

Kitzmiller's error
Use of an exclusive rather than inclusive definition of religion

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“For it is by discourse that men associate, and words are imposed according to the apprehension of the vulgar. And therefore the ill and unfit choice of words wonderfully obstructs the understanding. ...[The] words plainly force and overrule the understanding, and throw all into confusion, and lead men away into numberless empty controversies and idle fancies.” (Francis Bacon, *Novum Organum*, 1620)

Introduction

I find many aspects of the opinion in *Kitzmiller v. Dover Area School District* troubling. However, I believe the fatal error of the decision is that the court used the incorrect definition of religion in ruling on the legality of the ID Policy. For Judge Jones “religion” is simply belief in the supernatural. Given this narrow discriminatory definition, he had no difficulty finding ID “is religion,” since the observable data inexorably leads one to infer an intelligent cause, not only for life, but also for natural causes themselves.

The definition of religion used by the court may be popular, but it is legally and culturally wrong. It is legally erroneous because it conflicts with the inclusive and non-discriminatory definition of religion employed by the judicial peers of the Court - the courts that would have reviewed the decision had it been appealed. Based on controlling definitions of religion adopted by the Third Circuit in *Malnek v. Yogi* and *Africa v. Commonwealth of Pennsylvania* and the Supreme Court in *United States v. Seeger*, *Welsh v. United States*, *McGowan v. Maryland* and *Lee V. Wiseman*, religion is not confined to only belief in the supernatural. It also includes non-theistic beliefs that natural or material causes explain life. We now live in a pluralistic culture where theistic religions compete with traditional non-theistic religions such as Atheism, Secular humanism, Deism, Scientology, Transcendental Meditation and Wicca. Those religions place their faith in nature rather than a creator of nature.

The cultural competition between theistic and non-theistic religions is notorious. It is made evident in the recent film, *Expelled, No Intelligence Allowed*. A recent survey by the Pew Foundation shows non-theistic religions have grown from about 8% of the population in 1972 to about 18% today. Within the 18 to 29 age group, 28% fall into this category. Mainstream religions are losing adherents at an accelerating rate. Non-theists control the market place and most of the public forums where functionally religious views are promoted as secular.

The error of the Court is key to all First Amendment jurisprudence. If the word religion is defined to have a narrow and exclusively discriminatory meaning, the First Amendment can itself be used as a tool of religious discrimination rather than as a bulwark against it. This is the case, because the Establishment Clause requires that government exclude religion from the public school classroom and other venues touched by a tax dollar. If religion is limited to only belief in the supernatural, then the views of traditional Theists may be excluded while the functionally equivalent views of competing Atheists and other non-theists may be promoted as secular. This discrimination is promoted in the guise of science and neutrality when it actually is

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a derogation of those concepts. A narrow definition promotes religious discrimination while an inclusive definition precludes it.

The Definition of Religion Impacts the Definitions of Secular and Science

A discriminatory definition of religion has a domino effect. It spawns discriminatory definitions of other key terms such as “secular” and “science.” This follows because the definitions of both “Secular” and “science” mean not religious. Thus, if those words refer to a discriminatory definition of religion, then they too will have a discriminatory religious effect. This is reflected in the illustration attached to my written remarks.

If religion is defined narrowly than the scope of secular subjects that government may promote in public schools will be defined broadly. If religion is limited to just belief in God, then disbelief and atheistic beliefs become non-religious secular views that may be subtly poured into the impressionable minds of unsuspecting children. Similarly, the core value of science is to be non-religious. But if religion is defined as just belief in God, then institutions of science become a functional church that promotes the core tenets of Atheism and Secular Humanism by ignoring and systematically suppressing evidence that points to a Creator. Methodological Naturalism renders “agnostic science” a farce. It converts an enterprise that needs to be open-minded into a Humanist Church.

The result is different when religion is defined functionally as a concept that includes sets of beliefs about the cause, nature and purpose of life rather than just belief in the supernatural. When religion is defined functionally, then the realm or “sphere” of the secular is significantly reduced. It is not secular to promote the functionally religious views of Atheists and Secular Humanists. A functional definition of religion causes science to be the open-minded enterprise that it claims and needs to be. The functional definition of religion requires science to substitute accurate and truthful “we don’t know” explanations for mandated natural cause explanations that defy not only the evidence, but our intuition and common sense.

The Courts have Embraced a Functional Definition of Religion

The origin of the functional definition of religion in modern case law traces back to *Fellowship of Humanity v. County of Alameda*, a 1957 California Court of Appeals decision. The case involved 14 churches in Oakland California that were promoting the religion of Secular Humanism. They claimed their Church property was exempt from real estate taxes because it was used exclusively for religious worship. The exemption was refused because they denied rather than worshiped a supreme being.

Secular Humanism had its beginnings as Epicureanism in the fourth century BC. It was resurrected by John Dewey and others in 1933 when its first Manifesto was published. The Manifestos describe Humanism as a religion that rejects the supernatural, claims that life arises in a self-existing universe via unguided evolutionary change and that the purpose of life is to be guided by reason and science. It seeks to replace traditional theistic religion.

Judge Peters recognized the Humanist claim was novel, as the popular notion of religion confines it to belief in God. However, he found that Secular Humanism is a “belief [that] occupies in the lives of its holders the same place that the orthodox beliefs occupy in the lives of believing [theistic] majorities.” Using this functional test for religion, he then defined the essential characteristics of any religion as (1) a belief, not necessarily referring to supernatural

powers, that (2) provides the foundation for a system of moral practice, and (3) that is publicly promoted by an organized association of believers. The core belief of Secular Humanists and Atheists is that life arises from self-existing natural or material rather than supernatural causes. Because God is non-existent or irrelevant, morality and other aspects of life should be guided by human reason and science rather than traditional religion. It is a materialistic belief system promoted by the American Humanist Association and numerous Universal Unitarian Churches across the country. The Petition against the inaugural prayer was filed by those organizations and a large number of Atheists and “Secular” Humanists. The holding of Judge Peters that Secular Humanism is a religion, was followed a month later by the DC Circuit in the Case of *Washington Ethical Society*, a Humanist church also claiming a tax exemption for its Church property located in Washington DC.

Fellowship of Humanity is important, because seven years later its comprehensive test for religion was embraced by the Supreme Court in *United States v. Seeger* and then in *Welsh v. United States*. Like Judge Peters, the Supreme Court in *Seeger* and *Welsh* recognized that the defining characteristic of a religion is belief about a matter of ultimate concern that occupies in the life of its possessor a place parallel to that of a belief in God. Hence, an Atheist’s belief that life is a natural cause occurrence is just as religious as a theistic belief that life is a creation.

The concept of religion being centered around a matter of ultimate concern was subsequently embraced by Judge Adams in the Third Circuit cases of *Malnak v. Yogi* and *Africa v. Commonwealth*. *Malnak* involved the teaching of transcendental meditation in public schools. *Africa* involved an ad hoc belief developed by prisoners in a natural diet. Food was their religion. Judge Adams found that Transcendental Meditation, a non-theistic belief system, was a religion because it sought to guide all aspects of life and therefor addressed a matter of ultimate concern. On the other hand he held the diet program was not religion, because it was not concerned with matters of ultimate concern.

The subject matter of religion was subsequently addressed by Judge Brevard Hand in *Smith v. Board*, a 1987 case holding Secular Humanism is a religion under the Establishment Clause. Based on *Fellowship*, *Seeger*, *Welsh*, *Malnak* and *Africa*, the testimony of numerous experts and an exhaustive analysis of written authorities on religion, Judge Hand found that

Religions “may be classified by the questions they raise and issues they address” based on “**certain fundamental assumptions** with which governments are unconcerned. These assumptions may be grouped as *about* (1) the existence of supernatural and/or transcendent reality, (2) the nature of man; (3) the ultimate end, or goal or purpose of man’s existence, both individually and collectively; [and] 4. the purpose and nature of the universe.” [*Smith v. Board of School Commissioners of Mobile County*, 655 F. Supp, 939, 979 (SD Ala 1987), *rev’d* on other grounds 827 F2d 684 (11th Cir 1987)]

This definition of religion is consistent with the first listed definition found in the Random House Webster’s Unabridged Dictionary. That definition defines religion as a “set of beliefs about the cause, nature and purpose of the universe” and of life.

Although the 11th Circuit reversed Judge Hand’s conclusion that certain history, social studies and home economics textbooks promoted the religion of secular humanism, it did not find fault with his analysis or holding that Secular Humanism was a religion.

Subsequent to Smith, the seventh Circuit has held that Atheism is an establishment clause religion. Other courts have held that scientology and Wicca are religions. Atheists must show religious beliefs to have Article Three standing to complain about God on the money or in the pledge of allegiance. Other circuits have embraced broad and comprehensive definitions of religion, including the Second, Fourth, Ninth, Tenth and DC circuits. Dictionaries list functional definitions of religion and religion departments of universities routinely employ functional definitions. The Chair of the religious studies department of Kansas University was an atheist.

In the 1961 Supreme Court case of *McGowan v. Maryland*, involving Sunday closing laws, Justice Frankfurter in a concurring opinion explained that religion, “in the comprehensive sense in which the Constitution uses that word is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives.” All of the cases I have previously mentioned are consistent with this definition of religion. Theists relate life to the world through a creator of both, while non-theists relate it just to material or natural causes. The two contradictory and mutually exclusive relationships profoundly affect the subsidiary questions about the nature and purpose of life.

The meaning of religion in the Free Exercise Clause is the same as its meaning in the Establishment Clause.

There can be no doubt that Atheism is a religion for free exercise purposes. In our debate in Kansas an opinion filed with the State Board by the ACLU attorney for “mainstream science” acknowledged that Atheism was a religion for free exercise purposes. However, without citing any authority, he implicitly argued that it was not a religion for Establishment Clause purposes. That argument was effectively demolished in *Malnek v. Yogi* where Judge Adams gave two compelling reasons for concluding that “religion” means the same in both clauses. First, based on the unchallenged view of Justice Rutledge in *Everson v. Board*, Judge Adams noted that the word “religion” appears only once in the First Amendment. It first appears in the Establishment Clause. That occurrence is then incorporated by reference into the Free Exercise clause by the adverb “thereof.” Logically the single use of the word religion governs both clauses with the same meaning.

But the more compelling reason given by Judge Adams is that a dual definition would effectively discriminate against traditional religions and for non-theistic religions.

“Such an approach would create a three-tiered system of ideas: those that are unquestionably religious and thus both free from government interference and barred from receiving government support; those that are unquestionably non-religious and thus subject to government regulation and eligible to receive government support; and those that are only religious under the newer approach and thus free from governmental regulation but open to receipt of government support. That belief systems classified in the third grouping are the most advantageously positioned is obvious. No reason has been advanced, however, for favoring the newer belief systems over the older ones. If a Roman Catholic is barred from receiving aid from the government, so too should be a Transcendental Mediator or a Scientologist if those two are to enjoy the preferred position guaranteed to them by the free exercise clause. ...they are clearly not entitled to the advantages given by the first amendment while avoiding the apparent disadvantages. *The rose cannot be had without the thorn.*” [*Malnak v. Yogi*, 592 F.2d 197, 212-3 (3rd Cir 1979)]

The view of Judge Adams was applied by the 7th Circuit in the 2005 case of *Kaufman v. McCaughtry* where Atheism was held to be a religion for Establishment Clause purposes. Similarly, the Supreme Court in the 1992 case of *Lee v. Weisman* held under the Establishment Clause that the word “religion” was not restricted to just theistic beliefs, but also applied to non-theistic religions. For that reason, a school was not permitted to issue a “non-preferential” prayer at a Graduation ceremony. According to Justices Souter, Stevens and O’Connor, the prayer was actually preferential in that it preferred theists over non-theists. According to them the “settled law” is that the Establishment “Clause applies ‘to each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker’”

Public Schools Must Identify Religious Subject Matter

The importance of the inclusive definition of religion is that it requires the moderator of the forum who seeks to exclude religion to identify the kind of subject matter that unavoidably invokes a religious discussion. When religion is defined inclusively religious subjects include origins, sex, the sanctity of life, ethics and morality, but not reading, writing and arithmetic. Having separated the religious from the secular, the moderator then has two options. He may choose to exclude the religious subjects from the curriculum so that the school will not be intruding into the religious sphere. In the alternative, he may choose to make that intrusion, but only if he does so for a genuine educational or scientific purpose and in a manner that will objectively inform students about the subject. What the moderator cannot do is enter the religious sphere and then present only one of the competing views. If the moderator does that, then the moderator winds up causing the government controlled forum to endorse a particular religious view, a violation of the Establishment Clause.

Kitzmiller’s Error

Kitzmiller is a perfect example of the effect of the use of the discriminatory definition of religion. Instead of examining the meaning of the most important word before him, Judge Jones just assumed that religion is limited to only theistic beliefs. He concluded that “religion” explains using supernatural causes, when it also encompasses natural cause explanations. This narrow discriminatory definition then allowed him to classify the natural cause orthodoxy of methodological naturalism as science. That doctrine restricts all scientific explanations to natural or material causes. Under that doctrine the cause of the universe and life can only be a natural or material cause. Since ID challenges natural causation and implies supernatural causes, the Court’s false dichotomy renders a logical inference to an intelligent cause of origins religion and the natural cause orthodoxy science. Under this algorithm the ID Policy is one that endorses religion. It has no “secular purpose” because it does not seek to explain with natural causes, the so-called secular view of origins.

If the court had used the correct inclusive definition of religion, then it would have recognized that the ID Policy was one that addressed an existing discussion that had intruded into the religious sphere – a discussion of the origin and nature of life – a discussion that profoundly relates life to the world in which it is lived. It would then have recognized that the existing curriculum was constitutionally problematic as it restricted explanations to only natural causes per the orthodoxy of methodological naturalism. Use of that dogma excludes not only intelligent design, but challenges to natural cause explanations – gaps or problems with evolutionary theory. Hence, the court would have recognized that the existing curriculum was one that endorsed a particular religious doctrine, a doctrine that provides the foundation for the religions of Atheism and Secular Humanism.

In the context of that existing illegal activity – state promotion of a particular religious view – the court would have then had to ask whether the ID Policy was one that effectively neutralized the violation or did it seek to insert a theistic orthodoxy to replace the materialistic non-theistic one?

An analysis of the ID Policy, shows that it was a minimal first step toward the introduction of scientific objectivity into an existing one sided religious presentation. It not only introduced students to legitimate scientific challenges to evolutionary theory but it also provided them with an explanation not permitted by methodological naturalism. By introducing students to the alternative to natural cause theory, it introduced a third explanation also not permitted by the natural cause only orthodoxy – “cause unknown.” Methodological Naturalism does not permit a cause unknown explanation.

Had the court employed Judge Adams inclusive definition of religion, it would have had to conclude that the ID Policy served the valid secular purpose of neutralizing an otherwise impermissible promotion of a particular religious view, one that promotes the religions of Atheism, Secular Humanism, Deism, and Theistic Evolution. Adoption of the ID Policy was not only permissible, it was constitutionally necessary to achieve secular education having a neutral religious effect.

In conclusion, use of an inclusive functional definition of religion should bring coherence to First Amendment practice that is now incoherent due to a vulgar and popular use of a definition that is itself discriminatory. The exclusive definition actually promotes religious discrimination rather than true religious freedom. When religion is defined functionally, then secular activities become truly non-religious, religious subjects will be excluded or taught objectively and science will become the open-minded enterprise that it holds itself out to be.

IMPORTANT CASES RE DEFINITION OF RELIGION

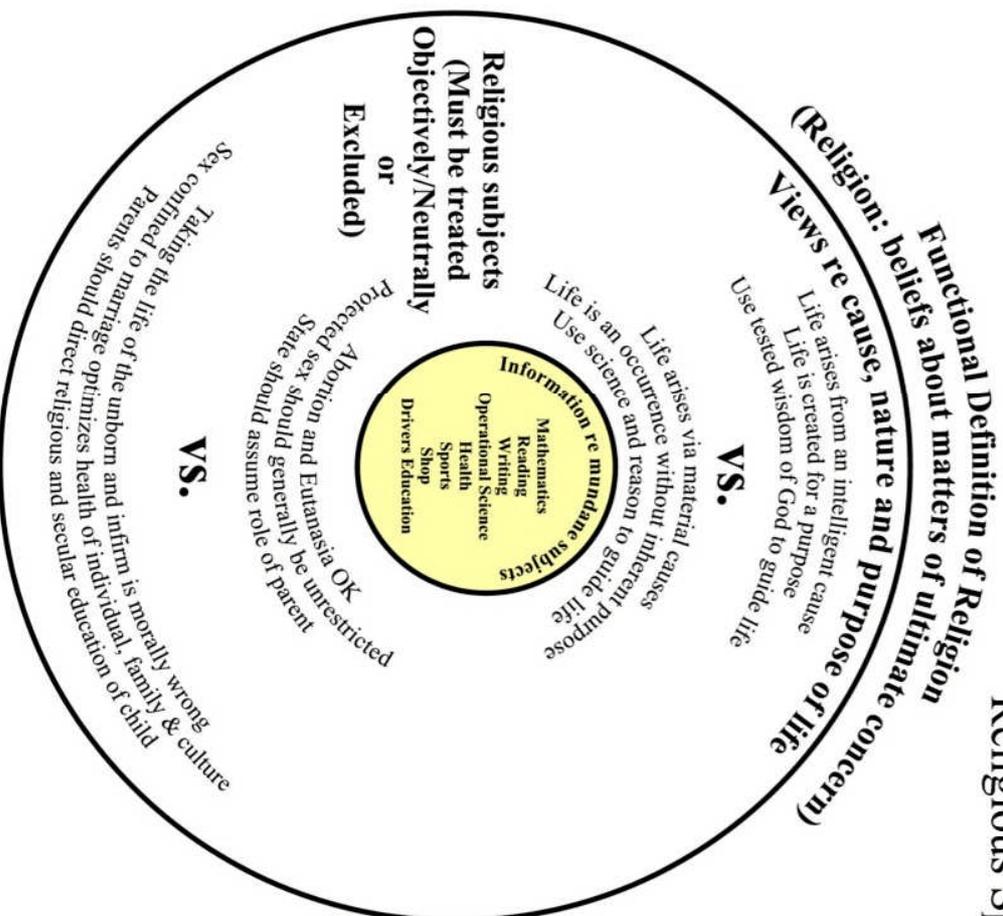
“[Government] shall make no [policy] respecting an establishment of *religion*, or prohibiting the free exercise thereof;”

- 1933** Humanist Manifesto published. It declares a new religion to replace traditional religion. Designed to be taught in public schools. It denies the supernatural, affirms that the universe is self-existing and that life arises from unguided evolutionary change. The purpose of life should be guided by reason and science per the scientific method.
- 1940** **Religion clauses apply to states;** *Cantwell v. Conn.*, 310 U.S. 296
- 1944** **State may not take a position on the validity of a religious belief:** *U.S. v. Ballard*, 322 U.S. 78 (The draftsmen “fashioned a charter of government which envisaged the widest possible toleration of conflicting views.”)
- 1947** **Separation is to be achieved by neutrality, not exclusion:** *Everson v. Board*, 330 U.S. 1, 8-9 (state subsidies of transportation to parochial schools upheld using “separation of church and state” dictum. Separation “requires the state to be neutral in its relations with groups of religious believers and non-believers;” Government “cannot *exclude* individual Catholics.. Mohammedans, .. *Non-believers,.. or the members of any other faith*, because of their faith, *or lack of it.*”
- 1957** **“Secular” Humanism, an atheistic belief system, is a religion:** *Fellowship of Humanity v. County of Alameda*, 153 Cal.App.2d 673. Fourteen “Secular” Humanist churches receive tax exemptions permitted only for property used exclusively for “religious worship.” Judge Peters adopts a functional definition of religion. The test is “whether or not the belief occupies the same place in the lives of its holders that the orthodox beliefs occupy in the lives of believing majorities;” “Religion simply includes: (1) a belief, not necessarily referring to supernatural powers; (2) a cult, involving a gregarious association openly expressing the belief; (3) a system of moral practice directly resulting from an adherence to the belief; and (4) an organization within the cult designed to observe the tenets of the belief.” Judge Peters decision was followed a month later by the DC Circuit in *Washington Ethical Society v. District of Columbia* (DC Cir 1957).
- 1961** **Supreme Court embraces “comprehensive” definition:** “By its nature, religion - in the comprehensive sense in which the Constitution uses that word - is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade..... virtually all human activity.” *McGowan v. Maryland*, 366 U.S. 420 (1961); But, Sunday closing laws do not invoke religious subject matter as they provide a day of rest for all religious persons, including disbelievers. “The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or *disbelief* in the verity of *some transcendental idea* and man's expression in action of that belief or *disbelief.*”
- 1965** **The Supreme Court adopts the Fellowship of Humanity Parallel Position Test:** *United States v. Seeger*, 380 U.S. 163 (1965). Conscientious objectors may qualify for a religious exemption from combat even though they do not believe in a “Supreme Being.” “Within [the phrase ‘religious training and belief’] would come all sincere religious beliefs which are based upon a power or being, *or upon a faith*, to which all else is subordinate *or upon which all else is ultimately dependent.*” “Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; *others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace.*”
- 1969** **Second & Ninth Circuits find religion includes non-theistic Scientology:** *Founding Church of Scientology v. U.S.*, 409 F.2d 1146 (DC Cir 1969); *Church of Scientology v. CIR*, 823 F.2d (9th Cir 1987)
- 1970** **The Supreme Court recognizes confusion over the broad meaning of religion** *Welsh V. United States*, 398 U.S. 333: “*But very few registrants are fully aware of the broad scope of the word "religious"* as used in 6 (j), and accordingly a registrant's statement that his beliefs are nonreligious is a highly unreliable guide for those charged with administering the exemption.”
- 1979** **The meaning of “religion” is functional and means the same in the EC and FEC. Non-theistic religions like transcendental meditation may not be taught in public schools in the guise of “science.”** *Malnak v. Yogi*, 592 F.2d 197 (3rd Cir 1979) “It seems unavoidable, from *Seeger*, *Welsh*, and *Torcaso*, that the theistic formulation presumed to be applicable ... is no longer sustainable.” “*First*, a religion addresses *fundamental and ultimate questions* having to do with deep and imponderable matters.” A diet regime is not a subject matter of religion [*Africa v. Commonwealth of Penn.* (3rd Cir 1981)] “Appellants ...do not consider SCI/TM to be a religion. But the question of the definition of religion for first amendment purposes is one for the courts, and is not controlled by the subjective perceptions of believers. Supporters of new belief systems may not ‘choose’ to be non-religious, particularly in the establishment clause context. There is some indication that SCI/TM has attempted a transformation from a religion to a secular science in order to gain access to the public schools.”
- 1983** **Second and Tenth Circuits embrace a broad definition of religion:** *U.S. v. Sun Myung Moon* 718 F.2d 1210 (2nd Cir, 1983); and *United States V. Meyers*, 95 F.3d 1475, (10th Cir 1996)
- 1978** **Religion is a set of beliefs about the cause, nature and purpose of life.** Analysis showing Secular Humanism a religion not reversed. *Smith v. Board*, 827 F.2d 684 (11th Cir. 1987); reversed on other grounds, 827 F.2d 684 (11th Cir. 1987).
- 1992** **Either belief or disbelief in God is an impermissible religious orthodoxy:** *Lee v. Weisman*, 505 U.S. 577 “[A] nonpreferentialist who would condemn subjecting public school graduates to, say, the Anglican liturgy would still need to explain why the government's preference for theistic over *nontheistic religion* is constitutional.” The “settled law” is that the “Clause applies ‘to each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker””
- 2005** **Atheism is an Establishment Clause Religion – Atheists are entitled to have “church” in prison.** *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir.2005)
- 2008** **EEOC Compliance Manual** defines religion as concerned with “‘ultimate ideas’ about ‘life, purpose, and death,” and includes atheism and other “religious beliefs that are new, uncommon,” citing many of the cases discussed above.

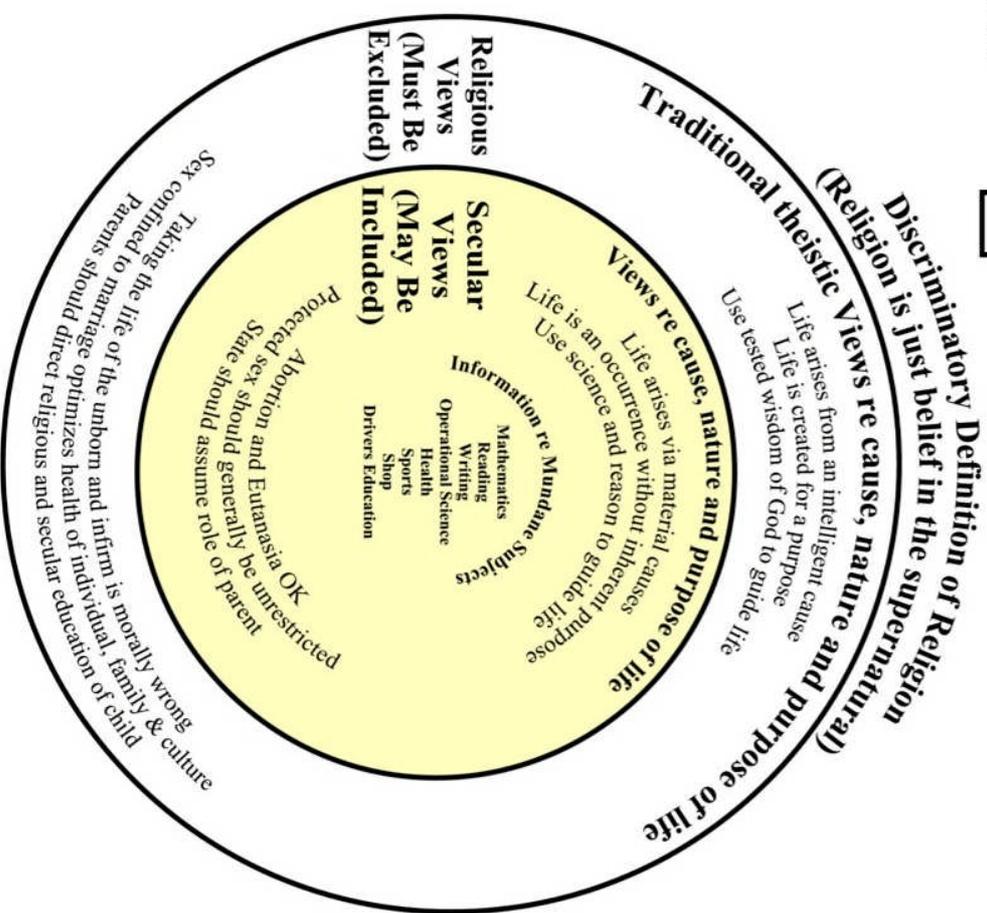
Content of Religious and Secular Spheres under the two definitions of religion

State entry into religious sphere requires secular purpose and neutral effect.

Secular Sphere =
 Religious Sphere =



Science is functionally non-religious
by being open-minded



Science is functionally religious
by being close minded re matters of ultimate concern