mead School District No. 354,*[53] for example, the

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Sunday services and advancing certain precepts. *Malnak*, 592 F.2d at 206. *See supra* note 44 (briefly explaining holdings in *Fellowship of Humanity* and *Washington Ethical Society* cases). *See also* Women's Services, P.C. v. Thone, 483 F. Supp. 1022 (D. Neb. 1979), *aff'd* 636 F.2d 206 (8th Cir. 1980), *vacated on other grounds,* 452 U.S. 911 (1981). In *Women's Services,* the plaintiff claimed that Nebraska's abortion law violated the Establishment Clause because the sole purpose of the law was to protect fetal life, a purpose based on the religious belief that life begins at conception. 483 F. Supp. at 1032. In defining the types of beliefs that qualify as religions for first amendment purposes, the United States District Court for Nebraska stated that a nontheistic belief must have tenets and organization. *Id.* at 1034.

47. 592 F.2d 197 (3d Cir. 1979) (per curiam).

48. *Id.* at 197-98. In *Malnak v. Yogi,* a high school curriculum included a course entitled Science of Creative Intelligence—Transcendental Meditation (SCI/TM), which required each student to attend a "puja," a ceremony involving religious offerings to deities. *Id.* The *Malnak* court found that the course was religious in nature, based on the content of the textbook, the participation of students in a religious ceremony, and because teachers of the course were not regular high school faculty members, but were imported advocates of SCI/TM. *Id.* at 198-99. Consequently, the *Malnak* court held that the primary effect of the SCI/TM course was to advance religion. *Id.* at 198. Furthermore, the *Malnak* court held that the expenditure of public funds and the use of public school facilities to teach SCI/TM constituted excessive government entanglement with religion. *Id.*

49. *Id.* at 207-09.

50. *Id.* at 212. The *Malnak* concurrence noted that the *Torcaso* Court's reference to the secular humanist group in *Fellowship of Humanity* seemed to identify a group that supported a comprehensive belief system. *Id.* at 212 n.52. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (referring to secular humanism as example of nontheistic religion); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Cal. Dist. Ct. App. 1957) (held, humanistic group qualified for religious tax exemption); *supra* notes 41-46 and accompanying text (discussion of meaning of reference to secular humanism in *Torcaso v. Watkins).*

51. Malnak v. Yogi, 592 F.2d at 212.

52. *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir. 1985) (eliminating from school curriculum every idea that is objectionable to any religion would critically impede state's interest in providing well-rounded education) *cert. denied,* 106 S. Ct. 85 (1985); Crowley v. Smithsonian Institution, 636 F.2d 738, 742 (D.C. Cir. 1980) (government exhibit on evolution does not violate Establishment Clause just because exhibit coincides with tenet of secular humanism).

53. 753 F.2d 1528 (9th Cir. 1985).

Ninth Circuit held that the Constitution does not require a public school to exclude a book from the curriculum simply because the book expresses ideas that are offensive to certain religions.[54] The *Grove* court determined that the book in question merely provided a cultural perspective and neither established nor opposed religion.[55] The plaintiff in *Grove* contended that the use of the book in a high school English curriculum effectively advanced secular humanism, which the plaintiff, relying chiefly on *Torcaso,* characterized as a religion.[56] The concurring opinion in *Grove* read the *Torcaso* Court's allusion to secular humanism as referring to an organized humanist group that met on Sundays and promoted a comprehensive belief system.[57] The *Grove* concurrence explained that assigning an autobiographical novel, which incidentally presented the religious views of a poor, rural, black adolescent, did not approach the endorsement of a comprehensive belief system supported by a formal group.[58] In addition, the *Grove* concurrence rejected the plaintiff's implication that secular means antireligious instead of nonreligious.[59]

Like the plaintiff in *Grove,* some opponents of secular humanism wish to have secular humanism recognized as a religion in order to contest its inclusion in the public school curriculum as a violation of the constitutional prohibition against the establishment of religion.[60] Whether the courts should

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54. Grove v. Mead School Dist. No. 354, 753 F.2d at 1534. The plaintiff in *Grove* objected to the book *The Learning Tree* by Gordon Parks, a well-known black photographer. *Id.* at 1531. A high school English teacher assigned this autobiographical novel to expose students to some of the attitudes and expectations of the black American subculture. *Id.* at 1540. Maintaining that the book advocates anti-Christian values and beliefs, the plaintiff in *Grove* claimed that the book's primary effect was to advance the religion of secular humanism and to inhibit the plaintiff's religion, "Biblical Christianity." *Id.* at 1539.

55. *Id.* at 1534.

56. *Id.* at 1535-36. *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (including secular humanism in list of nontheistic religions); *supra* notes 33-34 and accompanying text (allegations that secular humanism is anti-Christian).

57. Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1536-37 (9th Cir. 1985). The *Grove* concurrence cited the Third Circuit's opinion in *Malnak v. Yogi* to support the conclusion that the *Torcaso* Court was referring to an organized group of secular humanists that received a religious tax exemption in *Fellowship of Humanity. Id.* at 1537. *See* Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979); Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961); Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 315 P.2d 394 (Cal. Dist. Ct. App. 1957).

58. Grove, 753 F.2d at 1537.

59. *Id.* at 1536. The concurrence in *Grove* rejected the plaintiff's dualistic perspective which divides the world into either religious or antireligious realms. *Id.* Failure to recognize the secular or nonreligious—as distinguished from antireligious—nature of some government activities renders meaningless the Supreme Court's language in Establishment Clause decisions. *Id.* As the *Malnak* concurrence explained, if "secular" means antireligious, it would make no sense for the Supreme Court to hold that government activity must have a secular purpose to avoid violating the Establishment Clause. *Id. See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (to avoid violating Establishment Clause statute in question must have secular purpose and effect); *infra* notes 85-108 and accompanying text (discussing analysis of Establishment Clause controversies).

60. *See* Crowley v. Smithsonian Inst., 636 F.2d 738, 740 (D.C. Cir. 1980) (plaintiff claimed Smithsonian supported religion of secular humanism by explaining and advocating

regard secular humanism, or any philosophy, as a religion seems to depend on the context of the question. Courts sometimes apply different definitions of religion in deciding establishment questions as opposed to free exercise issues.[61] In free exercise cases, the Supreme Court has adopted a broad definition of religion to encompass nontheistic belief systems.[62] Some courts and commentators have suggested, however, that in establishment cases, a narrower definition may be more appropriate in order to avoid labeling many benevolent government programs constitutionally suspect.[63]

In determining whether a government activity violates the Establishment Clause, courts must distinguish between activity that endorses or imposes an entire doctrine and activity that merely advocates some ideas that a belief system happens to embrace.[64] Government endorsement of a belief system unconstitutionally advances a religion while government advocacy of discrete ideas does not.[65] The language of Title VII is unclear concerning whether

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theory of evolution); Jackson v. State of California, 460 F.2d 282 (9th Cir. 1972). In *Jackson,* the plaintiff sought to require the state to provide tuition grants for children to attend nonpublic schools. 460 F.2d at 283. To support his claim, the plaintiff contended that the California public school system had established the "irreligion of secular humanism." *Id.* at 283, n.1. *See also supra* note 54 (explaining plaintiff's allegation in *Grove).*

61. *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1537 (9th Cir. 1985) (supporting idea that definition of religion should vary when reviewing Establishment Clause or Free Exercise Clause). The *Grove* court indicated that the pervasive nature of modern government calls for a more restrictive definition of religion in the context of Establishment Clause analysis. *Id. But see* Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting) (Religion does not have two different meanings for Establishment Clause and Free Exercise Clause). *See infra* notes 62-63 and accompanying text (discussing possible application of different definitions of religion).

62. *See* United States v. Seeger, 380 U.S. 163, 180-184 (1965). In *Seeger,* the Supreme Court construed the term religious in the statute governing conscientious objector status to mean beliefs which occupy the same place in the objector's life as an orthodox belief in God occupies in the traditionally recognized objector's life. *Id.* at 184. After reviewing the writings of several modern theologians, such as Paul Tillich and Bishop John A. T. Robinson, the *Seeger* Court concluded that the statute's definition of "Supreme Being" must extend beyond the traditional idea of God to encompass modern theology's broad spectrum of religious beliefs. *Id.* at 180-83.

63. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 827-31 (1978). Tribe recognizes that today's increasing diversity of beliefs combined with modern theological concepts make inevitable a broadened understanding of religion. *Id.* at 826-27. Tribe proposes a two-fold definition of religion whereby the Free Exercise Clause would protect any beliefs or practices that are arguably religious, but any government action that is arguably nonreligious would not violate the Establishment Clause. *Id.* at 828. For example, Tribe suggests that a government program that encourages an arguably religious activity, without mandating that activity, does not violate the Establishment Clause. *Id.* He contends that adopting a broad definition for Establishment Clause purposes calls into question the constitutionality of many benevolent government programs that advance arguably religious values, such as human dignity and morality, especially when these government programs result from political activity by religious groups. *Id.* at 831.

64. *See supra* note 51-52 and accompanying text (explaining differences between belief system and ideas).

65. *See* Crowley v. Smithsonian Inst., 636 F.2d 738, 742 (D.C. Cir. 1980) (government support for theory of evolution through Smithsonian exhibit does not establish a religion simply because exhibit agrees with a tenet of that religion).

the Act contemplates banning the dissemination of all secular humanist ideas or merely forbids the teaching of secular humanism as a comprehensive belief system.[66] Banning the teaching of a comprehensive belief system known as secular humanism may be an acceptable reminder that schools may not endorse any religion, theistic or nontheistic. The official suppression of ideas, however, is constitutionally unacceptable because the first amendment guarantees freedom of speech and belief.[67]

While the Supreme Court has expanded the definition of religion with respect to the Free Exercise Clause,[68] the Court, since 1947, has construed the Establishment Clause to prohibit legislation that has the purpose or primary effect of advancing or inhibiting religion.[69] Although the Supreme Court has held that the Establishment Clause requires government neutrality toward religion,[70] some current members of the Court disagree with that interpretation.[71] Courts and historians generally agree that the Framers of

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66. *See* 20 U.S.C. § 4059 (1985). Title VII of the EESA states: "Grants under this subchapter may not be used. . .for the courses of instruction the substance of which is secular humanism." *Id.*

67. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982). In *Pico,* the dissent agreed with the plurality's assertion that the "Constitution does not permit the official suppression of ideas." *Id.* at 907. The dissent maintained, however, that education is necessarily a selective presentation of relevant and appropriate ideas. *Id.* at 914 (Rehnquist, J., dissenting). *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (state's attempt to prohibit teaching of theory of evolution because theory conflicted with religious belief violates first amendment); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom").

Furthermore, the Supreme Court has recognized the incompleteness of an education devoid of religious ideas. *See* School Dist. of Abingdon v. Schempp, 374 U.S. 203, 225 (1963) (education is incomplete without study of religions and their relationship to civilization); McCollum v. Board of Education, 333 U.S. 203, 236 (1948) (Jackson, J., concurring) (currents of religious thought are essential aspects of education).

68. *See supra* note 62 and accompanying text (discussing different definitions of religion for two religion clauses).

69. *See* Abingdon School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (to withstand strictures of Establishment Clause, statute must have secular legislative purpose and primary effect that neither enhances nor inhibits religion); Everson v. Board of Education, 330 U.S. 1, 15 (1947) (Neither the state nor the federal government "can pass laws which aid one religion, aid all religions or prefer one religion over another").

70. *See* Zorach v. Clauson, 343 U.S. 306, 314 (1952) (Establishment Clause does not require government to be hostile toward religion but to be neutral regarding competition between sects); Everson v. Board of Educ., 330 U.S. at 18 (first amendment requires state to be neutral in relations with believers and nonbelievers).

71. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2504 (1985) (O'Connor, J., concurring) (Court has exacerbated conflict between accommodation and establishment of religion by requiring government neutrality toward religion); *id.* at 2508 (Burger C.J., dissenting) (if government may not accommodate religious observances, "benevolent neutrality" will translate into "callous indifference"); *id.* at 2508 (White, J., dissenting) (Court should reassess its precedents regarding Establishment Clause); *id.* at 2512-13 (Rehnquist, J., dissenting) (history indicates that first amendment's purpose was to prohibit establishment of national religion and to prevent discrimination among sects, not to require neutrality by government in conflicts between religion and irreligion).

the Constitution recognized the danger of religious persecution inherent in the establishment of a national religion and the potential for political strife when a government shows a preference for a religious sect or particular belief.[72] Some judges and commentators believe, however, that the Framers did not intend to force the government to take a neutral stance toward religion or to erect a "wall of separation between church and state," but only intended to prevent the designation of a national church.[73]

Despite the controversy surrounding the intent of the Framers, for more than twenty years the Supreme Court consistently has construed the Establishment Clause to prohibit laws requiring prayer in public schools, maintaining that the purpose of these laws is to advance religion.[74] In cases involving other issues pertaining to religion in schools, however, Supreme Court opinions have not drawn a bright line between endorsement and permissible accommodation of religion. For example, in *Everson v. Board of Education*[75] the Supreme Court held that a state may reimburse parents for the cost of transporting their children to and from school even though the children attend parochial schools.[76] In *Lemon v. Kurtzman*,[77] however,

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72. *See* Cord, *Understanding the First Amendment*, NAT'L REV., Jan. 22, 1982 at 26 (Framers of Constitution designed first amendment to prevent establishment of national religion or giving preferred legal status to one denomination); Wallace v. Jaffree, 105 S. Ct. 2479, 2513 (1985) (Rehnquist, J., dissenting) (Framers sought to prevent establishment of national church and preference for one sect); Engel v. Vitale, 370 U.S. 421, 429 (1962) (at time of adoption of Constitution many Americans were familiar with dangers inherent in union of church and state).

73. *See* Jaffree, 105 S. Ct. at 2520 (Rehnquist, J., dissenting) (Framers of Establishment Clause only intended to prevent federal government from giving preferential treatment to one religious denomination); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 878-879 (1978). History may reveal that the Framers intended the Establishment Clause as a protection for religions established by the various states. *Id. See generally* Cord, *Understanding the First Amendment*, NAT'L REV., Jan. 22, 1982 at 26-32 (review of history that refutes interpretation of Establishment Clause as requiring wall of separation between church and state). As Justice O'Connor noted, however, the Framers of the Constitution could not have anticipated the problems involved in the relationship between religion and the public schools because free public education was virtually nonexistent 200 years ago. Wallace v. Jaffree, 105 S. Ct. at 2503.

74. *See* Wallace v. Jaffree, 105 S. Ct. at 2493 (Alabama statue violated Establishment Clause because purpose of statute was to convey state approval of prayer); Abingdon School Dist. v. Schempp, 374 U.S. 203, 205 (1963) (laws requiring daily prayer and Bible readings in schools are unconstitutional because state's purpose was to advance religion); Engel v. Vitale, 370 U.S. 421, 430 (1962) (law prescribing official prayer for use in public schools constitutes establishment of religion).

75. 330 U.S. 1 (1947).

76. *Id.* at 18. The *Everson* Court construed a New Jersey statute, which authorized reimbursement to parents for the cost of school transportation, as public welfare legislation designed to help parents transport children safely, regardless of their religion, to and from accredited schools. *Id.* The dissenting justices in *Everson* objected to the local school board's application of the state statute. *Id.* at 20, 30 (Jackson, J., and Rutledge, J., dissenting). The local board's resolution authorized transportation funds only for children attending public or Catholic schools. *Id.* Although there was no evidence that reimbursements had been denied to children attending other nonprofit schools, the dissenting justices contended that the local board's policy amounted to state support of religion. *Id.*

77. 403 U.S. 602 (1971).

the court disapproved statutes that authorized payment of subsidies to nonpublic schools and teachers even though the statutes provided that state funds must not be used to teach religion.[78] The *Lemon* Court held that enforcement of the restrictions on the expenditure of these state subsidies required a degree of government involvement in parochial school affairs that amounted to excessive entanglement between church and state.[79]

The Supreme Court drew another fine line in addressing the constitutionality of "released time" programs in which schools excused children from class to receive religious instruction. In *McCollom v. Board of Education,*[80] the Court held that released time programs violated the Establishment Clause when the religious classes were held on school premises.[81] However, in *Zorach v. Clauson,*[82] which involved religious classes off campus, the Court viewed the released time program as a permissible accommodation of religion by the school.[83] Although the Supreme Court distinguished *Zorach,* a permissible accommodation of religion, from *McCollum,* an impermissible establishment of religion, because of the factual similarities between the two cases, these cases provide little real guidance for meaningful application of the Establishment Clause.[84]

In these school cases the Supreme Court endeavored to define the line between state actions that amount to an establishment of religion and actions that merely accommodate individuals' right to freely exercise their religious beliefs. In an effort to provide guidance for lower courts analyzing Establishment Clause issues, the Court in *Lemon* developed a three-part test for determining whether a government action constitutes establishment of religion.[85]

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78. *Id.* at 625. *See infra* notes 85-87 and accompanying text (discussing *Lemon).*

79. *Id.* at 622. *See infra* note 87 (discussion of *Lemon).*

80. 333 U.S. 203 (1948).

81. *See id.* at 210. In *McCollum v. Board of Education* the court held that church and state are not separate when the state allows religious instruction in public school buildings and when the state compulsory school attendance law helps to provide pupils for sectarian classes. *Id.*

82. 343 U.S. 306 (1952).

83. *Id.* at 315. In *Zorach v. Clauson* the Court approved a released time program in which religious classes were held off school premises. *Id.* However, Justices Black, Frankfurter, and Jackson wrote separate dissents mainly objecting to the use of the compulsory education law to aid religious groups and to approve religious beliefs. *Id.* at 318-25. Cf., McCollum v. Board of Educ., 333 U.S. 203 (1948) (held, released time programs are unconstitutional). *See supra* note 81 and accompanying text (discussing *McCollum).*

84. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) (cases arising under religion clauses present perplexing questions because it is impossible and undesirable to enforce wall of separation); Walz v. Tax Comm'n., 397 U.S. 664, 668 (1970) ("considerable internal inconsistency in the opinions of the Court derives from what may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to particular cases but have limited meaning as general principles"); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971) (wall of separation is "blurred, indistinct, and variable barrier").

85. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (prescribing three-part test to determine whether law violates Establishment Clause). The *Lemon* Court noted that a law could respect an establishment of religion without actually establishing a religion if the law represents a step toward the establishment of religion. *Id.* at 612.

According to the *Lemon* test, which courts have applied frequently,[86] a statute does not violate the Establishment Clause when the statute has a secular purpose, when the statute's primary effect neither advances nor inhibits religion, and when the statute does not foster excessive entanglement between church and state.[87]

The first prong of the *Lemon* test requires that only one of the purposes of a challenged statute be secular.[88] In applying the secular purpose prong of *Lemon,* the Supreme Court has examined the legislative history and historical context of the act when the Court has found the purpose of the act obscure.[89]

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86. *See, e.g.,* Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (school prayer statute); Mueller v. Allen, 463 U.S. 388 (1983) (statute allowing tax deduction for school expenses); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (state grants to nonpublic schools and tuition grants and tax relief to parents); Grove v. Mead School Dist. No. 54, 753 F.2d 1528 (9th Cir.) (school board's refusal to remove objectionable book), *cert. denied,* 106 S. Ct. 85 (1985); Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), (school board's policy allowing meetings of student religious groups), *cert. denied,* 103 S. Ct. 800 (1983); Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (museum exhibit on evolution); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (state statute requiring teaching of creation-science).

87. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). In *Lemon,* the Supreme Court examined Pennsylvania and Rhode Island statutes authorizing the payment of state funds to supplement the salaries of nonpublic school teachers who did not teach religion. *Id.* at 606-07. The Pennsylvania statute also authorized state reimbursement to nonpublic schools for the cost of secular books and materials. *Id.* The *Lemon* Court recognized that both statutes had the secular purpose of enhancing the quality of education in all schools subject to compulsory attendance laws even though the statutes might have had an additional religious purpose. *Id.* at 613. The Court struck down the statutes because enforcement of the statutes' restrictions necessarily required a degree of monitoring of religious school teachers, curriculum and records amounting to excessive entanglement between church and state. *Id.* Both state statutes required the state to monitor subsidized parochial school teachers to be sure that the teachers did not teach religion. *Id.* at 619-22. The Rhode Island statute also required the state to examine church school records to determine whether church school per pupil expenditures for secular education equalled or exceeded per pupil expenditures of public schools. *Id.* at 620. According to the Supreme Court, the statutes subsidizing parochial schools created intimate and continuing relationships between church and state and increased the danger of state control of church schools. *Id.* at 622. The Court also noted that because of the large number of parochial schools in both Pennsylvania and Rhode Island, the statutes had the potential to cause political division along religious lines, a problem the Framers had intended to prevent. *Id.* The Supreme Court predicted that people would tend to vote along religious lines on the issues of appropriating funds to subsidize parochial schools. *Id.* The Court reasoned that since the Framers of the Constitution intended to prevent the intrusion of religion into politics and to protect religion from the power of government, the statutes were unconstitutional. *Id. See* Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947) (Jackson, J., dissenting) (primary intent of first amendment was to keep religious controversy out of public life).

88. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2495 (1985) (Powell, J., concurring) (if Alabama school prayer statute had secular purpose in addition to purpose of advancing religion, statute would be acceptable).

89. *See id.* at 2490-91 (Supreme Court considered statements of bill's sponsor and Alabama legislature's previous enactments concerning school prayer to ascertain purpose of challenged statute); Epperson v. Arkansas, 393 U.S. 97, 108-09 (1968) (Court examined historical accounts concerning political climate at time Arkansas legislature enacted anti-evolution statute); *infra* notes 91-95 and accompanying text (discussing Supreme Court's method of determining legis-

In *Epperson v. Arkansas,*[90] for example, the Supreme Court struck down an Arkansas statute prohibiting the teaching of the theory of evolution in public schools because the legislature's sole purpose in enacting the statute was to eradicate a theory that conflicted with a religious doctrine.[91] To ascertain the purpose of the Arkansas legislature, the *Epperson* Court examined the legislative history of the act in light of historical accounts of the political atmosphere in Arkansas at the time of the statute's enactment.[92] Similarly, in *Wallace v. Jaffree,*[93] the Supreme Court's most recent school prayer decision, the Court relied on legislative history to determine the purpose of Alabama's statute authorizing a minute of silence "for meditation or voluntary prayer" in public schools.[94] In *Jaffree,* after considering statements by the Act's sponsor, the State's failure to suggest any secular purpose, and the Alabama legislature's previous attempts to cope with the school prayer issue, the Court concluded that the Alabama statute lacked a secular purpose.[95]

Under the second prong of the *Lemon* test, a statute having a legitimate secular purpose may violate the Establishment Clause if the statute's primary effect is to advance or inhibit religion.[96] For example, in *Committee for*

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lative purpose of statutes in *Jaffree* and *Epperson).* Several justices have expressed dissatisfaction with the Supreme Court's practice of considering unofficial legislative history in ascertaining a legislature's purpose in passing a statute. *See* Jaffree, 105 S. Ct. at 2500 (O'Connor, J., concurring) (court has no license to psychoanalyze legislators to determine legislative intent); Epperson, 393 U.S. at 113 (Black, J., dissenting) (improper for court to invalidate statute on basis of court's opinion concerning legislature's motives because motives are too difficult to ascertain).

90. 393 U.S. 97 (1968).

91. *Id.* at 103. The *Epperson* Court found that the sole purpose of an Arkansas law, which prohibited teaching evolution in public schools, was to suppress the theory of evolution because the theory conflicted with a literal interpretation of the Biblical account of the origin of man. *Id.* at 108-09.

92. *See* Epperson, 393 U.S. at 108. The *Epperson* Court noted that the Arkansas legislature enacted the anti-evolution statute only one year after the *Scopes* "monkey trial" in Tennessee. *Id.* at 109 n.17. The Court speculated that the *Scopes* trial may have influenced the Arkansas legislature's choice of language. *Id.* at 109. In *Epperson* the Court also referred to advertising campaigns and letters published in Arkansas newspapers in 1928, which urged public support for the anti-evolution law as pro-Christian and anti-Communist. *Id.* at 108 n.16.

93. 105 S. Ct. 2479 (1985).

94. *See id.* at 2481; ALA. CODE § 16-1-20.1 (1985 Supp.) (enacted 1981).

95. *See* Wallace v. Jaffree at 2490-91. In concluding that an Alabama school prayer statute lacked a secular purpose, the *Jaffree* Court considered the statements of the Alabama school prayer bill's sponsor who testified that his sole purpose in sponsoring the bill was "to return voluntary prayer to the public schools." *Id.* at 4670. In addition, the State of Alabama presented no evidence that the statute had any secular purpose. *Id.* The Court also considered the succession of school prayer statutes enacted by the Alabama legislature and concluded that this series of enactments revealed the legislature's intent to convey state approval of prayer in the public schools. *Id.* at 4671.

96. *See* Wallace v. Jaffree, 105 S. Ct. at 2496 (O'Connor, J., concurring) (under *Lemon* test, statute must have both secular purpose and primary effect); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (having secular purpose does not immunize law that has primary effect of advancing religion).

Public Education and Religious Liberty v. Nyquist[97] the Supreme Court considered whether New York statutes unconstitutionally advanced religion in providing for state grants to nonpublic schools and for tuition grants and tax relief to low income families whose children attended nonpublic schools.[98] The *Nyquist* Court noted that the statutes advanced the secular purpose of increasing safety, promoting free choice, minimizing taxes, and supporting pluralism.[99] The Court held, however, that this aid, when granted to parochial schools or to parents of parochial school students, effectively subsidized, and thus advanced, the religious mission of church schools.[100] The *Nyquist* Court distinguished an earlier decision, *Board of Education v. Allen,*[101] in which the Supreme Court allowed the State of New York to require all local educational agencies to lend free secular textbooks to all public and private secondary school students,[102] noting that the textbook loans in *Allen* conferred only an indirect benefit on religious institutions.[103] The distinction between the effect of the state aid in *Nyquist* and in *Allen* appears to rest on a difference in degree of state control. In *Allen,* a state agency or local school responsible for loaning books could purchase only secular books with state funds.[104] In *Nyquist,* however, the State had no mechanism for ensuring that the state funds provided to parochial schools or parents would not be used for religious purposes.[105]

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97. 413 U.S. 756 (1973).

98. *Id.* at 761-69.

99. *See id.* at 773. The *Nyquist* court stated that the purpose of state grants to nonpublic schools for maintenance and repair of school facilities and equipment was to ensure the safety, health, and welfare of students. *Id.* The purposes of state tuition grants and tax relief to low income families with children attending nonpublic schools was to give these families the option of choosing where their children would be educated, to avoid increasing the tax burden of providing public school education for additional children, and to support the vitality of a pluralistic society by encouraging the use of private schools. *Id.* The *Nyquist* Court concluded that these secular purposes adequately supported the state statute. *Id.*

100. *See id.* at 779 (direct financial aid to parochial schools for maintenance and repair advances religious mission); *id.* at 783 (without effective means of ensuring that parents will use financial aid exclusively for secular purposes, aid to parents effectively provides financial aid to religious institutions).

101. 392 U.S. 236 (1968).

102. *See* Board of Educ. v. Allen, 392 U.S. at 245 (statute requiring local educational agencies to lend textbooks free of charge to all secondary school students, including students in private schools, did not advance religion because loan requirement applied to only secular books).

103. *See* Nyquist, 413 U.S. at 771 (law is not constitutionally invalid just because law confers incidental or indirect benefit upon religious institution). The textbook loans in *Allen* benefitted parents who would otherwise have to buy books and thus benefitted religious institutions only indirectly. Board of Educ. v. Allen, 392 U.S. 236, 244 (1968).

104. Board of Educ. v. Allen, 392 U.S. 236, 245 (1968). *See supra* note 103 and accompanying text (effect of loans of secular textbooks).

105. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 791, 798 (1973). *See supra* note 100 and accompanying text (primary effect of grants to parochial schools and parents is advancement of religion).

Ten years after *Nyquist,* however, the Court held in *Mueller v. Allen*[106] that a Minnesota statute allowing taxpayers to deduct the cost of school tuition, textbooks, and transportation of dependents did not have the primary effect of advancing religion.[107] The *Mueller* Court reasoned that the Minnesota law made available tax deductions to all parents whereas the tax deductions and tuition grants in *Nyquist* were available only to parents of children in nonpublic schools.[108] The practical effects of the tax relief in *Nyquist* and in *Mueller* are barely distinguishable since parents of public school children have no tuition costs to deduct and the benefits of deductions for transportation and textbook costs are likely to be minimal. By definition, the primary effect test involves a determination of the degree to which a statute advances or inhibits religion. From a practical standpoint, however, the *Mueller* and *Nyquist* opinions are inconsistent and consequently provide no clear guidance for application of the effect test.

Under the third prong of the *Lemon* test, government action may violate the Establishment Clause if the action fosters excessive entanglement between church and state even though the government action or law has a secular purpose and primary effect.[109] The objective of the entanglement prohibition is to protect religion from government interference and to prevent religion from intruding into the domain of government, although complete separation is impossible.[110] Entanglement may occur when a state agency and a religious institution maintain an intimate administrative relationship, creating the danger that one will control the other.[111] Entanglement also occurs when government action increases the potential for political divisiveness along religious lines by allowing or encouraging the intrusion of religion into politics.[112]

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106. 463 U.S. 388 (1983).

107. *See id.* at 396 (tax deduction for school expenses available to all parents has secular effect when benefits provided to broad spectrum of groups).

108. *Id.* at 398.

109. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *supra* note 88 and accompanying text (discussion of *Lemon).*

110. Lemon, 403 U.S. at 623; *see* Engel v. Vitale, 370 U.S. 421 (1962) (union of government and religion tends to destroy government and degrade religion); Everson v. Board of Educ., 330 U.S. 1, 26-27 (1947) (Jackson, J., dissenting) (purpose of religious amendment was "not only to keep the state's hands out of religion but to keep religion's hands off the state").

111. *See* Lemon, 403 U.S. at 621-22; *supra* note 87 and accompanying text (state statutes authorizing subsidies to parochial schools are example of administrative entanglement); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (granting tax exemption to churches involves less extensive government relationship with churches than taxing churches would require).

112. *See* Lemon, 403 U.S. at 623; *supra* note 87 and accompanying text (discussion of political division along religious lines). The Supreme Court has recognized two kinds of excessive entanglement between church and state: government action that creates an intimate relationship between a government agency and a religious institution and government action that results in continuing political strife over aid to religion. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973). In the past Supreme Court justices have raised the issue of political divisiveness along religious lines in cases that did not involve direct state subsidies to religious institutions. *See* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948) (Frankfurter,

Thus far, opponents of secular humanism have been unsuccessful in removing the influence of secular humanism from public schools and institutions by claiming that secular humanism is a religion.[113] The secular humanism ban in Title VII of the EESA may represent the beginning of legislative attempts to purge humanistic education from school curriculums.[114] One might question the constitutionality of this type of legislative censorship because banning the teaching of ideas or values that one religious group opposes may be equivalent to advancing the beliefs of the opposing group.

To ascertain whether the secular humanism ban violates the Establishment Clause, a court would apply the three-pronged *Lemon* test.[115] The first prong requires finding a secular purpose. Since both Title VII and its legislative history are silent concerning the purpose of the ban,[116] one must consult other sources to ascertain the Title's legislative purpose. News accounts suggest that the language of Title VII resulted from a last-minute compromise between liberal and conservative factions in the Senate.[117] Conservative proponents of the secular humanism ban maintained that the ban's

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J., concurring) (public schools should be agencies of cohesion but religious education in schools promotes divisiveness); Everson v. Board of Educ., 330 U.S. 1, 26 (1947) (Jackson, J., dissenting) (local school board's policy of providing transportation funds to public and Catholic school students is unconstitutional because purpose of first amendment was to exclude religious controversy from public life). In *Mueller v. Allen,* however, the majority opinion stated that courts should limit the political divisiveness question to cases involving government subsidies paid directly to parochial schools or teachers. Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983).

113. *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985); Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980): Jackson v. State of California, 460 F.2d 282 (9th Cir. 1972). In these cases the plaintiffs objected to the influence of the "religion" of secular humanism in public schools or institutions. *See Grove,* 753 F.2d at 1534; *Crowley,* 636 F.2d at 740; *Jackson,* 460 F.2d at 283 n.1. In each case the courts rejected the plaintiffs' claims without deciding whether secular humanism is a religion. *See Grove,* 753 F.2d at 1534 ("secular humanism may be a religion" but use of book in classroom did not constitute establishment of any religion); *Crowley,* 636 F.2d at 742 (Smithsonian's exhibit on evolution does not establish religion simply because secular humanists advocate evolution); *Jackson,* 460 F.2d at 283 n.1 (no evidence that public school system is hostile toward religion or has established "irreligion of secular humanism"). *See supra* notes 41-67 and accompanying text (discussion of secular humanism as religion).

114. *See supra* notes 36-40 and accompanying text (discussion of claim that humanistic education is equivalent to secular humanism in public schools).

115. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (three-part test for analysis of Establishment Clause issues); *supra* notes 85-112 and accompanying text (discussion of application of *Lemon* test).

116. *See supra* notes 17-18 and accompanying text (purpose of secular humanism ban is not evident in Title VII or legislative history).

117. *See* Rosenbaum, *supra* note 19, at A16; *Department Proposes Rule, supra* note 34, at A19, col. 5. Senator Moynihan and Senator Eagleton delayed passage of the math and science bill in order to add the magnet school amendment to provide aid for school districts trying to implement court-ordered desegregation efforts. Washington Post, *supra,* at A19, col. 5; N.Y. Times, *supra,* at A16, col. 5. Moynihan and Eagleton sought the support of Senator Hatch who, according to one of his aides, proposed a list of prohibitions designed "to focus the money on real concrete academic subjects . . . and to get away from the softer social engineering kinds of things." Washington Post, *supra,* at A19, col. 5. After Senator Baker

purpose is to ensure that schools use magnet school funds only for academic and vocational programs.[118] If the drafters of the ban were simply advocating curriculum improvement, the drafters might have used plainer language to convey this purpose instead of using "secular humanism," an undefined term.[119] The use of such an ambiguous term in Title VII suggests that the drafters intended to provide local school boards with a license to censor ideas that boards find objectionable.[120] The Establishment Clause prevents a school board from censoring ideas based solely on religious objections to those ideas.[121] By allowing a school board to determine that those objectionable ideas fall under the rubric of secular humanism, Title VII provides a secular purpose for censorship. Since objections to secular humanism frequently have a religious basis,[122] the purpose of legislation forbidding instruction of secular humanist courses arguably is to endorse the dominant religion in a community and to enable school boards to eliminate competing ideas or views by branding those ideas as secular humanism. Unless the secular humanism ban also has a clearly secular purpose, the ban violates the Establishment Clause.[123]

Even if a secular purpose exists behind the secular humanism ban, the ban may fail to satisfy the second prong of the *Lemon* test.[124] If the ban serves to remove all humanistic courses and ideas from magnet school curricula, then the primary effect of the ban will be to place the government's

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"virtually ordered" the opposing senators to compromise, a few senators from each side met and eliminated all of Hatch's prohibitions except those that proscribe using magnet school grants for "consultants, for transportation, or for any activity which does not augment academic improvement, or for courses of instruction the substance of which is secular humanism." *See* N.Y. Times, *supra,* at A16, Col. 5-6; 20 U.S.C. § 4059 (1985) (EESA). On the same day as the senatorial compromise, the Senate approved the magnet school amendment. 130 CONG. REC. S6682 (daily ed. June 6, 1984). Later Senator Moynihan stated, "I thought it was the price I had to pay to get school desegregation money." N.Y. Times, *supra,* at A16, col. 6.

118. *Department Proposes Rule, supra* note 34, at A19, col. 5.

119. *See supra* text accompanying notes 19-40 (discussing vagueness of definitions of secular humanism). If proponents of the secular humanism ban actually wanted to ensure that school systems would use magnet school funds to teach only concrete academic subjects and vocational programs, those legislators could have drafted a bill specifically limiting use of those funds for courses in physical, social and computer sciences, history, math, English, foreign languages, and vocational education. This language would define the act's purpose more clearly.

120. *See supra* note 17 and accompanying text (purpose of secular humanism ban is to support fundamentalist values).

121. *See* Epperson v. Arkansas, 393 U.S. 97, 109 (1968) (held, Arkansas law prohibiting teaching of evolution theory violated Establishment Clause because law's sole purpose was to blot out theory that conflicted with literal interpretation of Bible); *see also* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring) (state may not deny access to idea for partisan or political reasons because pluralism of ideas is fundamental to American system of government).

122. *See supra* notes 33-40 and accompanying text (discussing religious objections to secular humanism).

123. *See supra* notes 88-95 and accompanying text (discussing secular purpose requirement).

124. *See* Lemon v. Kurzman, 403 U.S. 602, 612 (1971) (second prong of *Lemon* test examines statute to determine whether statute's primary effect advances or inhibits religion).

stamp of disapproval on secular humanist ideas and values and thus place the government's sanction on the ideas and values of the opponents of secular humanism. Through its wholesale rejection of secular humanism, the government violates the Establishment Clause, which requires the government to take a neutral stance toward religious differences.[125] Furthermore, the secular humanism ban may promote political divisiveness along religious lines as fundamentalist groups struggle with opponents to gain influence over local school boards responsible for defining secular humanism.[126]

Suppose, for example, that a school board defines the theory of evolution as secular humanism and then proceeds to remove evolution from the curriculum of magnet schools. The board's action could survive a first amendment challenge with the defense that the secular humanism ban in Title VII provides a secular purpose for excluding evolution from magnet schools.[127] Since the stated purpose of the EESA was to improve the quality of scientific education,[128] it is ironic that the EESA could make possible the omission of a theory considered to be the "cornerstone of modern biology."[129] Because the purpose and language of the secular humanism ban are vague, the ban has potentially disastrous consequences which are incompatible with the thrust of the EESA.[130]

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125. *See* Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (first amendment requires state neutrality toward believers and nonbelievers); *supra* notes 70-73 and accompanying text (discussion of neutrality requirement).

126. *See supra* notes 109-112 and accompanying text (discussion of excessive entanglement).

127. *See* Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (Supreme Court struck down Arkansas anti-evolution law because law had only religious purpose); *supra* notes 90-92 and accompanying text (same).

128. *See* 20 U.S.C. § 3901 (1985) (EESA) (purpose of EESA is to improve quality of mathematics and science instruction).

129. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1273 (E.D. Ark. 1982) ("evolution is cornerstone of modern biology"). In striking down an Arkansas statute that required public schools to teach both "creation-science" and "evolution-science," the *McLean* court found that the theory of evolution is incorporated as a major theme in virtually all major textbooks and that "creation-science" is not a science. *Id.* at 1259, 1267.

130. The hypothetical example in the text assumes that a magnet school which did not teach evolution could attract enough minority students to achieve desegregation goals. *See* 20 U.S.C. § 4052 (1985) (EESA). To be eligible for magnet school funding under Title VII of the EESA, a school must have experienced a $1 million reduction in funding immediately following the repeal of the Emergency School Assistance Act in 1981, or must be implementing a court-ordered desegregation plan or a voluntary desegregation plan which the Secretary of Education has approved under Title VI of the Civil Rights Act of 1964. *Id.*

The example also assumes that a student or parent would have standing to challenge the school board's action. *See* Allen v. Wright, 104 S. Ct. 3315, 3325 (1984) (to have standing plaintiff must allege personal injury fairly traceable to defendant's unlawful conduct and likely to be redressed by requested relief). Since attendance at magnet schools is voluntary, a student might have difficulty demonstrating that the curriculum of a magnet school caused a personal injury. In *Allen v. Wright*, the Supreme Court recognized as an injury a child's diminished ability to receive an education in a racially integrated school. *Id.* at 3328. In some school districts, magnet schools might be the only substantially integrated schools. In the hypothetical magnet school, which defined evolution as secular humanism and consequently did not teach evolution, the quality of science education would be arguably inferior. *See* McLean v. Arkansas

While Title VII's secular humanism ban entails constitutional questions centering on the Establishment Clause, Title VIII involves free exercise and free speech.[131] The Supreme Court has recognized a tension or potential conflict between the Establishment Clause's prohibition against government establishment of religion and the Free Exercise Clause's emphasis on individual freedom of expression.[132] The Free Exercise Clause forbids government action that restricts or interferes with religious practice unless the government can demonstrate that its action is necessary to further a compelling state interest.[133] For example, in *Yoder v. Wisconsin*[134] the Supreme Court held that the first amendment required the state to accommodate the religious beliefs and practices of the Amish, who believe that their children should not attend public school after completing the eighth grade.[135] The *Yoder* Court rejected the State's contention that the state interest served by compulsory school attendance laws was sufficiently compelling to override the religious practices of the Amish.[136]

One legal commentator has suggested that the Free Exercise Clause creates a "zone of permissible accommodation."[137] The Supreme Court has agreed that government action may accommodate religion without going so far as to establish religion.[138] The Court has approved state accommodations

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Board of Educ., 529 F. Supp. 1255, 1273 (E.D. Ark. 1982) (student deprived of access to prevailing scientific theory will be educationally deprived). In this situation a student-plaintiff might contend that the school board's action eliminating evolution from the curriculum of magnet schools denies the student the opportunity to attend a racially integrated school without sacrificing the quality of scientific education.

131. *See supra* notes 15-16 and accompanying text (discussing purpose of Title VIII).

132. *See* Wallace v. Jaffree, 105 S. Ct. 2479, 2504 (1985) (O'Connor, J., concurring) (stating that two religion clauses would clash if carried to extreme); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 788 (1973) (tension between free exercise and establishment clauses is inevitable); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (because religion clauses are stated in absolute terms, clauses would clash if expanded to logical extremes).

133. *See* Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) (ruling state's interest was not sufficiently compelling to force Amish religious practice to conform to state's compulsory school attendance law).

134. 406 U.S. 205 (1972).

135. *Id.* at 235.

136. *See id.* at 224-25. The *Yoder* Court held that the State had not shown that Amish youngsters required an additional one or two years of public school education to enable them to participate effectively and intelligently in the political system or to enable them to become self-sufficient members of society. *Id.*

137. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 823 (1978).

138. *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952). In *Zorach,* Justice Douglas, writing for the majority stated: "We are a religious people whose institutions presuppose a Supreme Being. . . . We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." *Id.* The *Zorach* Court held that the Constitution permitted schools to accommodate people's spiritual needs through "released time" programs. *Id.* at 309. The *Zorach* Court added that the Constitution does not require government to show "callous indifference" to religious groups. *Id.* at 314. *See supra* notes 80-83 and accompanying text (discussing released time programs).

of religion such as released time program in schools[139] and tax exemption for religious institutions,[140] while ruling that the first amendment does not require the states to assist parents in providing religious education to their children.[141]

The stated purpose of the original Senate equal access bill was to confirm and to clarify the rights of students to exercise religious freedom through voluntary extracurricular meetings at school.[142] Title VIII, the Equal Access Act, broadened the scope of the original bill to include the religious, political, and philosophical content of speech at meetings of student groups.[143] Based on the language and legislative history[144] of the Act, the purpose of the Act is to ensure that secondary schools receiving federal financial assistance, and having a limited open forum as defined in the Act,[145] do not deny students access to that forum based on the content of the students' speech. The phrase "limited open forum" refers to a school policy of allowing "noncurriculum-related" student groups to meet on school premises.[146] Title VIII encourages schools to recognize that students have the right to engage in free speech and to conduct meetings as long as those meetings are voluntary, student-initiated, and do not disrupt educational activities.[147]

The legislative history of Title VIII suggests that the impetus for equal access legislation was a congressional perception of a need for legislation to end legal confusion and litigation concerning the relationship between schools and student religious groups.[148] Title VIII addresses the authority of school

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139. 343 U.S. at 315. *See supra* notes 80-83 and accompanying text (discussion of released time programs).

140. *See* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970). *See also* notes 42, 46 (discussion of tax exemption of religious institutions).

141. *See* Brusca v. Missouri *ex rel.* State Bd. of Educ., 332 F. Supp. 275 (E.D. Mo. 1971) (religion clauses do not require state to provide financial aid to help parents educate children religiously), *aff'd*, 405 U.S. 1050 (1972).

142. S. REP. No. 357, 98th Cong., 2d Sess. 4, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2349; *infra* note 148 and accompanying text (discussing legislative history of Title VIII).

143. 20 U.S.C. § 4071(a) (1985) (EESA). *See supra* note 15 (discussing differences between original bill and Equal Access Act).

144. *See* S. REP. No. 357, 98th Cong., 2d Sess. 1, (report of Senate Judiciary Committee on original equal access bill), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348.

145. *See* 20 U.S.C. § 4071(b) (1985) (EESA). Under the Equal Access Act, a public secondary school has a limited open forum whenever that school allows or offers to allow one or more noncurriculum related student groups to meet at the school during noninstructional time. *Id.* Noninstructional time occurs before or after actual classroom instruction. 20 U.S.C. § 4072(4). *See infra* note 175 (definition of noninstructional time).

146. *See infra* notes 182-183 and accompanying text (discussing undefined terms in Title VIII).

147. *See* 20 U.S.C. § 4071(c) (1985) (EESA).

148. *See* S. REP. No. 357, 98th Cong., 2d Sess., 14-17, *reprinted in* U.S. CODE CONG. & AD. NEWS 2348, 2358, 2360-63. Misunderstanding of legal issues and fear of expensive lawsuits have led some school administrators to drastically restrict students' rights. *Id.* at 2358, 2360. Testimony presented to the Senate Judiciary Committee indicated that some schools have banned religious clubs and religiously affiliated community service organizations from meeting on

administrators to exercise discretionary control over student activities outside the classroom.[149] Support exists for the view that school authorities should not exercise the same degree of control over extracurricular activities as over curriculum related activities.[150] In *Board of Education, Island Trees Union Free School District No. 26 v. Pico,*[151] for example, the Supreme Court dealt with the question whether the first amendment limits a school board's discretion to remove books from a school library.[152] The *Pico* plurality held that a school board has less discretion to determine the contents of a school library than to select classroom curriculum.[153] The plurality stated that while

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campus and that some school officials have prohibited even private religious discussions among students. *Id.* at 2361-63.

A few senators expressed special concern about the Fifth Circuit's decision in *Lubbock Civil Liberties Union v. Lubbock Independent School District. Id.* at 2366; *see* Lubbock, 669 F.2d 1038 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983). Senator Strom Thurmond interpreted the *Lubbock* decision as requiring an affirmative hostility toward religious values. S. REP. No. 357, 98th Cong., 2d Sess. 20, *reprinted in* U.S. CODE CONG. & AD. NEWS 2345, 2366. In an *amicus curiae* brief in support of the Lubbock School District's petition for writ of certiorari, twenty-four senators declared that the Fifth Circuit's decision in *Lubbock* required the state to become the adversary of students desiring to engage in religious activities. *Id.*

The *Lubbock* court held that a school board policy that authorized meetings of student groups for religious purposes before and after school constituted an establishment of religion. *Lubbock,* 669 F.2d at 1038. The Fifth Circuit determined that the purpose of the school district's policy was to allow meetings of religious groups, and not to develop student leadership and communication skills as the school district claimed. *Id.* at 1045. The *Lubbock* court also found that the school district's policy had the primary effect of advancing religion because impressionable secondary and primary age school children might interpret the policy as placing the district's approval on religious activity. *Id.* Furthermore, the court ruled that the use of school facilities by religious groups and supervision of religious meetings by school personnel created excessive entanglement. *Id.* at 1047. *See supra* notes 87-112 and accompanying text (discussing use of *Lemon* test for Establishment Clause analysis).

While the *Lubbock* opinion appears to approach requiring government hostility toward religion, the decision may be an anomaly based on the peculiar facts of that case. S. REP. No. 357, 98th Cong., 2d Sess. 7, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2353. The Lubbock School District had a long history of unconstitutional policies, such as permitting school-sponsored prayer, Bible readings, and evangelistic speakers and the distribution of Gideon Bibles to students. Lubbock, 669 F.2d at 1040 n.3. The school district continued to allow many of these practices for almost ten years after assuring the Lubbock Civil Liberties Union that the District would stop those practices. *Id.* at 1039.

149. *See* 20 U.S.C. § 4071 (1985) (EESA) (Title VIII applies to student groups desiring to meet on school premises during noninstructional time); *supra* notes 13, 14, 142-148 and *infra* notes 179-184 and accompanying text (discussing provisions of Title VIII).

150. *See* Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982) (plurality opinion) (first amendment restricts school board's discretion to remove books from school library because use of library is extracurricular activity); Bowman v. Bethel-Tate Bd. of Educ., 610 F. Supp. 577 (S.D. Ohio 1985) (first amendment restricts school board's discretion to stop production of extracurricular student play); *infra* notes 157-59 and accompanying text (discussing *Bowman*).

151. 457 U.S. 853 (1982).

152. *Id.* at 863.

153. *Id.* at 869. The *Pico* Court's majority holding was limited to a procedural question on summary judgment. *Id.* at 862-63. The *Pico* Court held that summary judgment was not

a school board may claim discretion over curriculum based on the board's duty to inculcate community values, that degree of discretion does not extend beyond the classroom.[154] The *Pico* plurality recognized that a right to receive ideas exists which is implied by the first amendment and which restricts the school board's authority to deny access to ideas outside the classroom for political or partisan reasons.[155] The *Pico* Court characterized the use of a school library as an extracurricular activity because students use the library on a voluntary basis.[156]

Relying on *Pico,* the United States District Court for the Southern District of Ohio held, in *Bowman v. Bethel-Tate Board of Education,* that a school board could not stop the production of a voluntary extracurricular play solely because the board disagreed with some of the ideas expressed in the play.[157] In *Bowman,* the district court distinguished between the board's "exceptional amount of discretion" over curriculum and the board's obligation to respect the first amendment rights of students and teachers engaged in voluntary extracurricular activity.[158] The *Bowman* court found that the play was an extracurricular activity since participation was completely voluntary and rehearsals were held before and after school.[159] Both *Pico* and *Bowman* support the proposition that school authorities have less discretion to restrict students' rights during extracurricular activities than during curricular activities.[160]

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appropriate because a genuine issue of material fact existed concerning the basis of the school board's decision to remove the books from the library. *Id.* at 875. The plurality in *Pico* expressed the opinion that if the board's intent to deny access to ideas was the decisive factor in the board's decision, then the board exercised discretion in violation of the first amendment. *Id.* at 871.

154. *Id.* at 869.

155. *Id.* at 867. In *Pico,* the plurality maintained that the first amendment's free speech guarantee implies a right to receive ideas because access to ideas and information is necessary for the meaningful exercise of the rights of speech, press, and political freedom. *Id.* at 867. Four dissenters, however, contended that an individual's right to receive ideas does not require the government to provide those ideas. *Id.* at 886.

156. *Id.* at 869 (school library gives students opportunity for voluntary enrichment, self-education, and free inquiry).

157. *See* Bowman v. Bethel-Tate Board of Educ., 610 F. Supp. 577, 582 (S.D. Ohio 1985). In *Bowman,* the District Court enjoined the school board from interfering with the production of a play by third graders. *Id.* at 582. The board objected to the play, a musical comedy entitled *Sorceror and Friends,* because in the board's opinion the play "glorifies cowardice, denigrates patriotism, and disparages the aged." *Id.* at 581.

158. *Id.* at 581-82.

159. *Id.* at 579-80.

160. *See* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969). The *Tinker* Court noted that even during regular school hours, the first amendment limits the discretion of school authorities. *Id.* at 507. In upholding the right of students to wear black armbands at school to demonstrate opposition to the Viet Nam War, the *Tinker* Court held that a school may not prohibit the expression of a particular viewpoint unless the prohibition is "necessary to avoid material and substantial interference with schoolwork or discipline." *Id.* at 511.

Whether the Free Exercise Clause requires, or even permits, schools to allow meetings of student religious groups depends on whether these meetings create the impression that the school is placing its imprimatur on a particular religion. In *Brandon v. Board of Education,*[161] the Second Circuit upheld the right of a school board to deny the request of a student group to conduct prayer meetings in a classroom immediately prior to the beginning of classes.[162] The *Brandon* court held that because the school had an obligation to supervise students during that time, allowing a prayer group would create the appearance of official approval of a religious activity.[163] In *Brandon,* the Second Circuit refused to require a school board to accommodate a religious group because of the school board's compelling interest in avoiding the appearance of state endorsement of a particular belief.[164] In *Lubbock Civil Liberties Union v. Lubbock Independent School District,*[165] however, the Fifth Circuit appeared to go further in restricting students' rights. The *Lubbock* court held that the school board's policy of allowing meetings of student religious groups before and after school on the same basis as other student groups was an impermissible accommodation of religion because the policy created the impression of official school board approval.[166]

A school's open forum policy may weaken the school's interest in avoiding the appearance of official approval of a religious group. In *Widmar v. Vincent*[167] the Supreme Court held that a state university having an open forum policy, which generally allowed on-campus meetings of student groups, could not exclude student religious groups based on the content of those groups' speech.[168] The *Widmar* Court concluded that the university's action violated the fundamental principle that state regulation of speech be "content-neutral."[169] The Court reasoned that once a university has created a forum generally open to students by accommodating many student groups, the university must justify discriminating against some student groups under the constitutional norms applicable to prior restraint.[170] These norms require that the government policy be necessary to serve a compelling state interest.[171] The *Widmar* Court held that in the context of an open forum, the state's

161. 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981).

162. *Id.* at 973.

163. *Id.* at 978-79.

164. *Id.* at 978.

165. 669 F.2d 1038 (5th Cir. 1982), *cert. denied,* 459 U.S. 1155 (1983).

166. *See id.* at 1045; *supra* note 148 and accompanying text (discussing *Lubbock).*

167. 454 U.S. 263 (1981).

168. *See* Widmar v. Vincent, 454 U.S. 263, 277 (1981). In *Widmar,* the University of Missouri at Kansas City, which had allowed an evangelical student group to use university facilities for four years, rescinded permission for the group to hold meetings on campus, maintaining that the United States Constitution and state law required separation of church and state. *Id.* at 265, 270. The *Widmar* Court construed the issue as whether the university could exclude a religious group from an open forum. *Id.* at 273.

169. *Id.* at 277.

170. *Id.* at 269-70.

171. *Id.* at 270.

interest in avoiding the appearance of official endorsement of religion is not sufficiently compelling to justify excluding religious groups from that forum.[172] Asserting that the primary effect of an open forum does not advance religion, the *Widmar* Court explained that an equal access policy confers only incidential benefits on religious groups.[173]

The Equal Access Act attempts to extend the *Widmar* holding to secondary schools. In *Widmar,* however, the Supreme Court noted that college students are less impressionable than younger students and can appreciate the policy of neutrality toward religion.[174] Whether secondary school students are mature enough to appreciate and understand the neutrality policy is a matter of controversy.[175] The Second Circuit in *Brandon* indicated that high school students are too impressionable to distinguish between endorsement and neutrality.[176] On the other hand, in considering the need for an equal access law, the Senate Judiciary Committee rejected

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172. *Id.* at 276.

173. *Id.* at 274. The *Widmar* Court explained that the religious benefits of an open forum are only incidental because the forum is available to a broad class of religious and nonreligious groups. *Id.* at 274.

174. *Id.* at 274 n.14.

175. The United States Supreme Court had the opportunity to decide whether to extend its holding in *Widmar* to younger students when the Court heard the case of *Bender v. Williamsport Area School District* in October, 1985. *See* 106 S. Ct. 1326 (1985). In *Bender* the Third Circuit upheld a school district's decision to deny access to a student religious group, observing that high school students probably could not distinguish between accommodation and endorsement of religious activity. Bender v. Williamsport Area School Dist., 741 F.2d 538, 552 (3d Cir. 1984). The Third Circuit rendered a decision in *Bender* a few weeks before the President signed the Equal Access Act. Remes, *Equal Access Act, 'Humanism Ban Extend an Invitation to Litigation,* Nat'l L.J., June 24, 1985, at 16, col. 2. The Supreme Court granted a petition for certiorari filed by the *Bender* students who were joined by the United States. *Id.* The Supreme Court, however, never reached the merits of the case because the Court vacated the judgment of the Third Circuit on grounds that the appellant, a member of the school board, lacked standing to appeal as an individual. 106 S. Ct. at 1335.

Amicus briefs in the *Bender* litigation at the Supreme Court level invoked Title VIII to support the students' position because the Equal Access Act applies to secondary schools. Nat'l L.J., *supra,* at 16, col. 2. The plaintiffs in *Bender* and the United States contended that in enacting Title VIII Congress found as a matter of fact that secondary school students are capable of distinguishing between school accomodation of religion and school endorsement of religion. *Id. See* 20 U.S.C. § 4071 (1985) (EESA) (Title VIII mandates equal access for student groups in public secondary schools having a limited open forum). Application of the Act may not be appropriate, however, because the *Bender* student group requested to meet during a scheduled activity period during school hours. *See Bender,* 741 F.2d at 543. The Act, however, restricts the equal access requirement to meetings held during noninstructional time. *See* 20 U.S.C. § 4071(b) (1985) (EESA). The Act defines noninstructional time as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." *Id.* at § 4072(4). The legislative history of Title VIII indicates that Congress intended "noninstructional" time to mean before or after regular school hours. *See* 130 CONG. REC. S8353 (daily ed. June 27, 1984) (statement of Senator Hatfield).

176. *See* Brandon v. Board of Educ., 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981). The *Brandon* court reasoned that impressionable high school students might view the appearance of school involvement in religious activity as an indication of state

the position that younger students would not be able to make the distinction between school-sponsored and student-led religious activities.[177]

One may read the Equal Access Act as an attempt to use the principles expressed by the Supreme Court in *Pico* and *Widmar* to protect students from discrimination by school authorities.[178] The Act essentially reinforces and protects the first amendment right of all student groups to use school facilities before or after regular school hours if the school allows that privilege to some student groups.[179] The Act recognizes, however, that schools must have authority to maintain safety and discipline and to ensure that student participation is voluntary.[180] One purpose of the Act is to assure school officials that accommodating different student groups does not constitute endorsement of those groups or their philosophies.[181]

While the spirit of toleration in Title VIII may serve to promote the values of pluralism, the Act's vague terminology creates problems for application. The Act states that a limited open forum exists when a school allows meetings of "noncurriculum related" student groups.[182] Since the Act fails to define the term noncurriculum related, the meaning of "limited open forum" is unclear. The original equal access bill used the term extracurricular,[183] but the drafters of Title VIII apparently rejected that term in favor of "noncurriculum related," which connotes a narrower meaning than "extracurricular." High school students engage in a wide variety of extracurricular group activities, many of which are related to some element of the school curriculum. Examples of curriculum related, extracurricular student groups that use school facilities include foreign language, science, and

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endorsement. *Id.* The Second Circuit held that the school board had a compelling interest in avoiding a symbolic inference of state endorsement of a particular religious creed. *Id.*

177. *See* S. REP. No. 357, 98th Cong., 2d Sess. 9, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2355. The Senate Committee Report on the equal access bill rejected the notion that students "below college level" could not distinguish between religious speech that is school-sponsored and teacher-led and religious speech that is initiated and led by students as one of a variety of extra-curricular activities. *Id.* The report also stated that students may perceive state hostility toward religion if all religious speech in extracurricular activities is banned. *Id.*

178. *See supra* notes 152-56 and accompanying text (discussing *Pico*); notes 168-74 and accompanying text (discussing *Widmar*).

179. 20 U.S.C. § 4071 (1985) (EESA). *See supra* notes 13, 14, 149-153 and accompanying text (discussing provisions of Title VIII).

180. *See* 20 U.S.C. § 4071(f) (1985) (EESA) (Title VIII does not limit school's authority to maintain order, to protect students and teachers, and to assure that students' attendance at meetings is voluntary).

181. *See supra* note 148 and accompanying text (purpose of Equal Access Act was to allay fears of school officials who believed that accommodation of student religious groups violated Constitution). The Act's assurance that religious accommodation does not constitute endorsement implies that Congress assumed that secondary school students are able to distinguish between endorsement and accommodation. *See supra* note 175 (contention of plaintiffs in *Bender*).

182. 20 U.S.C. § 4071(b) (1985) (EESA).

183. *See* S. REP. No. 357, 98th Cong., 2d Sess. 36-38, (section by section analysis of original equal access bill in report of Senate Judiciary Committee), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 2348, 2382-84.

computer clubs, thespian societies, and vocation-related groups. The term noncurriculum related may apply only to those student groups that have absolutely no connection to courses offered in the curriculum.[184] The uncertain meaning of "noncurriculum related" student groups creates the danger that the Equal Access Act will not apply to schools that limit the use of school facilities to groups having some tenuous relationship to the curriculum. Thus, for example, a school administrator could claim that his school does not provide a limited open forum within the meaning of Title VIII because the school only allows meetings of curriculum related student groups.

The Equal Access Act may fail to achieve its goal of stemming the tide of litigation in this area because of the undefined term "noncurriculum related" and limited application of the Act. The language of the Act restricts the Act's protection of student rights to those schools that provide a limited open forum.[185] In addition, by not clearly defining terms, the Act appears to grant considerable leeway to school administrators to decide whether their school policies concerning extracurricular activities come within the meaning of the Act. For the most part, school board members and school administrators are not legal experts familiar with legal terms and concepts such as zones of permissible accommodation.[186] School officials will probably continue to make decisions based on a limited appreciation of complex constitutional questions, a fear of expensive lawsuits, and a desire to avoid controversy.[187]

Title VIII's ambition to promote pluralism and free expression seems incompatible with Title VII's secular humanism ban, which appears to promote censorship.[188] Both acts represent congressional attempts to address aspects of the ideological conflict between secularists and fundamentalists concerning the role of religion in public education.[189] Both acts are also illustrations of the type of ineffective lawmaking that frequently results from

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184. *See* 130 CONG. REC. S8342 (daily ed. June 27, 1984) (remarks of Senator Hatfield). During the Senate debate on the Equal Access Amendment, Senator Hatfield explained that student groups such as the French Club or Spanish Club are connected to the school curriculum, but other groups such as the Young Republicans or the Chess Club are noncurriculum related groups. *Id.* Senator Hatfield also stated that the Act ultimately allows each school board to decide where to draw the line between curriculum related and noncurriculum related groups. *Id.*

185. *See* 20 U.S.C. § 4071 (EESA) (unlawful for school with limited open forum to deny equal access).

186. *See supra* notes 137-141 and accompanying text (discussing zones of permissible accommodation).

187. *See supra* note 148 (discussing reactions of school administrators to legal confusion and fear of lawsuits).

188. *See supra* notes 142-47, 174-81 and accompanying text (discussing purpose of Title VIII); notes 15-16, 118-22 and accompanying text (discussing Title VII's censorship).

189. *See* Brandon v. Board of Educ., 635 F.2d 971, 973 (2d Cir. 1980), *cert. denied,* 454 U.S. 1123 (1981). The *Brandon* Court remarked: "In this immigrant nation of dreamers and dissidents, however, no broad consensus regarding the spiritual side of the human condition exists." *Id.*

political compromise. Unfortunately, this legislation, weakened by the use of undefined terms, will probably not succeed in removing the public school system from the battleground of religious differences.[190]

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190. *See* McCollum v. Board of Educ., 333 U.S. 203, 235 (1948). In his concurrence, Justice Jackson stated:

> If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits.

Id.