

COMMENTARY
“SECULAR HUMANISM” AS AN
“ESTABLISHED RELIGION”: A RESPONSE
TO WHITEHEAD AND CONLAN

by
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The Winter 1978 issue of the Texas Tech Law Review contains an article by John Whitehead and John Conlan in which the authors trace the evolution of the concept of “religion” in the decisions of the United States Supreme Court, claim that the “religion” of “secular humanism” has been established in the United States, and denounce “secular humanism.”¹ Unfortunately, the article is incomplete in its analysis of Supreme Court cases, contains factual inaccuracies and ill-founded assumptions, and omits any discussion of a possible solution to the perceived problem.

I. INCOMPLETE ANALYSIS OF SUPREME COURT CASES

The authors trace the history of the Supreme Court’s interpretation of the term “religion” in an effort to show that the original understanding of that term—“traditional theism, and, in particular, Christianity”²—has been altered to include beliefs that traditionally would not be regarded as religious but that are analogous to religious beliefs. The authors refer specifically to *United States v. Seeger*,³ in which the Supreme Court construed the conscientious objector provision of the Universal Military Training and Service Act⁴ to include a belief that it was morally wrong to take human life when the objector “considered this belief superior to his obligation to the state.”⁵

In view of the authors’ concern about the exclusion of theism

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1. Whitehead and Conlan, *The Establishment of the Religion of Secular Humanism and Its First Amendment Implications*, 10 TEX. TECH L. REV. 1 (1978).

2. *Id.* at 7.

3. 380 U.S. 163 (1965).

4. 50 U.S.C. App. § 456(j) (1976).

5. 380 U.S. at 169.

from public discourse generally and their more specific concern that the Supreme Court's decisions have "virtually eliminated theism from the public educational system,"⁶ it is surprising that the authors only briefly refer to *School District of Abington Township v. Schempp*,⁷ forbidding the reading of passages from the Bible in public schools, and do not even mention *Engel v. Vitale*,⁸ forbidding the use of a "nonsectarian prayer" in the public schools. Moreover, no reference is made to some of the more recent Supreme Court cases, such as *Lemon v. Kurtzman*,⁹ in which the Court set forth a test for determining whether a particular legislative scheme violates the establishment clause of the first amendment.¹⁰ This is regrettable since these opinions reveal the evils thought to be inherent in establishment: "sponsorship, financial support, and active involvement of the sovereign in religious activity."¹¹ Surely no discussion of a possible establishment can legitimately ignore such perceived evils; statutory and constitutional interpretation requires some awareness of the purpose of the provision to be construed, and the evils at which the provision was directed are among the chief clues to its purpose.¹²

II. FACTUAL INACCURACIES AND ILL-FOUNDED ASSUMPTIONS

Factual inaccuracies and ill-founded assumptions are both major and minor. Relatively minor errors include occasional misquoting of authors,¹³ attribution of a quote to the wrong author,¹⁴

6. Whitehead and Conlan, *supra* note 1, at 17.

7. 374 U.S. 203 (1963).

8. 370 U.S. 421 (1962).

9. 403 U.S. 602 (1971).

10. The test is as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion. . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.* at 612-13.

11. *Id.* at 612, quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

12. See H. Hart and A. Sacks, *The Legal Process* 1144-1200 (unpublished ed. 1958).

13. For example, when the authors quote a passage from A. DE REINCOURT, *THE COMING CAESARS* 179 (1957), they use an improper tense, substitute "the" for an "a," and refer to "historical process" when the correct phrase is "historical progress." Whitehead and Conlan, *supra* note 1, at 28. Similarly, the authors misquote passages from the Old and New Testament (King James). *Id.* at 44 n.219.

14. The following is the last sentence of one of the authors' footnotes: "Dietrich Bonhoeffer, a prominent European theologian, once wrote that 'God is beginning to resemble not a ruler but the last fading smile of a cosmic Chesire Cat.' D. BONHOEFFER, *RELIGION WITHOUT RESERVATION* 58 (1957)." Whitehead and Conlan, *supra* note 1, at 38 n.197. Bon-

and the implication that Mormons are not Christians.¹⁵

An important assumption made by the authors is that "[t]he religion of the first amendment is traditional theism and, in particular, Christianity,"¹⁶ and that "the first amendment was not meant to prevent the 'establishment' of Christianity as a religion, but to prevent one Christian denomination from dominating the others."¹⁷ The authors quote Story in support of their assumption.¹⁸ Although this assumption is not clearly wrong, other evidence points in the opposite direction, such as the fact that "of the first four presidents

hoeffer never wrote such a book; the quotation is from J. HUXLEY, *RELIGION WITHOUT REVELATION* 59 (rev. ed. 1957).

15. In discussing *Reynolds v. United States*, 98 U.S. 145 (1878), in which the Supreme Court upheld a conviction of bigamy despite the defendant's claim that polygamy was a tenet of his religion, the authors imply that Mormonism is not a Christian religion. For example, the authors state: "The legislation [on which the conviction was based] was clearly aimed at the Mormon practice of polygamy, which conflicted with Christian theism's tenet of monogamy." Whitehead and Conlan, *supra* note 1, at 5. Nowhere do they attempt to clarify the situation by noting that Mormons regard themselves as Christians. The official name of the Mormon Church—The Church of Jesus Christ of Latter-Day Saints—should perhaps have provided some clue to the authors that this Church does indeed regard itself as a Christian Church. It may be true that some of the beliefs of the Church of Jesus Christ of Latter-Day Saints are not shared by the more traditional Christian churches. This is not a reason, however, for regarding the Mormon Church as something other than a Christian church. If we were to exclude from the category of "Christians" all those whose views were regarded as heretical by some other sect, we would be left with very few Christians indeed. The authors' assumption that Mormons are not Christians is illustrative of the authors' very narrow perspective.

16. Whitehead and Conlan, *supra* note 1, at 2.

17. *Id.* at 3.

18. The authors cite other authorities, and in so doing, are somewhat misleading. For example, the authors offer the following argument in support of their position:

The concern of Madison and the founding fathers was that one Christian denomination would prevail over the others. Thus, the first amendment was not meant to prevent the "establishment" of Christianity as a religion, but to prevent one Christian denomination from dominating the others. The framers had no intention of eradicating traditional theism via the first amendment, because to them "religion entailed a relationship of man to [a] Supreme Being."¹²

Id. From this context it appears that the quotation at the end of this passage is meant to support the view that "the first amendment was not meant to prevent the 'establishment' of Christianity as a religion." Footnote 12, however, is a reference to Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060 (1978), which also contains the following passage found immediately after the passage quoted by the authors: "This, however, is not decisive for contemporary doctrine. While they were theists, there is no clear evidence that the founders wished to protect only theism."²⁷ In footnote 27 the author of the Harvard Law Review note quotes Jefferson to the effect that "his [Jefferson's] Act for Establishing Religious Freedom (in Virginia) 'was meant to be a universal . . . to comprehend within the mantle of its protection the Jew and the Gentile, the Christian and the Mahometan, the Hindoo and infidel of every denomination.'" (emphasis in original).

of the United States, two deemed presidential proclamations of prayer and thanksgiving to be proper, while two held the contrary opinion,"¹⁹ and the circumstance that the 1797 treaty with Tripoli contained the clause, "the government of the United States is not, in any sense, founded on the Christian religion."²⁰

A major error is the assumption that "secular humanism," as defined by the authors, is the "established religion" in the United States today. The authors' argument is essentially as follows: (1) Given the Supreme Court's expansive interpretation of "religion," the government cannot avoid establishing some religion. (2) Since traditional theistic religion has been banned from public discourse, "secular humanism" is, of necessity, the established religion. The problem with their argument is that although the first point may be at least partially true, the second point does not follow from the first.

It may be true that if one defines religion to include almost any deeply held belief, or matter of "ultimate concern,"²¹ a governmental entity cannot avoid espousing, and hence establishing in the broad sense, a religion or religions. It is difficult for a school, for example, to refrain totally from advocating such views as that it is important to respect the person and property of others. "Secular humanism" could be said to be established, however, only if all strongly held beliefs or matters of "ultimate concern" that are not theistic can be characterized as secularly humanistic. Intuitively one may shrink from the assumption that the label "secular humanism" may be applied to Buddhism, for example.²² Also, the problem is compounded because the authors do not make clear whether "theism" includes Judaism. At times the authors seem to equate

19. A. STOKES AND L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 89 (1964).

20. *Id.*

21. The phrase is Paul Tillich's. P. TILLICH, *THE SHAKING OF THE FOUNDATIONS* 57 (1948). Curiously, the authors cite pages 63 and 64 of a 1972 edition of Tillich's book. As nearly as can be determined, there is no 1972 edition of this work. It may be that this error reflects something less than a high standard of scholarship. See notes 13 and 14 *supra*. This possibility is also suggested by the authors' treatment of the following quote from Holmes: "Truth is the majority vote of that nation that could lick all others." Whitehead and Conlan, *supra* note 1, at 59-60. Instead of citing the original source (Holmes, *Natural Law*, 32 HARV. L. REV. 40 (1918)), the authors cite F. SCHAEFFER, *HOW SHOULD WE THEN LIVE?* 217 (1976). An examination of Schaeffer's book reveals that he does not cite the original either; instead, he states that Daniel H. Benson (one of my colleagues at Texas Tech) quotes Holmes to that effect. Thus, the authors rely on a tertiary source, not a secondary source.

22. See, e.g., E. CONZE, *BUDDHISM* (1951).

theism with Christianity;²³ at other times, "theism" seems to include Judaism.²⁴ Presumably, at least practicing Jews could not be regarded as secular humanists.

In any event, the effort to treat "secular humanism" as a residual category including everyone except theists must clearly be seen to fail when the authors get around to defining "secular humanism"—twenty-nine pages into the article. We are told, among other things, that certain tenets "apply universally to adherents of the religion of Secular Humanism."²⁵ Among these tenets are "the belief in the inevitability of progress"²⁶ and "the belief in the absolutism of evolution."²⁷ The authors refer to no evidence supporting the claim that all persons who are not theists adhere to these beliefs. Common sense suggests that non-theists come in an almost infinite variety of forms, and generalizations about them are exceedingly dangerous. The same might be said about theists. Thus, one cannot assume that all theists do not believe in the inevitability of progress or in evolution. For example, the belief in the inevitability of progress was one of the major principles of nineteenth century liberal protestant theology.²⁸ Also, unless one insists on a "literal" interpretation of perhaps two of the six biblical accounts relating to creation,²⁹ a theist is not logically or otherwise precluded from believing in partial evolution.³⁰

III. ABSENCE OF DISCUSSION OF A SOLUTION

We are told of the many supposed evils of "secular humanism"

23. For example, the authors say at one point: "The importance of *Davis* [*Davis v. Beason*, 133 U.S. 333 (1890)] lies in the Supreme Court's definition of the term 'religion' in its reaffirmation of traditional Christian theism." Whitehead and Conlan, *supra* note 1, at 7.

24. At one point the authors refer to "the traditional theistic Judaeo-Christian religion." *Id.* at 2.

25. *Id.* at 37.

26. *Id.* at 39.

27. *Id.* at 46.

28. See H. NIEBUHR, *THE KINGDOM OF GOD IN AMERICA* 190-96 (Harper Torchbook ed. 1959).

29. The most familiar stories are found in Genesis. *Genesis* 1, 2:1-3 (seven-day story of creation); *Genesis* 2:4-25, 3 (Adam and Eve). Other accounts of creation can be found, however, in *Genesis* 5; *Psalms* 104; *Proverbs* 8; *John* 1. The first two or three of these six stories might be regarded as inconsistent with some theory of partial evolution. An inconsistency is inevitable, however, only if one ignores the context, historical and otherwise, in which these words were used. Individual words do not have single meanings; they must be interpreted in the light of context. See, e.g., H. Hart and A. Sacks, *supra* note 12.

30. Evolution is not a unitary concept, and classical Darwinism is far from universally accepted among evolutionists. See N. MACBETH, *DARWIN RETRIED* (1971).

and its establishment, including the threat of totalitarianism,³¹ but the only passage that can be fairly regarded as directed to a solution is on the penultimate page of this sixty-six page article. We are told of the need for "a return to traditional theism," but it is not clear how this is to be accomplished. The only clue, so far as governmental action is concerned, is the call for recognition of "secular humanism" as "a religious ideology" and for prohibition of "its unconstitutional establishment within our governmental organs."³²

Further, the authors fail to deal with the ramifications of an effort to prohibit establishment of "secular humanism." In view of the authors' assumption that either theism or "secular humanism" must be established, presumably the authors are calling for the establishment or, in their view, re-establishment of "theism." Here substantial problems are encountered.

First, it is not clear what an establishment or re-establishment of theism would involve. Would it merely involve, for example, public expressions of support for theism? Or would it also involve governmental assistance, perhaps monetary, to theistic groups?

Second, there is the unresolved question whether it is to be Christianity or a broader version of theism, including Judaism, that is to be established. At one point the authors refer to "*the* traditional theistic Judaeo-Christian religion."³³ The assumption that this phrase can identify a single religion is naive in the extreme. Many Jews are highly offended by the claim of the divinity of Christ and would not willingly tolerate the establishment of "the Christian religion."³⁴ Presumably such diverse groups as Buddhists, Confu-

31. *E.g.*: "The implications of Secular Humanism and its application to the various facets of life, including political and social philosophy, are clearly seen in the totalitarian regimes of history." Whitehead and Conlan, *supra* note 1, at 55.

On the face of it, it would appear that protection against totalitarianism might come in the form of adherence to the Bill of Rights, which guarantees, among other things, freedom of speech, press, assembly, and religion (U.S. CONST. amend. I) and mandates the use of certain procedural devices that guarantee privacy and a fair trial in criminal cases (U.S. CONST. amends. IV, V, and VI). These obstacles to the development of a totalitarian society in the United States are not mentioned by the authors.

32. Whitehead and Conlan, *supra* note 1, at 65.

33. *Id.* at 2 (emphasis added).

34. In *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 209 (1963), the Court quoted the trial court's summarization of testimony by an expert on Judaism:

Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was "practically blasphemous." He cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn.

cianists, Mohammedans, and Unitarians, for example, also would not favor such an establishment.

Third, even if we focus on Christians alone, a problem remains: It would be virtually impossible to establish a form of Christianity that did not *either* offend one or more Christian churches,³⁵ or express itself in such generalities as to constitute banalities unworthy of serious religion.³⁶

The authors correctly point to a possible dilemma: How can one ban traditional religion from the public domain without at least appearing to prefer non-religion? Arguably, the apparent dilemma is unreal, at least in the public schools, in light of the availability of such devices as released-time programs³⁷ and non-sectarian teaching of religious history and thought.³⁸

Nevertheless, *if* one must choose between preferring traditional

35. One authority has stated:

Some Christians believe all prayer is to be addressed to the Father, through the Son. Others believe it to be blasphemy to pray to the Father at all. If a universal form of address could be agreed upon, what is our prayer to be about? Should we pray for "protection against this evil world?" Not all of Christendom believes the world to be evil, and some Christians are in fact very much offended by that notion. Should we pray for guidance?; good sportsmanship?; healing? Each of those would be offensive to some Christians. I find it impossible to imagine any prayer that would have any meaning that would not deeply offend some Christians, not to mention non-Christians. A prayer that would be inoffensive would also be bland, and one hopes that bland religious expression would be offensive, itself, to any person who takes religious commitment seriously.

Letter from the Reverend Robert C. Granfeldt to the members of the board of the Lubbock Independent School District (October 23, 1979).

36. *Id.* Consider also: "What emerges in the end is some general common-denominator religion identified with civic virtues and the established secular order. Furthermore, such practices are essentially ritualistic in nature, and tend to become mechanical, and may, indeed, have the effect of debasing religion in the mind of the student." P. KAUPER, *RELIGION AND THE CONSTITUTION* 93 (1964).

37. A form of released time was upheld in *Zorach v. Clauson*, 343 U.S. 306 (1952). Children whose parents so desired were released for no more than one hour per week to attend religious classes held off school premises and conducted by non-public school teachers. The majority assumed an absence of coercion. 343 U.S. at 311. Justice Frankfurter, dissenting, was unwilling to do so since "the appellants were not allowed to make proof of it [coercion]." 343 U.S. at 321. In any event, it is possible to conceive of a released time program in which coercion is absent.

38. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently. . . .

School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

religion or non-religion, how should the choice be made? Although the authors fail to deal with the problem, surely the effort to do so is worthwhile. First, any attempt to establish a traditional religion raises the possibility of governmental entanglement with religion, which was one of the dangers that led to the adoption of the establishment clause of the first amendment.³⁹ Establishment not only prefers one sect to another, but also creates the danger that the freedom of the established sect will be curtailed. For example, in England the established church cannot change the Book of Common Prayer without an act of Parliament.⁴⁰ Second, the authors' assumption that Christianity must be restored to the public domain in order to combat "secular humanism" is doubtful. Christian churches may be healthier where they are not established than where they are established.⁴¹ Moreover, there is ample authority in the New Testament for the proposition that the public practice of religion is not commendable; indeed, it is hypocritical.⁴²

39. See *Engel v. Vitale*, 370 U.S. 421, 425-27 (1962).

40. Parliament has not always agreed to changes suggested by the Church hierarchy: The most liberal interpretation of the term "religious freedom" can hardly encompass a situation in which a government prohibits a church from praying out of the prayer book the church wishes to use. Government dictation of how God is to be worshipped cannot be equated with religious liberty, even by the most ardent supporters of establishmentarianism.

Yet that is exactly what happened in England in 1927 and 1928. In each of those years a proposal to revise the Anglican Prayer Book was rejected by a Parliament in which a majority were not members of the Anglican Church, and many of whom were Catholics, Jews, and even non-believers.

L. PFEFFER, *CHURCH, STATE AND FREEDOM* 52-53 (rev. ed. 1967).

41. England provides an example of a weak established church in comparison with more vigorous Christian churches in the United States. Although there is no completely satisfactory measure of the health of a church or of formal religion in general, church attendance may provide at least a rough guide. It has recently been reported that on an average Sunday about 10% of the people in England go to church and that the proportion of nonestablishment church members who attend is much higher than the proportion of Church of England members who do so. 13 *ENCYCLOPEDIA AMERICANA* 288 (1978). In contrast, it has recently been reported that 42% of the adults in America attend church during a typical week. *GALLUP OPINION INDEX* 24 (August 1977).

42. The Bible states:

And when thou prayest, thou shalt not be as the hypocrites *are*: for they love to pray standing in the synagogues and in the corners of the streets, that they may be seen of men. Verily I say unto you, They have their reward.

But thou, when thou prayest, enter into thy closet, and when thou hast shut thy door, pray to thy Father which is in secret; and thy Father which seeth in secret shall reward thee openly.

Matthew 6:5-6 (King James).

IV. CONCLUSION

The increasingly pluralistic nature of American society has been recognized in United States Supreme Court decisions dealing with the concept of religion. The evolutionary development of this concept should come as no surprise in light of Marshall's early admonition that "we must never forget that it is a *constitution* we are expounding."⁴³ Apparently the formal recognition of religious pluralism is an anathema to Whitehead and Conlan; unfortunately we are only left to speculate about a possible solution to the problem perceived by them. What does seem reasonably clear is the authors' own problem. They believe that, in matters of religion, they are right and everyone else is wrong. More fundamentally, they appear reluctant to let the marketplace of ideas operate freely and without governmental intervention. Their philosophy is thus clearly at odds with the spirit of toleration manifested in both the speech and religion clauses of the first amendment.

43. *McCulloch v. Maryland*, 17 U.S. 159, 200, 4 Wheat. 316, 407 (1819). Because it is possible to take an evolutionary view of the religion clauses of the first amendment, one may properly suggest, in the light of the increasing pluralism of American society, that the term "religion" be given a different meaning in regard to the free exercise clause from that given to it in regard to the establishment clause. Thus, it may be possible to take a very expansive view of religion when one considers the protections of the free exercise clause, while taking a somewhat narrower and perhaps more traditional view of religion when deciding whether certain governmental action constitutes an establishment. See Note, *Toward A Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1083-86 (1978).

