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The Establishment of Secular Humanism: The Supreme Court, the Religious Right, and Public Education

Current debates over the rise of "nones," people who report having no religious affiliation, poses important questions over what the American political landscape will look like with a majority nonreligious population. Will the "nones," like evangelical Christians, seek to form a political movement and mobilize their supporters? Will they elect nonreligious candidates to public office and promote nonreligious values? These questions may not be answered for several decades. But political and legal history may offer some insight. In the 1980s, the Religious Right claimed "secular humanists" were gaining political power and seeking to undermine Judeo-Christian values. According to the Religious Right, this organized group was removing prayer and Bible reading from public schools and replacing them with "secular humanist" values. Using an obscure legal article and a short footnote from a Supreme Court case, the Religious Right developed a whole legal strategy to combat the threat of "secular humanism."

The Establishment Clause of the First Amendment to the United States Constitution ("Congress shall make no law respecting an establishment of religion. . . .") was adopted in 1791. Like other portions of the Bill of Rights, the Establishment Clause of the First Amendment only applied to actions by the federal government. The federal government was prohibited from establishing a national religion or interfering with how each state dealt with the establishment of

religion. At the time of the adoption of the First Amendment, at least six states had established religions in some form; Maryland, South Carolina and Georgia levied taxes in support of all Christian churches, while Massachusetts, Connecticut and New Hampshire allocated taxes to local denominations selected by a majority of residents of each city. Other states, such as Rhode Island, Pennsylvania, and Delaware, had been founded by religious minorities fleeing persecution and had never established religions. Virginia had recently disestablished its religion.[1]

After Reconstruction, the Fourteenth Amendment to the Constitution was adopted in order to prohibit former slave-holding states from infringing upon the rights of newly emancipated slaves who had been granted citizenship. At the beginning of the 20th century, the Supreme Court was posed with the problem of how to apply the Fourteenth Amendment to the Bill of Rights. The court sought to solve it with what became known as the selective incorporation doctrine. Seven years after the Free Exercise Clause had been incorporated against the states in *Cantwell v. Connecticut*[2], the Establishment Clause was incorporated in *Everson v. Board of Education*.[3]

After hearing multiple cases arising under the Establishment Clause, the Court saw the need to formulate a formal judicial test to help determine whether or not a government action was unconstitutional. The Court came up with the *Lemon* test, named after Alton Lemon, the plaintiff in *Lemon v. Kurtzman*, a case challenging the constitutionality of a state statute reimbursing the costs of public school textbooks purchased by teachers in private, religious schools.[4] The *Lemon* test consists of three prongs: (1) the government action "must have a secular legislative purpose"; (2) the principal or primary effect of the government action "must

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[1] Town of Greece v. Galloway, 572 U.S. ___ (2014)
[2] Cantwell v. Connecticut, 310 U.S. 296 (1940)
[3] Everson v. Board of Education, 330 U.S. 1 (1947)
[4] Lemon v. Kurtzman, 403 U.S. 602 (1971)

not advance nor inhibit religious practice", and (3) the government action "must not result in an excessive government entanglement with religious affairs."[5] Together the selective incorporation doctrine and the *Lemon* test prohibit the federal, state and local governments from endorsing or promoting one religion over another religion, or religion over nonreligion, providing the legal bases in cases involving the Establishment Clause.

In 1960, Roy Torcaso was appointed to the office of notary public by the Governor of Maryland. At the time of Torcaso's appointment, the Maryland state constitution proscribed a declaration of belief in God as a condition of the oath of office. Article 37 of the Declaration of Rights provided: "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . ."[6]

When Torcaso, a self-identified atheist, refused to profess his belief in God, his commission was rescinded. He filed suit in the Circuit Court of Maryland for Montgomery County alleging that the state provision violated the First and Fourteenth Amendment of the U.S. Constitution. The Circuit Court rejected Torcaso's arguments, and the highest court in Maryland, the Maryland Court of Appeals, affirmed the lower court's decision, holding that the state constitutional provision did not violate the federal constitution.[7] Circuit Judge Hammond Henderson, who delivered the opinion of the court, was unpersuaded by Torcaso's arguments that "a declaration of belief in the existence of God is discriminatory and invalid." He boldly declared:

> To the members of the Convention, as to the voters who adopted our Constitution, belief in God was equated with a belief in moral accountability and the sanctity of an oath. We may assume that there may be permissible differences in the individual's conception of God. But it seems clear that under our Constitution disbelief in a Supreme Being, and the

[5] Ibid.
[6] Md. Const., Decl. of Rts., Art. 37
[7] Abington School District v. Schempp, 374 U.S. 203 (1963)

> denial of any moral accountability for conduct, not only renders a person incompetent to hold public office, but to give testimony, or serve as a juror. The historical record makes it clear that religious toleration, in which this State has taken pride, was never thought to encompass the ungodly.[8]

Torcaso appealed his case to the Supreme Court of the United States seeking review of the lower court decision. During the oral arguments there was a contentious issue over what constituted a "religion" under the religion clauses of the First Amendment. Justice Potter Stewart questioned Torcaso's attorney, Leo Pfeffer, on whether "religion" would include individuals and groups who do not profess a belief in God. Pfeffer answered that he would not necessarily assert that atheism was a religion, but that atheists, like Torcaso, were entitled to the protections afforded by the First Amendment.

> Mr. Leo Pfeffer: I do not contend that atheism is a religion. I'm contending only and I think the only issue before this Court is whether the constitutional provisions against laws respecting an establishment of religion or for having the free exercise of religion, encompassed the atheist. I have suggested that's a ban on establishment, encompass a non-theist. I'm prepared now to go one step further and assert that it encompasses as well, those who disbelieve, actively deny the existence of a Supreme of a God.
> Justice Felix Frankfurter: Do we have to decide here what the content of religion is or what it isn't? We've got a very specific question here, whether Maryland may require to the Notary Public, taken oath, but we believe in a deity. And therefore, of course, we must deny that right to Maryland, it must be predicated on something, as far as I'm concerned, it can't be predicated on anything except the Fourteenth Amendment, with all that the Fourteenth Amendment draws unto itself.
> Justice Felix Frankfurter: Would you agree with that?
> Mr. Leo Pfeffer: Well, I would agree with that.[9]

This exchange between the justices and Torcaso's attorney led Justice Black, who delivered the opinion of the majority, to include a minor footnote in the Court's final decision striking down the provision as unconstitutional under the Due Process Clause of the Fourteenth

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[8] Abington School District v. Schempp, 374 U.S. 203 (1963)
[9] Chicago-Kent College of Law at Illinois Tech. "Torcaso v. Watkins." Oyez. https://www.oyez.org/cases/1960/373 (accessed December 23, 2016)

Amendment. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others," added Black. He went on to cite two cases, *Washington Ethical Society v. District of Columbia* and *Fellowship of Humanity v. County of Alameda*, in which non-theistic organizations had been granted the same tax-exempt status as religious organizations under tax codes.[10] Unbeknownst to Justice Black and Torcaso's attorney at the time, this short footnote would become a major source of contention in the debate over whether secular humanism is a religion and whether the government is prohibited from endorsing secular humanism on the same basis as other religions.

Two years after the Court's decision in *Torcaso,* the Supreme Court was confronted with the question of whether mandatory Bible reading in public schools violated the Establishment Clause of the First Amendment. In *Abington v. Schempp*[11], the Court answered affirmatively in an 8-to-1 landmark decision. Justice Potter Stewart was the lone dissenter. In dissenting from the majority, Justice Potter asserted that prohibiting religious exercises in public schools would constitute the establishment of 'the religion of secularism.' "[A] refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism," Justice Potter wrote. "Or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private," he added.[12]

The Supreme Court's landmark decisions in *Torcaso* and *Abington* – which both took place during the two-year period between 1961 to 1963 – was met with substantial opposition

[10] Torcaso v. Watkins, 367 U.S. 488 (1961).
[11] Abington School District v. Schempp, 374 U.S. 203 (1963).
[12] Ibid.

from the evangelical Christian community. A new political movement emerged to mobilize evangelical Christians around the perceived loss of power and influence of religion in politics and society. Among the newly founded organizations included Jerry Falwell's Moral Majority, Pat Robertson's Christian Coalition, James Dobson's Focus on the Family, and Paul Weyrich's Heritage Foundation, which together formed the Religious Right. The political agenda of the Religious Right encompassed issues ranging from religion in public schools to abortion. One of the critical issues for the Religious Right was the prevalence of "secular humanism" in American society.

In 1979, Arizona Congressman John Conlan and attorney John Whitehead (who went on to form the conservative Rutherford Institute) co-wrote a legal article in the Texas Tech Law Review entitled "The Establishment of the Religion of Secular Humanism and Its First Amendment Implications."[13] Whitehead and Conlan lay out the legal argument that "secular humanism" constitutes a religion under the Establishment Clause of the First Amendment. The following year, the Reverend Tim LaHaye popularized Whitehead and Conlan's arguments in his best-selling book *The Battle for the Mind.*[14] LaHaye asserted that the religion of "secular humanism" pervaded every aspect of American society in the government, public schools, and entertainment. The book served as a call-to-arms for evangelical Christians to combat the threat of the establishment of "secular humanism." LaHaye's wife, Beverly LaHaye, also founded her own organization, Concerned Women for America, which aided in litigating cases brought by Christian parents concerned that their children's public schools were promoting "secular humanism." In a 1987 national study, 69 percent of evangelical Christian respondents familiar

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[13] John Conlan and John W. Whitehead, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications* (Lubbock, TX: School of Law, Texas Tech University, 1979).

14 Tim LaHaye, The Battle For the Mind (Old Tappan, NJ: Revell, 1980).

with the term "secular humanism" agreed with the statement that "public schools [were] teaching the values of secular humanism."[15]

One case that sought to apply the Religious Right's theories against "secular humanism" was *Smith v. Board of School Com'mrs of Mobile County*.[16] In 1982, Ishmael Jaffree, an avowed atheist and father of three school-aged children, sued the Mobile County Public School System for compelling his children to participate in the daily recitation of Christian prayers.[17] Jaffree contacted the elementary school teachers and superintendent to request they discontinue the daily prayers because his children did not want to participate, but after his requests were repeatedly ignored by the school faculty and administration, he decided to pursue legal action. Jaffree argued that the school's actions violated the Establishment Clause of the First Amendment and relied on the legal rationale in the Supreme Court's decisions in *Engel v. Vitale*[18] and *Abington v. Schempp*[19] invalidating mandatory prayer and Bible recitation in public schools.

Soon thereafter, Douglas T. Smith, an eighth-grade science teacher, and a group of over 600 teachers and parents of students in Mobile, Alabama sought to intervene in the *Jaffree* case as co-defendants with the school district. The defendant-intervenors argued that if the school district endorsed Christianity by leading the class in prayer, then the school district also endorsed "secular humanism" in its curriculum through its adoption of history books which omitted the role of religion in major periods of American history and psychology books that promote principles of "secular humanism."[20] District Judge Brevard Hand issued a 172-page opinion

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[15] James L. Nolan, *The American Culture Wars: Current Contests and Future Prospects* (Charlottesville: University Press of Virginia, 1996), 49.
[16] Smith v. Board of School Comm'rs, 655 F.Supp. 939 (S.D. Ala. 1987).
[17] Jaffree v. Board of School Comm'rs, 554 F.Supp. 1104, 1128 (S.D. Ala. 1983).
[18] Engel v. Vitale, 370 U.S. 421 (1962).
[19] Abington School District v. Schempp, 374 U.S. 203 (1963).
[20] Smith v. Board of School Commissioners of Mobile County, 655 F.Supp. 939 (S.D. Ala. 1987).

declaring that the textbooks adopted by the Alabama public school system endorsed the religion of "secular humanism" in violation of the Establishment and Free Exercise clauses of the First Amendment and ordered the removal of 44 textbooks in total.[21]

Judge Hand was persuaded by the arguments that the omission of the role of religion in history had been deliberate. "The pattern in these books is the omission of religious aspects to significant American events," he wrote. "The religious significance of much of the history of the Puritians is ignored. . . The religious influence on the abolitionist, women's suffrage, temperance, modern civil rights and peace movements is ignored or diminished to insignificance," he added. "Omissions, if sufficient, do affect a person's ability to develop religious beliefs and exercise that religious freedom guaranteed by the Constitution."[22] Judge Hand also accepted that human psychology presupposed the principles of secular humanism. "Humanistic psychology is a manifestation of humanism. Both deny the supernatural, both make man the center of all existence, including morals formulation, both view man's sole collective and individual purpose as fulfillment of his physical, temporal potential," he wrote. "Such characteristics constitute a religious faith under the First Amendment."[23]

The *Smith* case garnered attention from the national press and sparked the interest of advocacy organizations on both sides of the First Amendment debate. The National Legal Foundation (NLF), founded by television evangelist Pat Robertson, applauded the decision, saying that "humanism is out of the closet for the first time." A group founded to combat the rise of the Religious Right, People for the American Way (PFAW), decried the decision as a "judicial book burning" and "nothing less than government censorship of the school curriculum."[24] PFAW

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[21] Smith v. Board of School Comm'rs, 655 F.Supp. 939 (S.D. Ala. 1987).
[22] Ibid.
[23] Ibid.
[24] Robin Toner, "Schoolbooks Ruled Biased on Religion," New York Times, March 5, 1987.

had filed an amicus curiae brief in *Smith* in support of the school district, while NLF had supported the claims of the teachers and parents. Other groups that signed on in support of the school district included groups concerned with public education, such as the National School Boards Association, the National Education Association, the American Federation of Teachers, the American Library Association, and the Committee for Public Education.[25]

The school district filed an appeal with the 11th Circuit Court of Appeals seeking review of the lower court's decision. Circuit Judge Frank Johnson delivered the opinion of the Circuit Court, ruling in favor of the school district and reversing the lower court's decision that the textbooks constituted an establishment of religion. "The message conveyed by these textbooks with regard to theistic religion is one of neutrality: the textbooks neither endorse theistic religion as a system of belief, nor discredit it," wrote Judge Johnson. "While the Supreme Court has recognized that the State may not establish a religion of secularism . . . that Court also has made it clear that the neutrality mandated by the establishment clause does not itself equate with hostility towards religion," he concluded.[26]

At the same time the *Smith* case was taking place in Alabama, another case was being heard in Washington on a similar claim. In *Grove v. Mead School Dist.*, Carolyn Grove sued her daughter's public school for assigning reading containing themes offensive to her family's religious beliefs.[27] Cassie Grove was assigned Gordon Park's *The Learning Tree* in her sophomore English class, a novel about Newt Winger, an African-American boy's struggles with racial prejudice while growing up in a small town in Kansas in the 1920s and 1930s. Throughout

[25] Ibid.
[26] Smith v. Board of School Comm'rs, 827 F.2d 684 (11th Cir. 1987).
27 Grove v. Mead School District, 753 F.2d 1528 (9th Cir. 1985).

the book, Wringer doubts the religion he has been brought up to believe in internal monologues and exchanges with other characters. Among the passages:

> He wondered, as he had often done before, what the whites' real reasons were for denying them a part in the school's athletic and social affairs. "Why does our color make such a difference? ... Didn't God know that we'd have a lot of trouble if he made us black? ... Since he's white, maybe he don't care either." He smiled wryly. "Never seen black angels ... even the chariot horses are white."[28]

Mrs. Grove asserted that the *The Learning Tree* "clearly teaches anti-Christian concepts, values, and beliefs" and its inclusion in the English curriculum impermissibly advances "secular humanism" under the Establishment Clause and inhibits the free exercise of Christianity under the Free Exercise Clause. The Eastern District Court for Washington found no violation of the Constitution and granted summary judgment in favor of the school district. Mrs. Grove appealed to the Ninth Circuit seeking to overturn the lower court's decision. In the majority opinion delivered by Circuit Judge Eugene Wright, the Circuit Court affirmed the lower court's decision.

In rejecting Mrs. Grove's arguments, Judge Wright looked at the "anti-religious" passages in *The Learning Tree* in the larger context of the book. "The passages identified by [Mrs. Grove] are simply scattered references to religion in a much larger work depicting a poor, black adolescent's painful process of coming of age," wrote Judge Wright. The "purpose and effect" of selecting the book was to "expose students to the attitudes and outlooks of an important American subculture." Judge Wright likened including The Learning Tree in the English curriculum to other works of fiction with Christian themes. "To include the work no more communicates governmental endorsement of the author's or characters' religious views than to assign Paradise Lost, Pilgrim's Progress, or The Divine Comedy conveys endorsement or approval of Milton's, Bunyan's, or Dante's Christianity," he reasoned.[29]

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[28] Ibid.
[29] Ibid.

Although the Religious Right succeeded in mobilizing its base to combat the threat of "secular humanism," the movement was ultimately unsuccessful in persuading courts of law to adopt their legal arguments that public schools were promoting "secular humanism" in violation of the Constitution. The courts seem to agree that the establishment of "secular humanism" is prohibited by the Establishment Clause of the First Amendment, but the existing legal precedent leaves open the interesting question of what - if anything - would constitute establishment. That's a question to be answered another time.

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