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The Monkey Laws and the Public Schools: A Second Consumption?

Frederic S. Le Clercq*

I. INTRODUCTION

As a national issue, the teaching of evolution in the public schools appeared to have been put to rest with the celebrated Scopes trial in Tennessee almost half a century ago.¹ When the Supreme Court finally invalidated a state "antievolution" law in *Epperson v. Arkansas*,² Justice Black, in his concurring opinion, seriously questioned whether the case presented a genuinely justiciable case or controversy since the state had never made a single attempt to enforce it for nearly forty years after passage.³ Evolution as a religious-political issue—fraught with all its potential for religious fragmen-

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1. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). The *Scopes* trial has generated a substantial amount of nonlegal literature and has become a part of American folklore. See generally L. ALLEN, *BRYAN AND DARROW AT DAYTON* (1967); R. BRUMBAUGH, *SIX TRIALS* (1969); W. CURTIS, *FUNDAMENTALISM v. EVOLUTION AT DAYTON, TENNESSEE* (1956); L. DECAMP, *THE GREAT MONKEY TRIAL* (1968); R. GINGER, *SIX DAYS OR FOREVER? TENNESSEE v. JOHN THOMAS SCOPES* (1958); S. GRABSTEIN, *MONKEY TRIAL* (1960); J. LAWRENCE & R. LEE, *INHERIT THE WIND* (1955); J. SCOPES & J. PRESLEY, *CENTER OF THE STORM* (1967); M. SETTLE, *THE SCOPES TRIAL* (1972); J. TOMPKINS, *D-DAYS AT DAYTON* (1965).

2. 393 U.S. 97 (1968). In 1970, the Mississippi Supreme Court invalidated the Mississippi antievolution statute on the authority of *Epperson*. *Smith v. State*, 242 So. 2d 692 (Miss. 1970).

3. 393 U.S. at 109. A study published in 1942, however, revealed that fewer than half of the high school biology teachers taught evolution as the principle underlying the development of all living things. COMM. ON TEACHING OF THE UNION OF AMERICAN BIOLOGICAL SOCIETIES, *THE TEACHING OF BIOLOGY IN SECONDARY SCHOOLS OF THE UNITED STATES: A REPORT OF RESULTS FROM A QUESTIONNAIRE* (O. Riddle, F. Fitzpatrick & H. Glass ed. 1942). Nor had the situation changed significantly in 1959. See Muller, *One Hundred Years Without Darwinism Are Enough*, 19 *THE HUMANIST* 139 (1959). The Biological Sciences Curriculum Study, however, funded by the National Science Foundation at the University of Colorado since 1960 has ushered in a new breed of biology textbooks which

reflect the major innovations in teaching methods—process and inquiry—that revolutionized high school biology in the 1960's and are now penetrating the new elementary school science curricula.

Aulie, *The Doctrine of Special Creation*, 34 *AM. BIO. TEACHER* 191, 192 (1972).

tation and social discord—is now being revived and politicized by various groups of religious fundamentalists who espouse a “creationist” position.⁴ Creationists are making a determined effort to replace the theory of evolution in public school science textbooks with the doctrine of Divine or Biblical Creation, or its protean “scientific” counterpart, special or spontaneous creation. At the very least, creationists hope to dilute the theory of evolution to the level of hypothesis or speculation and to win equal time for the doctrine of special creation.

Recent events suggest that the creationist movement is both potent and truly national in scope. In California, the science curriculum guidelines for public schools were modified by a sympathetic state board of education to accommodate the creationist position.⁵

4. The political base of the creationist movement is located in the various fundamentalist religious sects. Its leadership is often associated with fundamentalist sectarian educational institutions such as Bob Jones University, Greenville, South Carolina; Concordia Lutheran Junior College, Ann Arbor, Michigan; and David Lipscomb College, Nashville, Tennessee. The Creationist Research Society of Ann Arbor, Michigan, founded in 1963, is the oldest national creationist organization, aside from churches and educational institutions. It has 400 voting members, who must have at least a masters degree in some branch of science, and 1300 sustaining members who are “Christians who believe that the facts of science support the revealed account of creation in the Bible.” 1 ENCYCLOPEDIA OF ASSOCIATIONS § 10, *Religious Organizations*, at 937 (7th ed. 1972). The Society includes “the hard core of scientist-creationists who advocate the falsity of evolution and the truth of Genesis.” 178 SCIENCE 726 (1972). Other major creationist groups include the Institute for Creation Research, a division of Christian Heritage College in San Diego, California; the Creation-Science Research Center of San Diego, California; the Bible Science Association of Caldwell, Idaho; and the American Scientific Affiliation.

For additional background information on the creationist movement and its leadership see Aulie, *The Doctrine of Special Creation*, 34 AM. BIO. TEACHER 191-200, 261-68 (1972); Bresdesen, *Anatomy of a Confrontation*, 23 J. OF AM. SCI. AFFILIATION 146 (1971); Larsen, *California's Evolution War: Should Genesis Get Equal Time*, 87 CHRISTIAN CENTURY 251-53 (1970); Morris, *Relation Between Institute for Creation Research and Other Creationist Organizations* (undated pamphlet distributed by the Institute for Creation Research); *Evolution Slips Back a Notch in California Schools*, 14 MED. WORLD NEWS, Feb. 2, 1973, at 20-21; 178 SCIENCE 724-29 (1972); *The National Observer*, Dec. 30, 1972, at 6.

5. The California State Board of Education “reflects to some degree the pietism of Gov. Ronald Reagan, who appointed all of its members.” *Evolution Slips Back a Notch in California Schools*, 14 MED. WORLD NEWS, Feb. 2, 1973, at 20. Over the express disapproval of its blue ribbon State Advisory Committee on Science Education, the California Board of Education approved inclusion of the following two paragraphs in its science curriculum guidelines:

All scientific evidence to date concerning the origin of life implies at least a dualism or the necessity to use several theories to fully explain relationships between established data points. This dualism is not unique to this study but is also appropriate in other scientific disciplines, such as the physics of light.

While the Bible and other philosophic treatises also mention creation, science has independently postulated the various theories of creation. Therefore, creation in scientific terms is not a religious or philosophic belief. Also note that creation and evolutionary theories are not necessarily mutual exclusives. Some of the scientific data (e.g., the

Science textbooks for use in the public schools of California are being edited to dilute passages on evolution,⁶ and creationists almost achieved express recognition of their beliefs in the science texts.⁷ In Tennessee, a law has been passed that requires inclusion of the Biblical account of creation in biology textbooks used in the public schools.⁸ Similar legislation to require treatment of creation-

regular absence of transitional forms) may be best explained by a creation theory, while other data (e.g., transmutation of species) substantiate a process of evolution.

CALIFORNIA STATE COMMITTEE ON SCIENCE EDUCATION, SCIENCE FRAMEWORK FOR CALIFORNIA SCHOOLS 106 (1970).

6. Progress Reports from the Consulting Committee Charged with Editing Science Textbooks with Regard to Origins to the members of the California State Board of Education, Jan. 11, 1973, Feb. 8, 1973. The proposed changes generally were more conditional or qualified than statements in present editions. Thus, in the memorandum of January 11, 1973, it was recommended that a sentence which read: "Modern animals that are descendants of some that lived in the Coal Age are salamanders, turtles, dragonflies, and cockroaches" be changed to read: "Modern animals that *seem to be direct* descendants of . . ." The sentence, "Meanwhile, about 400 million years ago, animals began to move from water to land," was recommended to read, "*It is thought that* about 400 million years . . ." The words, "scientists think" were often reduced to read "*most* scientists think." Qualifications such as "according to evolutionary theory" were proposed for a number of statements. In the memorandum of February 11, 1973, 52 editorial changes were proposed for 13 science texts. Typical proposed changes were insertions of statements such as: "Science cannot answer the question of where the first matter and energy came from;" and "No one knows just how or when the vertebrates first came into being."

7. On February 8, 1973, the California State Board of Education voted 5 to 2 in favor of inserting creation doctrine in science textbooks. The motion failed only because a majority of six is required for action by the ten member board. One of the two "no" votes was cast by Rev. David Hubbard, president of Fuller Theological Seminary in Pasadena, California, who favors putting creation doctrine in science texts but thought that the time was too short to make the creationist revisions in an adequate manner. Rev. Hubbard, therefore, preferred to see the books edited "to make certain that evolution is stated as a theory rather than as a fact." Los Angeles Times, Feb. 9, 1973, Pt. I, at 26, col. 1.

8. TENN. CODE ANN. § 49-2008 (1972) *as amended*, Ch. 377, §§ 1-4, [1973] Tenn. Pub. Acts 1152. The Tennessee law provides in pertinent part:

Any biology textbook used for teaching in the public schools, which expresses an opinion of, or relates to a theory about origins or creation of man and his world shall be prohibited from being used as a textbook in such system unless it specifically states that it is a theory as to the origin and creation of man and his world and is not represented to be scientific fact. Any textbook so used in the public education system which expresses an opinion or relates to a theory or theories shall give in the same text book and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible. The provisions of this Act shall not apply to use of any textbook now legally in use, until the beginning of the school year of 1975-1976; provided, however, that the textbook requirements stated above shall in no way diminish the duty of the state textbook commission to prepare a list of approved standard editions of textbooks for use in the public schools of the state as provided in this section. Each local school board may use textbooks or supplementary material as approved by the State Board of Education to carry out the provisions of this section. The teaching of all occult or satanical beliefs of human origin is expressly excluded from this act.

ist doctrine in science textbooks was also introduced in state legislatures in Colorado,⁹ Michigan,¹⁰ Washington,¹¹ and Georgia.¹² Additionally, some local school boards, such as the Columbus, Ohio, Board of Education,¹³ have passed resolutions to require inclusion of the creationist position. In Texas, a creationist campaign won important concessions from the state board of education,¹⁴ and active creationist campaigns are also being conducted in Louisiana,¹⁵ Indiana,¹⁶ Florida,¹⁷ Illinois,¹⁸ Virginia,¹⁹ and Pennsylvania,²⁰ among other states. Creationists have threatened to seek relief from the courts under the free exercise clause, although the first skirmish resulted in dismissal for failure to state a claim.²¹ Intensified creationist efforts can be expected in state legislatures and before state and local boards of education across the nation. A creationist press has been organized to arouse the public and to supply the demand for public school textbooks bearing a creationist imprimatur. Of even greater significance is the possibility that national school text-

Provided however that the Holy Bible shall not be defined as a textbook, but is hereby declared to be a reference work, and shall not be required to carry the disclaimer above provided for textbooks.

9. H.R. Con. Res. 1011, Colo. State Assembly, _____ Sess. (1972).

10. S. 67, Mich. Leg., _____ Sess. (Jan. 30-31, 1973).

11. H.R. 1021, Wash. _____ (Mar. 12, 1973).

12. S. 276, Ga. Senate _____ (March _____, 1973).

13. Columbus, Ohio, Board of Education, Resolution No. _____ (March 16, 1971).

14. 178 SCIENCE 728-29 (1972).

15. *Id.* at 729.

16. *Id.*

17. *Id.*

18. Letter from Richard W. Thomas, Burbank, Illinois to Jerry Lightner, Exec. Sec., Nat'l Ass'n of Biology Teachers, Feb. 13, 1973. A Bible and Modern Science Seminar was held February 24, 1973 in Oak Forest, Illinois at the Calvary Baptist Church on the topic "Evolution: Fact or Fiction." Two of the three speakers in the all day program were faculty members of the science department at Bob Jones University in Greenville, South Carolina.

19. In the spring of 1972, J. T. Houk from Falls Church, Virginia, under the letterhead of the Creation-Science Research Center memorialized all principals of public secondary schools and state education officials in Virginia in a four page memorandum criticizing biology textbooks on the Virginia approved list and urging consideration of creationist biology texts. Letter from J.T. Houk to W. Wilkerson, Supt. of Schools for the State of Virginia, undated.

20. Letter from Clyde M. Broadbelt, Downingtown, Pennsylvania to H. Wingerd, Supt., West Chester Area School Dist., West Chester, Pennsylvania, May 9, 1972.

21. *Willoughby v. Steven*, Civil No. 1574-72 (D.D.C., Aug. 25, 1972). In *Willoughby* the plaintiff challenged financial grants made by the National Science Foundation to the Biological Sciences Curriculum Study (BSCS), a project to prepare biology textbooks for school children, on the grounds that BSCS textbooks present the theory of evolution as "the only reliable theory of the origin of man," a view which is "hostile to the religious beliefs of the plaintiff." Complaint, at ¶¶ 14, 16. In its dismissal order, the court declined to request the convening of a three-judge court because of the "insubstantiality of the alleged constitutional issue proposed by the plaintiff." Dismissal order at 3, 7.

book publishing companies will edit school textbooks to accommodate the creationist position.

Ultimately, the issues raised in the controversy over science teaching and textbooks will probably have to be resolved in the courts. Litigation in California has thus far been forestalled as a result of a tenuous, and perhaps temporary, settlement.²² Therefore, it is probable that the issue will be litigated first in Tennessee, which has enacted creationist legislation. This article will explore the important and highly sensitive constitutional implications of the science teaching and textbook controversy under the establishment, free exercise, and free speech clauses of the first amendment and the due process clause of the fourteenth amendment.

II. SCIENCE TEACHING, TEXTBOOKS, AND THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The establishment and free exercise clauses of the first amendment,²³ Justice Powell recently observed, present "some of the most perplexing questions to come before this Court."²⁴ The elusive, meandering line that separates the secular from the sectarian in American life cannot be defined with precision but is a "paradox central to our scheme of liberty."²⁵ Although there is consensus on the broad contours of the controlling constitutional standards, the application of general principles to particular factual situations remains an exacting task.²⁶

The science teaching and textbook controversy, like many other issues arising under the religion clauses of the first amendment, lies in the tension between the establishment and free exercise clauses.²⁷

22. See notes 6 and 7 *supra*.

23. The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The Court has "decisively settled" and "repeatedly reaffirmed" the doctrine that the "First Amendment's mandate . . . has been made wholly applicable to the States by the Fourteenth Amendment." *School Dist. v. Schempp*, 374 U.S. 203, 215-16 (1963).

24. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. ___, ___, 93 S. Ct. 2955, 2959 (1973).

25. *School Dist. v. Schempp*, 374 U.S. at 231. (Brennan, J., concurring).

26. This explains why the Court's decisions on cases arising under the establishment and free exercise clauses have rarely been unanimous.

27. The general problem of conflict and accommodation between the two clauses was emphasized in *School Dist. v. Schempp*, 374 U.S. at 296-304 (Brennan, J., concurring). The "interrelationship" of the establishment and free exercise clauses was first touched upon in *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). More recently, the Court suggested that the tension inevitably existing between the establishment and free exercise clauses is the reason "our cases require the State to maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. at ___, 93 S. Ct. at 2973.

The scientific community generally regards the doctrine of spontaneous or special creation as non-scientific and religious.²⁸ Under this view, the inclusion of creationist doctrine in science classes amounts to an establishment of religion proscribed by the first amendment. State legislation or administrative regulations that require the teaching of creation doctrine or its inclusion in textbooks also raise substantial free exercise questions for many teachers and students.

Creationist leaders and fundamentalist parents, however, see the issue from a quite different perspective. For them, present science teaching and textual materials that discuss evolution exclusively amount to an establishment of a "secular religion" and interfere with the free exercise of the revealed truths of fundamentalist religion.²⁹

It is within this framework of diverse, competing values and social interests that the delicate constitutional balance must be struck between the usual presumption supporting legislative and administrative action and the preferred place given first amendment freedoms.

A. *The Establishment Clause*

Most of the establishment clause cases have addressed the relationship between religion and education. Among these precedents, two general categories of cases may be identified—those dealing with religious activities within the public schools,³⁰ and those concerning public aid in varying forms to sectarian educational institu-

28. See, e.g., Resolution of the Commission on Science Education of the American Association for the Advancement of Science (Oct. 13, 1972), *THE BIOLOGICAL SCIENCES CURRICULUM STUDY NEWSLETTER* No. 49, at 17 (1972).

29. See Houk letter, *supra* note 19, in which the writer contends that present science teaching and teaching materials

[1] . . . create a deterrence of the belief structure of the religious child

[2] . . . [inculcate] the basic tenets of the established religion of secular humanism, including the origin of man from lower forms of life, and the accidental origin of life on this planet

[3] . . . implant in pupils' minds a preference for atheism or agnosticism, and reflect unfavorably upon the bedrock reference material of religion and upon all religions and upon particular creeds.

The Court has already considered and disagreed with the charge that unless "religious exercises are permitted a 'religion of secularism' is established in the schools." *School Dist v. Schempp*, 374 U.S. at 225.

30. E.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (antievolutionary limitation on public school study); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (prayer reading in public schools); *Zorach v. Clauson*, 343 U.S. 306 (1952) ("released time" from public education for religious education); *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (also a "released time" case).

tions.³¹ Certain controlling constitutional guidelines have also emerged from the previous establishment clause litigation.³² First, the law or act in question must reflect a clearly secular legislative purpose;³³ secondly, it must have a primary effect that neither advances nor inhibits religion;³⁴ and thirdly, it must avoid excessive government entanglement with religion.³⁵

1. *Legislative Purpose.*—To pass muster under the establishment clause, legislation or state action must be adequately supported by legitimate secular interests. This secular purpose alone, however, will not immunize a law from further scrutiny if its primary effect still advances religion or causes excessive entanglements between church and state.³⁶

In *Epperson v. Arkansas*, the Supreme Court held in 1963 that state legislation cannot be justified by considerations of state policy resting solely upon the religious views of some of its citizens and invalidated the Arkansas antievolution statute because it was “clear that fundamentalist sectarian conviction was and is the law’s reason for existence.”³⁷ Although the Arkansas act³⁸ was less explicit in religious references than those of other states,³⁹ the *Epperson* Court

31. *E.g.*, *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. ___, 93 S. Ct. 2955 (1973) (maintenance, repair, and tuition reimbursement grants and income tax deductions); *Hunt v. McNair*, ___ U.S. ___, 93 S. Ct. 2868 (1973) (secular college facilities); *Sloan v. Lemon*, ___ U.S. ___, 93 S. Ct. 2982 (1973) (tuition reimbursement) [hereinafter cited as *Lemon III*]; *Tilton v. Richardson*, 403 U.S. 672 (1971) (secular college facilities); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (teachers’ salaries, textbooks, instructional materials) [hereinafter cited as *Lemon I*]; *Board of Educ. v. Allen*, 392 U.S. 236 (1968) (textbooks); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (bus transportation).

32. Taken together, these standards, according to Justice Powell, amount to a “well defined three-part test.” *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. at ___, 93 S. Ct. at 2965.

33. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

34. *School Dist. v. Schempp*, 374 U.S. 203 (1963).

35. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Tilton v. Richardson*, 403 U.S. 672, 684-89 (1971); *Walz v. Tax Comm’n.*, 397 U.S. 664, 674 (1970).

36. *School Dist. v. Schempp*, 374 U.S. 203 (1963).

37. 393 U.S. at 107-08. The Supreme Court in establishing the legislative purpose of the Arkansas antievolution law took judicial notice of newspaper advertisements and letters to the editor. *Id.* at 108 n.16. See also *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) where the Court observed that it is proper to examine the constitutionality of state legislation “in terms of its ‘immediate objective,’ its ‘ultimate effect’ and its ‘historical context and the conditions existing prior to its enactment’”

38. Act No. 1, Ark. Acts 1929, the text of which is reprinted in *Epperson v. Arkansas*, 393 U.S. at 99 n.3.

39. The original Tennessee antievolution law, Law of March 21, 1925, ch. 27 [1925] Tenn. Acts (repealed 1967), had “candidly stated its purpose” of making it unlawful to teach any theory that rejected the divine creation of man as stated in the Bible. *Epperson v. Arkansas*, 393 U.S. at 108-09. Compare ch. 377 [1973] Tenn. Acts 1152 (requiring that

ruled that the purpose of the law was still the same—to suppress the teaching of any theory that seemed to deny the divine creation of man.⁴⁰ The Court concluded that

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read.⁴¹

The current drive to win equal time for creationist doctrine⁴²—in lieu of the 1920's strategy to “blot out” evolution—may well have been conceived as a response to *Epperson*. Although the equal time argument has far more public appeal than the simple negativism that the fundamentalist movement formerly exercised, one biologist recently pointed out that the basic problem still remains: “religion is not science.”⁴³ Luckily, creationists have not espoused the variety of “religious neutrality” that would remove from the public school classroom all discussion about the origin of man.⁴⁴

The litany of such metaphysical concepts as religious neutrality recited in *Epperson* are confusing and of little analytical or predictive value. The constitutional values that emerge from the case are of much greater utility and durability. *Epperson* suggests that state legislation should be strictly scrutinized to the extent that legislation advances religious rather than secular interests. Where the only interests supporting legislation are religious or nonsecular, as in *Epperson*, the presumption of invalidity should be conclusive. Another important constitutional value implicit in the decision is that in public educational institutions no religious group should be allowed to blot out a segment of knowledge “deemed to conflict with a particular religious doctrine.”⁴⁵ A fortiori, no religious group should be permitted to compel the inclusion of a segment of its particular religious doctrine in the public school curriculum.⁴⁶

biology textbooks discussing man's origin give “an equal amount of emphasis” on different theories, including the Biblical account), amending TENN. CODE ANN. § 49-2008 (1972).

40. 393 U.S. at 109.

41. *Id.*

42. See notes 9-13 *supra*.

43. Mayer, *The Nineteenth Century Revisited*, THE BIOLOGICAL SCIENCES CURRICULUM STUDY NEWSLETTER No. 49, at 12 (1972).

44. *Epperson v. Arkansas*, 393 U.S. at 109 (dictum).

45. 393 U.S. at 103.

46. As the Court observed in *Epperson*, “the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.” *Id.* at 106 (dictum). See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952), cited with approval in *Epperson*, where Mr. Justice Clark stated that

A third important constitutional value outlined by *Epperson* is the right of the individual "to engage in any of the common occupations of life and to acquire useful knowledge."⁴⁷ This right of teachers and students to be free of arbitrary restrictions upon the educational process is secured by the due process clause of the fourteenth amendment.⁴⁸ Although the *Epperson* Court decided that it need not rely upon the broad due process premise which an earlier Court decision had furnished,⁴⁹ the fundamental rights secured in this area obviously deserve careful examination in the context of the present controversy over science teaching and textbooks. Finally, *Epperson* advances a rule of construction that is helpful in ascertaining legislative purpose: courts should look behind the explicit language of legislation to determine the law's purpose. The motivation for the law has probative value,⁵⁰ and the Court may properly take judicial notice of the public context within which the contested legislation was enacted.

The Court in *Epperson* explored the questions of vagueness and free speech, but declined to base its holding on either ground.⁵¹ The Court saw little importance in the uncertainty whether the Arkansas statute prohibited explanation of the theory of evolution at all or merely forbade teaching it as a fact since under either interpretation of its language the statute could not stand.⁵² Thus *Epperson* does not bode well for recent legislative and administrative proposals that, consistent with present creationist policy, seek not to prohibit the teaching of evolution but rather to prohibit oral or written representations that the theory of evolution is true or is a scientific fact.⁵³

"the state has no legitimate interest in protecting any or all religions from views distasteful to them." 393 U.S. at 107.

47. 393 U.S. at 105 (dictum). Cf. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

48. 393 U.S. at 105.

49. See *Meyer v. Nebraska*, 262 U.S. 390 (1923).

50. *Id.* at 109. See *United States Dep't of Agriculture v. Moreno*, ___ U.S. ___, ___, 93 S. Ct. 2821, 2825-26 (1973) ("bare Congressional desire to harm a politically unpopular group [i.e., to keep 'hippies' off the food stamp program] cannot constitute a *legitimate* governmental interest").

51. Mr. Justice Harlan concurred with the Court's opinion on establishment grounds but criticized the Court for exploring the vagueness and free speech questions "only to conclude that these issues need not be decided in this case. In the process of *not* deciding them, the Court obscures its otherwise straightforward holding . . ." 393 U.S. at 115. Justices Black and Stewart wrote separate opinions concurring with the result exclusively on vagueness grounds.

52. *Id.* at 102-03.

53. See notes 8-13 *supra*. The semantic differences separating scientists from creationists are of considerable importance. William V. Mayer, Professor of Biology at the University

It is, of course, possible for a law to have predecessors which are religious in origin yet avoid the prohibition of the establishment clause. The Supreme Court recognizes that the function and purpose of legislation may change over time. Thus, after engaging in the close scrutiny demanded in first amendment cases, the Court has upheld the Sunday closing laws because they are consistent with a legitimate, secular state interest to set aside a day of rest and recreation.⁵⁴ In this light, the creationist effort to support its doctrine on non-religious grounds represents an ostensible attempt to establish an independent secular interest sufficient to withstand constitutional attack.⁵⁵

2. *Effect of the Law.*—To avoid the strictures of the establishment clause, legislation must have “a primary effect that neither advances nor inhibits religion.”⁵⁶ Although the Court failed for a considerable period to define precisely what it meant by “primary effect of advancing religion,” a recent Supreme Court case has declared that public aid furthers religion when it goes to an institution whose functions are totally related to religion or when it funds a religious activity even in a secular setting.⁵⁷ The issue raised in the science-teaching and textbook controversy is whether oral or written

of Colorado and Director of the Biological Sciences Curriculum Study has stated that [fundamentalists use the term *theory* in describing creation, but they use the term in a sense entirely different from that used by scientists [I]f one is to consider a creation *theory* seriously, it must be subject to the tests demanded of all scientific theories. That no such tests have been made, and that none is available for examination, should be apparent to all. There is no creation *theory* of course, but rather a religious belief that is quite outside the realm of scientific investigation.

As further evidence of the misuse of the term *theory*, there is not a reputable biologist alive who would not jettison the evolution theory were a better *scientific* theory postulated concerning evolution. The fundamentalist's position, however, is the antithesis of that of the scientist. While the theory of evolution was derived from a vast mass of data and from hypotheses consistently analyzed, the *theory* of creation is not to be questioned. There can be no modification of the creation *theory* regardless of evidence, for the *theory* has not been derived from fact; rather it has been postulated, and facts are now being sought to buttress it.

Mayer, *The Nineteenth Century Revisited*, THE BIOLOGICAL SCIENCES CURRICULUM STUDY NEWSLETTER No. 49, at 8 (1972).

54. *McGowan v. Maryland*, 366 U.S. 420, 449 (1961).

55. See 2 ACTS AND FACTS No. 5, at 1-4 (Institute for Creation Research, 1973) in which Henry Morris of the Creation Research Society suggests that “evolution is completely inadequate as a scientific theory and that creationism provides a better framework for scientific interpretation.” *Id.* at 3.

56. *School Dist. v. Schempp*, 374 U.S. at 222. See *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. ___, ___, 93 S. Ct. 2955, 2965-66 (1973); *Sloan v. Lemon (Lemon II)*, ___ U.S. ___, ___, 93 S. Ct. 2982, 2985 (1973); *McGowan v. Maryland*, 366 U.S. 420, 453 (1960).

57. *Hunt v. McNair*, ___ U.S. ___, ___, 93 S. Ct. 2868, 2873-74 (1973).

communication regarding the doctrine of spontaneous or special creation in public school science classes constitutes "religious activity." Several cases respond directly or indirectly to this question.

In *School District v. Schempp*,⁵⁸ which invalidated required Bible reading in the public schools in exercises that are religious in nature, the Court's decision turned on the pervading religious character of the ceremony involved.⁵⁹ Because of the Bible's undisputed role as an instrument of religion, its reading—whatever version—at any exercise or ceremony for religious purposes is violative of the establishment clause.⁶⁰ The Court went to great lengths in *Schempp* to emphasize that its decision did not prohibit public schools from using the Bible in their curricula either for nonreligious moral inspiration or for teaching secular subjects.⁶¹ The Court observed that a study of comparative religion or the history of religion can have an important role in one's education, agreed that the Bible is worthy of study for its literary qualities, and concluded that its use is constitutionally permissible when presented in an objective program.⁶² Although the Bible or Biblical doctrines are constitutionally appropriate in objective courses in religion, literature, or history, their use in science courses raises serious problems under the establishment clause. The National Academy of Sciences recently enacted a resolution which declared that the basic precepts of science exclude resorting to supernatural causes since there are no objective criteria by which to validate them. The Academy took the position that science and religion are "mutually exclusive realms of human thought" and should not be taught together.⁶³

58. 374 U.S. 203 (1963).

59. *Id.* at 224.

60. *Id.* The pervading religious character of the ceremony and its sectarian bias is apparent. The invalidated rule provided "specific permission of the alternative use of the Catholic Douay version as well as . . . permitting non-attendance at the exercises." In his concurring opinion, Mr. Justice Brennan posed the following answer, which might be dispositive of the Bible-reading issue: "any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alteration of versions in the first place . . ." *Id.* at 282. But even with rotation, "smaller sects suffer commensurate discrimination." Another more telling problem is there are "persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive . . . [and] others whose reverence for the Holy Scriptures demands private study or reflection and to whom public reading or recitation is sacreligious . . ." *Id.* at 283 (Brennan, J., concurring).

61. *Id.* at 224-25 (dictum).

62. *Id.* at 225. "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as a part of a secular program of education, may not be effected consistently with the First Amendment." *Id.* But cf. *id.* at 301 (Brennan, J., concurring).

63. Resolution, National Academy of Sciences, Oct. 17, 1972. The National Academy of Sciences passed this resolution in response to its concern that "the California State Board

In *Board of Education v. Allen*,⁶⁴ a divided Court held that providing secular textbooks to parochial schools does not violate the establishment clause. The Court, however, considered the case in the narrow procedural context of summary judgment entered on the pleadings, and the record before it contained no evidence about particular schools, courses, teachers, or books.⁶⁵ The challenged law had been construed by the Court of Appeals of New York as “‘merely making available secular textbooks at the request of the individual student.’”⁶⁶ The Court observed that each book loaned had to be approved by the public school authorities as a suitable secular work, and it refused to conclude that those officials who constantly select books are incapable, absent evidence, to distinguish between religious and secular books.⁶⁷ Inferentially, state support of *religious* textbooks would violate the establishment clause, although the question of which textbooks are unsuitable for use in the public schools because of religious content was not presented in *Allen*.

In a scathing dissent in *Allen*, Justice Black contended that books purchased for use by sectarian schools will serve to further the views of that religion, regardless of the work's contents.⁶⁸ Justice Douglas, in another dissenting opinion, emphasized the critical function of textbooks in the educational process, distinguishing books from other school items on the ground that there is “nothing ideological about a bus.”⁶⁹ Justice Douglas reasoned that textbooks are *sui generis* because

[t]he textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith A parochial school textbook may contain many, many more seeds of creed and dogma than a prayer.⁷⁰

He found particular difficulty with a textbook loan program be-

of Education is considering a requirement that all public school science texts give parallel treatment to the theory of evolution and to special creation.” See also Resolution of the Commission on Science Education of the American Association for the Advancement of Science, *supra* note 28.

64. 392 U.S. 236 (1968).

65. *Id.* at 248.

66. *Id.* at 245.

67. *Id.* at 244-45.

68. *Id.* at 250, 252 (Black, J., dissenting).

69. *Id.* at 257. Likewise, other instances of constitutionally permissible public assistance to individuals within the framework of religious institutions are distinguishable because there is “nothing ideological about a school lunch, or a public nurse, or a scholarship.” (Douglas, J., dissenting). *Id.*

70. *Id.*

cause there was no reliable standard by which to distinguish secular from religious textbooks. This, Justice Douglas believed, flirted with the obvious constitutional problems of public use or funding of texts that are "liberally sprinkled with religious vignettes."⁷¹ Although the majority in *Allen* rejected the idea that the secular and religious training processes in a parochial school are so intertwined that secular textbooks furnished to students by the public further the teaching of religion,⁷² the holding of the case should be limited to the narrow question before the Court—namely, is there constitutional infirmity with a state law providing *secular* textbooks to students attending parochial schools?⁷³

*Everson v. Board of Education*⁷⁴ provides the cornerstone upon which modern establishment-clause law rests. In that case a sharply divided Court held that a New Jersey law providing free public transportation to children attending parochial schools was supported by an independent, legitimate, secular public purpose and thus did not violate the establishment clause.⁷⁵ From its review of the early history out of which the establishment clause arose, the *Everson* Court pronounced that

[t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws

71. *Id.* at 260 n.9, 260-61. In a prophetic note justified by recent events, Justice Douglas explained his fear that

[p]owerful religious-political pressures will . . . be on the state agencies to provide the books that are desired . . . [and] . . . to obtain approval of what is "proper." For the "proper" books will radiate the "correct" religious view not only in the parochial school *but in the public school as well.*

Id. at 265-66 (emphasis added).

72. *Id.* at 248. *But see id.* at 262 n.12 (Douglas, J., dissenting).

73. *Allen* does not address itself to the question of what judicial standard would be appropriate for distinguishing between secular and religious textbooks. Nonetheless, it is almost certain that several of the textbooks to which Mr. Justice Douglas made reference would be constitutionally inappropriate for a publicly funded loan program to parochial schools or for use in the public schools. *Id.* at 258 (Douglas, J., dissenting).

74. 330 U.S. 1 (1947) (Jackson, Rutledge, Frankfurter, and Burton, JJ., dissented).

75. The legislation was upheld because, in the Court's view, it "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." Although the *Everson* Court recognized that the contested New Jersey statute "approaches the verge of . . . [the state's constitutional] power," the law was upheld as a secular welfare measure comparable to "such general services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks" from which parents who send their children to parochial schools likewise benefit. *Id.* at 16-18. Although both Justices Black and Douglas sharply dissented in *Allen*, Justice Black wrote the majority opinion in *Everson* in which Justice Douglas joined. Justice Douglas later observed that *Everson* "seems in retrospect to be out of line with the First Amendment." *Engle v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

which aid one religion, aid all religions or prefer one religion over another. . . .⁷⁶

Thus the "denominationally neutral" Regents' prayer in *Engle v. Vitale*⁷⁷ was held violative of the establishment clause because it represented an officially approved religious doctrine.⁷⁸ As a result, neither brevity nor generality can shield a practice or a writing from the establishment clause. The holding in *Engle* is clearly traceable to the doctrine of *Everson* that a state cannot aid all religions.

The "released time" cases, *McCullum v. Board of Education*⁷⁹ and *Zorach v. Clauson*,⁸⁰ establish that the state lacks the authority to allow religious instruction in public school classrooms. In *Zorach* the released-time program did not offend the establishment clause because it involved neither religious instruction in public school classrooms nor the expenditure of public funds. Conversely, in *McCullum*, the released-time program was disapproved because it provided for the use of tax-supported property for religious instruction.⁸¹

In *Tilton v. Richardson*,⁸² the Court held that grants to church-related colleges and universities for construction of facilities used solely for nonreligious purposes does not violate the establishment clause. The Court unanimously invalidated a section of the Higher Education Facilities Act of 1963 that would have limited the prohibition on religious use of the structures to twenty years. The crucial question in *Tilton* was whether the primary effect of the legislative program advanced religion.⁸³ The Court upheld the federal aid program because it expressed a legitimate secular objective appropriate for governmental action—namely, that the nation must assist colleges and universities to accommodate the growing numbers of youth who desire a higher education. The record had fully established that there had been no religious services or symbols in the

76. 330 U.S. at 15.

77. 370 U.S. 421 (1962).

78. *Id.* at 430, 436. In a like vein, neither can the state be "hostile" to religion. Compare *McCullum v. Board of Educ.*, 333 U.S. 203, 211 (1948) with *Zorach v. Clauson*, 343 U.S. 306, 312 (1952). The writer shares the view of Justice Brennan that the distinction which the Court drew between *Zorach* and *McCullum* is "faithful to the function of the establishment clause." *School Dist. v. Schempp*, 374 U.S. 261 (Brennan, J., concurring).

79. 333 U.S. 203 (1948).

80. 343 U.S. 306 (1952).

81. The Court found additionally violative of the establishment clause the state's practice of affording sectarian groups invaluable aid by providing pupils for their religious classes through the use of the state's compulsory public school machinery. 333 U.S. at 212.

82. 403 U.S. 672 (1971).

83. *Id.* at 679.

federally financed facilities and that they had been used solely for nonreligious purposes.⁸⁴ As in *Allen*, the *Tilton* Court refused to assume that religiosity necessarily permeates the secular education provided by church-supported schools. The Court observed that "by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."⁸⁵ The opinion appeared to equate respect for the internal discipline of academic courses with academic freedom.⁸⁶ The Court acknowledged that there are significant differences between the religious aspects of church-related colleges and parochial elementary and secondary schools. College students presumably are less impressionable and less susceptible to religious indoctrination than younger persons. Further, in contrast to parochial and elementary schools, a high degree of academic freedom characterizes many church-related colleges. This distinction is illustrated by two parochial school cases, *Committee for Public Education and Religious Liberty v. Nyquist*⁸⁷ and *Sloan v. Lemon (Lemon II)*,⁸⁸ in which the Court concluded that it was not possible to restrict public fund usage solely to secular purposes in parochial secondary and elementary schools and held unconstitutional, under the establishment clause, state assistance in New York and New Jersey to such religion-oriented institutions.⁸⁹ In *Hunt v. McNair*,⁹⁰ however, decided the same day as *Nyquist* and *Lemon II*, the Court approved the issuance of state revenue bonds for construction of church-related college facilities subject to a prohibition against use for religious purposes.

Tilton, *Nyquist*, *Lemon II*, and *Hunt* thus emphasize the narrowness of the Court's holding in *Allen*.⁹¹ While state assistance for construction of facilities earmarked exclusively for secular use at some church-related colleges is permissible,⁹² six members of the

84. *Id.* at 680.

85. *Id.* at 686.

86. *Id.* This equation must be of little comfort to creationists whose doctrinal efforts are opposed by the overwhelming weight of academically respectable scientific authority. See notes 28 and 70 *supra* and accompanying text.

87. ___ U.S. ___, 93 S. Ct. 2955 (1973).

88. ___ U.S. ___, 93 S. Ct. 2982 (1973).

89. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. at ___, 93 S. Ct. at 2966.

90. ___ U.S. ___, 93 S. Ct. 2868 (1973).

91. Mr. Justice Powell stressed that *Allen* related only to "secular textbooks." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. at ___, 93 S. Ct. at 2966.

92. There may be church-related colleges in which religion so permeates the curriculum that public assistance would be impermissible. The holding in *Tilton* and in *Hunt* were based

present Court have indicated their assent to the proposition that it is impossible to designate facilities exclusively for secular purposes in elementary and secondary sectarian schools.⁹³ Just as the Court had declined to approve public assistance to parochial schools because of their religious orientation, the use of religiously oriented textbooks in the public schools or the provision of such textbooks to students in parochial schools would also violate the establishment clause.

Several of the constitutional principles emerging from the above cases are relevant to the controversy over science teaching and textbooks. The Court's concern for the greater impressionability of elementary and secondary students and their susceptibility to religious indoctrination should clearly extend to any case involving the question whether the inclusion of creation doctrine in science textbooks violates the establishment clause. Moreover, the logic of the *McCullum* decision should not be subverted merely by incorporating religious instruction into science classes rather than as a separate study, because state support of religious activities are prohibited "whatever they may be called or whatever form they may adopt."⁹⁴

The establishment clause must be given a broad interpretation in light of its history and the evils at which it was aimed.⁹⁵ Although a too-precise quest for the advice of the Founding Fathers would be futile, modern practices can be measured to determine whether they "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."⁹⁶ The preservation of civic harmony in a pluralistic nation that has undergone a dramatic change in the religious diversity among the population served by our public schools is a prime example of how historic values can be supportive of contemporary social needs.⁹⁷

on substantive evidence in the records which tended to support the Court's assumption that the church-related colleges involved did, in fact, separate secular and religious components of education. *Tilton v. Richardson*, 403 U.S. at 686-87. In *Hunt*, the Court concluded that there was no basis on the record to conclude that the "[c]ollege's operations are oriented significantly towards sectarian rather than secular education." ___ U.S. at ___, 93 S. Ct. at 2874.

93. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, ___ U.S. at ___, 93 S. Ct. at 2966. *But see Tilton v. Richardson*, 403 U.S. at 681.

94. *Everson v. Board of Educ.*, 330 U.S. at 16 (1947).

95. *Id.* at 14-15. These evils include the centuries of civil strife in Europe born of efforts of different sects to maintain religious and political supremacy; punishments for speaking disrespectfully of ministers, for not attending church, and for expressing nonbelief in approved doctrines; and failure to pay tithes and taxes for church support.

96. *School Dist. v. Schempp*, 374 U.S. at 236-37 (Brennan, J., concurring).

97. *See id.* at 232-53. The public schools in America serve a "uniquely public function:

3. *Entanglement*.—The use of entanglement as an independent measure of constitutionality has generally been related to the “danger that pervasive modern governmental power will ultimately intrude on religion.”⁹⁸ In *Lemon v. Kurtzman (Lemon I)*,⁹⁹ the Court invalidated state salary supplements for teachers in Rhode Island and Pennsylvania elementary and secondary parochial schools because of the comprehensive and continuing state surveillance that would be required.¹⁰⁰ The decision in *Board of Education v. Allen* to allow public secular textbooks in the parochial schools was distinguished on the ground that whereas the potential of books to inject religion into secular subjects is ascertainable without a monitoring system, a teacher’s potential is not.¹⁰¹

The Court in *Lemon I* also expressed its concern about a different and broader entanglement problem “presented by the divisive political potential of these state programs.”¹⁰² The Court thought that many people would vote along religious lines when faced with these educational questions—one of the evils against which the first amendment was intended to protect. In other settings, however, the Court has generally approved construction grants to colleges for secular buildings against entanglement challenges.¹⁰³ Tax exemp-

the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.” *Id.* at 241-42.

98. *Lemon v. Kurtzman*, 403 U.S. at 620. The Court objected to “[t]his kind of state inspection and evaluation of the religious content of a religious organization [which] is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches.” *Id.*

99. 403 U.S. 602 (1971).

100. 403 U.S. at 619. The Court concluded that “the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.” *Id.* at 614.

101. *Id.* at 617.

102. *Id.* at 622. Although *Nyquist* was decided on the ground that the “challenged sections have the impermissible [sic] effect of advancing religion,” there, too, the Court expressed its apprehension that the assistance “carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.” ____ U.S. at ____, 93 S. Ct. at 2976.

103. *Hunt v. McNair*, ____ U.S. ____, 93 S. Ct. 2868 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971). The majority in *Tilton* was influenced by three factors: (1) Many church-related colleges permit “a high degree of academic freedom” and the Court, faced with conflicting allegations and evidence, could reasonably find that the institutions offered secular courses. (2) The aid provided was of a nonideological character. It was for facilities—not teachers. (3) No continuing regulation and surveillance was required. The government grant was a one-time, single-purpose construction grant that required

no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution’s expenditures on secular as distinguished from religious

tions for church property have also been upheld against a challenge on entanglement grounds.¹⁰⁴

In *Lemon I* the danger posed by entanglement between religion and the state lay in the private religious sector. In cases such as *McCullum*, on the other hand, and in the controversy over science teaching and textbooks, the danger zone is in the public sector. Yet the same bitter fruit is produced regardless of whether the entanglement occurs in the public or the private religious sector.¹⁰⁵ The danger of intrusions by organized religious and quasi-religious political groups upon the curriculum of the public schools generates apprehension equal to fears of excessive government direction of church schools and churches. Political division along religious lines—with its attending threat to the normal political process—is as inherent in the entanglement of religion in the public schools as in the entanglement of public policies in church schools and, hence, churches themselves.¹⁰⁶

B. *The Free Exercise Clause*

The free exercise and establishment clauses forbid two quite different kinds of governmental encroachment upon religious freedom. The purpose of the free exercise clause is “to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority,”¹⁰⁷ and its violation is predicated on coercion.¹⁰⁸ To

activities. Inspection as to use is a minimal contact.

403 U.S. at 686-88. The *Tilton* Court concluded that although “[n]o one of these three factors standing alone is necessarily controlling,” cumulatively they were dispositive. *Id.* at 688.

104. *Walz v. Tax Comm'n*, 397 U.S. 664, 675 (1970). The court was obviously influenced by the continuous practice of exemption that “covers our entire national existence and indeed predates it.” *Id.* at 678. Justice Brennan concurred because he believed exemptions are supported by at least two legitimate secular interests: (1) Churches are merely “among a range of other private, nonprofit organizations [that] contribute to the well-being of the community in a variety of nonreligious ways” and (2) the exemptions contribute to the “diversity of association, viewpoint, and enterprises essential to a vigorous, pluralistic society.” *Id.* at 687-89.

105. *School Dist. v. Schempp*, 374 U.S. at 259 (Brennan, J., concurring): “[G]overnment and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.”

106. In some areas, especially those that are rural and relatively homogeneous, the judicial disestablishment of religion in the public schools has itself generated substantial political fallout. See, e.g., R. Mykkeltvedt, *Response of Georgia's Public School Systems to the School Prayer Decisions: "Whipping a Dead Horse,"* 9 GA. ST. B.J. 425 (1973).

107. *School Dist. v. Schempp*, 374 U.S. at 223.

108. *Engle v. Vitale*, 370 U.S. at 430.

determine the constitutionality of state action that allegedly impinges upon the free exercise of religion, the courts resort to a balancing process in which the interests of the state are weighed in relation to other fundamental rights and interests that may be affected. Only those interests of primary importance that cannot be otherwise served can overbalance the free exercise of religion.¹⁰⁹ The free exercise of religion actually has a dual character: it prevents the state from compelling the acceptance of any creed or practice, thus allowing the individual freedom of choice in his beliefs, while at the same time it protects the practice of any religion that an individual does choose to believe. This part of the first amendment involves both the right to believe, which is absolute, and the freedom to act, which in a pluralistic society is not.¹¹⁰ The free exercise question arises in two different contexts in the controversy over science teaching and textbooks in the public schools. First, is the doctrine of spontaneous or special creation a non-scientific, religious doctrine the teaching or study of which could not constitutionally be required by the state in science courses? Secondly, does opposition to the teaching or study of evolution, if grounded upon sincere religious belief, provide a basis for the exemption of students from compulsory science or biology classes?¹¹¹

It is well settled that the free exercise clause is violated by state-imposed prayers¹¹² or Bible reading¹¹³ in the public schools because of the religious character of these practices. Nor may a state require an applicant for public office to swear or affirm a belief in a deity, because such a religious test "unconstitutionally invades the appellant's freedom of belief and religion."¹¹⁴ In *Torcaso v. Watkins*,¹¹⁵ the Court repeated and reaffirmed what it had said in two earlier cases¹¹⁶—that neither a state nor federal government can constitutionally force a person to believe or disbelieve in any religion.¹¹⁷ State legislation to require consideration of Biblical or religious explanations of creation in the science curricula of public

109. *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972).

110. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940); *cf. Sherbert v. Verner*, 374 U.S. 398 (1963); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

111. Standing would present no problem in either context. *See School Dist. v. Schempp*, 374 U.S. at 224 n.9.

112. *Engle v. Vitale*, 370 U.S. 421 (1962).

113. *School Dist. v. Schempp*, 374 U.S. 203 (1963).

114. *Torcaso v. Watkins*, 367 U.S. 488, 496 (1961).

115. 367 U.S. 488 (1961).

116. *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

117. 367 U.S. at 495.

schools raises substantial questions under the free exercise clause, and any student or faculty member whose religious freedoms were infringed would have standing to challenge such legislation.¹¹⁸ The place of the Bible as an instrument of religion cannot be denied, and Biblical or other divine explanations of creation engrafted upon the science curricula of the public schools assume a religious function of the character disapproved in *Schempp*, *Engel*, and *McCullum*. Also, whatever legitimate state interest there may be in acquainting students with Biblical or other divine explanations of creation can be served by other means that do not offend the free exercise clause, as, for example, when such explanations are presented objectively in a course on the sociology of religion, history of religion, or comparative religion.¹¹⁹

The teaching of the doctrine of special or spontaneous creation apart from any Biblical referents may likewise offend the free exercise clause. Special creation is a supernatural doctrine that presupposes a creator the existence of which is empirically unverifiable.¹²⁰ Because acceptance of the doctrine of special creation must be a matter of faith, it is a *religious* doctrine the teaching of which in the public schools presents insurmountable obstacles under both the free exercise and establishment clauses of the first amendment.

Allegations of fundamentalist parents that the teaching of evolution to their children violates their fundamental parental rights and their freedom of conscience present a claim that, in the opinion of this writer, raises equally substantial questions under the free exercise clause. In *Board of Education v. Schempp*, the Court was confronted with a claim that unless religious exercises are permitted a "religion of secularism" would be established in the schools.¹²¹ Although the phrase "religion of secularism" may be a semantic red herring, the claim raises far more difficult problems in the present context than it did in *Schempp*. There, the Court agreed that the state may not prefer those who believe in no religion by openly opposing or being hostile to religion generally, but held that the decision did not have that effect.¹²² One may agree with the holding in *Schempp* that the state is precluded under the establishment clause from adopting practices of a religious character in order to avoid the charge that it has established a religion of secularism in

118. See note 111 *supra*.

119. See notes 61-63 *supra* and accompanying text.

120. See note 28 and the text accompanying note 64 *supra*.

121. *School Dist v. Schempp*, 374 U.S. at 225.

122. *Id.*

the schools. The acceptance of that proposition, however, is by no means dispositive of a sincere claim by fundamentalist parents based upon religious beliefs that the study of the theory of evolution by their children violates their fundamental parental rights "to direct the upbringing and education of children under their control."¹²³ In *Pierce v. Society of Sisters*,¹²⁴ the Court invalidated state legislation that would have deprived parents of the right to send their children to private rather than public schools. If there is no general state power to standardize children by forcing them to accept instruction exclusively from public teachers, then it is likewise reasonable to contend that there is no state power to force children attending the public schools into a common mold, especially where delicate claims arising under the free exercise clause are presented.¹²⁵ Several other Supreme Court cases support this position.¹²⁶

In *West Virginia State Board of Education v. Barnette*,¹²⁷ the Court in a three-judge plurality opinion invalidated legislation compelling a salute and pledge of allegiance to the American flag on the grounds that the ceremony overstepped constitutional limitations on state power and invaded the sphere of the intellect that is protected from official control by the first amendment.¹²⁸ In their concurring opinion, Justices Black and Douglas observed that the purpose of the first amendment is to "permit the widest toleration of conflicting viewpoints consistent with a society of free men."¹²⁹ The justices viewed the ceremony, when enforced against conscientious objections, as merely a disguised form of religious persecution.¹³⁰

123. *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1924). Compare *Epperson v. Arkansas*, 393 U.S. at 113-14 (Black, J., concurring).

124. 268 U.S. 510 (1924).

125. Conversely, it would appear that a certain amount of "standardization" of course content is necessary in most schools, especially in order to make possible comparative assessments of student performance.

126. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

127. 319 U.S. 624 (1943).

128. *Id.* at 642. The *Barnette* plurality reasoned that "[i]t is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty." *Id.* at 635. Query whether the plurality opinion in *Barnette* is based upon the free exercise clause, the free speech clause, or both, or *neither*? Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965). However, three members of the *Barnette* Court did reach the free exercise question. 319 U.S. at 643-44 (Black and Douglas, JJ., concurring); *id.* at 644-46 (Murphy, J., concurring).

129. 319 U.S. at 644.

130. "Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation. If, as we think their fears are groundless, time and reason

In another concurrence in *Barnette*, Justice Murphy declared that governmental compulsion to affirm what is contrary to one's religious beliefs "is the antithesis of freedom of worship . . ."¹³¹ By the same rationale, it could be contended that the free exercise clause would be violated by compelling students to study science texts presenting data that tends to support the theory of evolution, if the effect of such study is to interfere with or destroy belief in religious doctrine inculcated in the home or the church.¹³² Religious beliefs founded upon a literal interpretation of verses 1-11 of *Genesis* that the earth was created in seven days or that the Noachian flood was an historic event are deserving of as much protection as the beliefs which were protected in *Barnette*.¹³³ Most people in this country who subscribe to religious beliefs have developed belief-systems that are either compatible with, or are preserved in a sphere of the mind apart from, the data, hypotheses, theories, and laws of science. The study of evolution in the public schools raises no free exercise questions for them or their children. For a minority of fundamentalists, however, the study of evolution interferes with their freedom to act in accordance with their sincere religious belief.¹³⁴ In *Wisconsin v. Yoder*¹³⁵ the Court exempted Amish children between the ages of fourteen and sixteen years who had completed the eighth grade and were participating in a program of informal vocational education from an otherwise lawful and generally applicable requirement that children attend school until age sixteen. The study of evolution by certain children of fundamentalist parents may, as in *Yoder*, carry with it the danger of censure by the church

are the proper antidotes for their errors. The ceremonial, when enforced against conscientious objections . . . is a handy implement for disguised religious persecution." *Id.*

131. *Id.* at 646 (Murphy, J., concurring).

132. On the other hand, *Barnette* may be distinguishable on the ground that the act of saluting the flag was repulsive whereas in a science course the student is not forced to believe as true anything which he studies. If the student cannot accommodate his or his parents' religious views with the theory of evolution, as most students do, he is free to reject personally the theory of evolution for whatever reasons he wishes since the right to believe or think is absolutely protected under the first amendment.

133. The challenging parties in *Barnette* were Jehovah's Witnesses, who "are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: 'Thou shalt not make unto thee any graven image . . . thou shalt not bow down thyself to them nor serve them.' They consider that the flag is an 'image' within this command. For this reason they refuse to salute it." 319 U.S. at 629.

134. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). The majority in *Yoder* thought that the "convincing showing . . . [of the Amish was] one that probably few other religious groups or sects could make . . ." *Id.* at 235-36.

135. 406 U.S. 205 (1972).

community and threat to the salvation of parents and children.¹³⁶

The Court in *Yoder* recognized the values of parental direction of the religious education of their children in their formative years¹³⁷ and found that the traditional interest of parents with respect to the religious upbringing of their children can outweigh even the strong state interest in universal education, provided that parents adequately prepare their children for added responsibilities.¹³⁸ There may be parents who as a result of deep religious conviction feel themselves as much threatened by the children's study of evolution as the Amish felt threatened by the compulsory attendance law. Is the justification for "hydraulic insistence on conformity to majoritarian standards"¹³⁹ any less in the case of the fundamentalist parent who on religious grounds objects to the study of evolution than in the case of the Amish parent who on similar grounds objects to compulsory education beyond the eighth grade? Perhaps the social policy most consistent with the free exercise and establishment clauses would permit exemptions from science courses, or portions thereof, for children whose parents request that their children be excused on religious grounds. The curtailment of employment and earnings potential, educational opportunities, and attainable life style of children excused from biology or science classes is not nearly so drastic as for those who do not go beyond the eighth grade. Such exemptions or excusals could forestall political efforts by fundamentalists to compromise the academic integrity of science textbooks and would depoliticize the present controversy. If accommodation with the interests of fundamentalist parents could be realized by excusing their children from some or all science classes, then the establishment and free exercise claims asserted by the majority to be free of creation doctrine in science teaching and textbooks—claims that are of equal or greater weight in this instance—could perhaps be avoided altogether.

Two problems remain, however. School attendance and enroll-

136. *Id.* at 209.

137. *Id.* at 213-14. *Cf.* *Ginsburg v. New York*, 390 U.S. 629, 639 (1968); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). In *Ginsburg* the Court upheld a statute prohibiting sale of obscene materials to minors under seventeen years of age on grounds that it was supportive of the "consistently recognized . . . parents' claim . . . to direct the rearing of their children [which] is basic in the structure of our society." 390 U.S. at 639. In *Meyer*, the Court found a parental duty to give his children an education suitable to their social position in life.

138. 406 U.S. at 214. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

139. *Id.* at 217.

ment in the prescribed science curriculum involve not only the freedom to believe, which is absolute, but the freedom to act, which may be lawfully circumscribed by the state.¹⁴⁰ Also, a state has a legitimate interest not only in developing the talents of its young, but also in preparing them for the lifestyle that they may choose or have the option to choose later in life.¹⁴¹ Justice Douglas dissented in *Yoder* because he thought that the decision imperilled the student's future, not the parents'. He insisted that while parents usually speak for the whole family, on such a vital matter as education, the child may have views and ought to be heard.¹⁴² The majority in *Yoder* insisted that its decision in no way determined possible competing interests of parents and children since the record did not present such an issue in that case.¹⁴³ The child-oriented position acknowledged by Justices Stewart and Brennan and insisted upon by Justice Douglas is persuasive, however. In a matter such as education, there may be instances when the wishes of the child, especially as the child grows older, ought to prevail even over the *parens patriae* and free exercise claims of the parent. The Court in *Yoder* admitted that the "power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens."¹⁴⁴ Cases involving declared adverse interests between parents and minor children over educational opportunity and free exercise matters raise extremely difficult questions that are left unsettled by *Yoder*.

III. ACADEMIC DUE PROCESS

Although the establishment and free exercise clauses represent the most formidable constitutional barrier to creationist efforts to rewrite the science textbooks used in the nation's public schools and

140. See text accompanying note 110 *supra*.

141. *Yoder v. Wisconsin*, 406 U.S. at 240 (Stewart and Brennan, JJ., concurring). The question in *Yoder* was considered "close" by Justices Stewart and Brennan. *Id.*

142. *Id.* at 244 (Douglas, J., dissenting in part). Justice Douglas favored reserving decision until the views of the Amish children in question could be canvassed on remand by the Wisconsin courts. *Id.* at 246.

143. *Id.* at 231.

144. *Id.* at 233-34. See *Prince v. Massachusetts*, 321 U.S. 158 (1944). In *Prince*, the Court upheld a statute forbidding boys under eighteen years of age from selling magazines in the streets against a claim based upon parental power over the child and the alleged infringement of the right of free exercise of religion by Jehovah's Witnesses whose children distributed religious literature in the streets. Parents, the Court suggested, should not be allowed "to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves." *Id.* at 170.

to win equal time for creationist doctrine in science teaching, the controversy also involves substantial claims of academic due process that deserve exploration.

A. *The Free Speech Clause*

The free speech guarantee of the first amendment has long been recognized as one of the "fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."¹⁴⁵ Although control over the public school curriculum is, like public education generally, committed to the control of state and local authorities,¹⁴⁶ the first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."¹⁴⁷ Academic freedom is a particular concern of the first amendment because of its "transcendent value to all of us and not merely to the teachers concerned."¹⁴⁸ In *Keyishian v. Board of Regents*,¹⁴⁹ as in most other loyalty cases, the first amendment has been invoked to protect speech and associational activities of teachers outside of the classroom. A fortiori, speech inside the classroom on matters within the professional competence of the teacher deserves protection as well.¹⁵⁰

In the leading case on student constitutional rights, *Tinker v. Des Moines Independent Community School District*,¹⁵¹ the Court observed that

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.¹⁵²

Thus the right of students protesting the Vietnam war to wear black armbands while in school was approved as symbolic speech within

145. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

146. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 51 & n.108 (1973).

147. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (invalidating New York's Feinberg Law).

148. *Id.* Unwarranted inhibitions upon teachers "chill that free play of the spirit which all teachers ought especially to cultivate and practice." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter & Douglas, JJ., concurring).

149. 385 U.S. 589 (1967).

150. See American Association of University Professors, *Statement of Principles on Academic Freedom and Tenure*, printed in *HANDBOOK OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ACADEMIC FREEDOM AND TENURE* 33 (G. Joughin ed. 1967). "The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to this subject . . ." *Id.* at 35-36. See also *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

151. 393 U.S. 503 (1969).

152. *Id.* at 506.

the right of students to "personal intercommunication."¹⁵³ Regulations impinging upon rights of personal intercommunication among students can be justified only when school officials can demonstrate that the activities would materially disrupt the work and discipline of the school.¹⁵⁴

In *Shelton v. Tucker*¹⁵⁵ the Court invalidated an Arkansas statute that required teachers in public schools to file as a prerequisite to employment affidavits giving the names and addresses of all organizations to which they had belonged or contributed within the preceding five years. Of course, a state has the right to investigate the competence and fitness of those it hires to teach in its schools.¹⁵⁶ But although the governmental purpose was both legitimate and substantial in *Shelton*, the Court overturned the statute because its purpose could have been achieved by less drastic means. The decision suggests several observations pertinent to the controversy over science teaching and textbooks. It is difficult to define a state purpose behind creationist legislation that is either legitimate or substantial. Such legislation certainly is not prompted by a compelling state interest of the magnitude necessary to justify restrictions upon intellectual freedom. Also, the plaintiffs in *Shelton* included public secondary school teachers as well as a college teacher, in contrast to most of the loyalty cases which primarily have involved only college teachers.¹⁵⁷ The proposition that nowhere is the protection of constitutional freedoms more vital than in the schools is also applicable, therefore, at the secondary and elementary levels as well as at the college level.¹⁵⁸

153. *Id.* at 512. The Court found it "relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance." *Id.* at 510.

154. *Id.* at 513. The undifferentiated fear or apprehension of disturbance by school officials is not enough to overcome the right to freedom of expression. *Id.* at 508; *cf.* *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967).

155. 364 U.S. 479 (1960).

156. *Id.* at 485. In *Adler v. Board of Educ.*, the Court recognized that because the teacher "shapes the attitude of young minds towards the society in which they live" the schoolroom is a "sensitive area" in which the state has a vital concern. 342 U.S. at 485, 493 (1952).

157. *Id.* at 482-84.

158. *Id.* at 487. There are 2 schools of thought on whether the guarantees of the free speech clause should be extended to teachers and students in the public schools. This writer believes that recognition of academic freedom within the context of professional responsibility is the concept best suited to quality education in a free society. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). *But see Mailloux v. Kiley*, 323 F. Supp. 1387, 1392 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1053 (1968), where it was suggested, on the

Application of the free speech clause of the first amendment to the public school classroom can satisfy the important societal goal of making the classroom a market place of ideas.¹⁵⁹ The primary function of the public school should be to encourage students to develop an appropriate methodology for engaging in intellectual inquiry.¹⁶⁰ The method of inquiry appropriate to the science class is, of course, the scientific method. For the state to compel the science or biology teacher to devote classroom time to the explanation of creation doctrine derived non-scientifically by revelation, authority, or induction is an egregious abuse of the teacher's freedom of speech. The state has a legitimate interest in requiring that the science or biology teacher cover the subject in a professionally acceptable manner. Dismissal for the teacher's failure to perform in a professionally acceptable manner in the classroom is unquestionably the right of the state, and in this sense, government may properly regulate the classroom speech of the teacher. But this governmental right should be limited to action that reasonably advances the legitimate interest of the state to assure that the classroom performance of the teacher is professionally acceptable.¹⁶¹

basis of what this writer thinks are highly questionable, authoritarian assumptions, that the "free speech clause of the first amendment . . . is of questionable relevance to speech in public elementary or secondary classrooms." A school should not be like a hospital or a jail. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. at 512 n.6. See also *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969).

159. The emerging legal rights of teachers to academic freedom have been discussed by Fellman, *Academic Freedom in American Law*, 1961 WIS. L. REV. 3; Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447 (1963); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841; Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027 (1969); Comment, *Academic Freedom—Its Constitutional Context*, 40 U. COLO. L. REV. 600 (1968); 55 MARQ. L. REV. 379 (1972).

160. The philosopher Charles Peirce defined inquiry as the "irritation of doubts [that] causes a struggle to attain a state of belief." He was convinced that "[w]hen doubt ceases, mental action on the subject comes to an end." He urged the superiority of the method of science over the methods of tenacity, authority, and induction for discovering matters of "external permanency." See Peirce, *The Fixation of Belief*, in CLASSIC AMERICAN PHILOSOPHERS 55, 60-61, 66 (M. Fisch ed. 1951). Cf. *Sweezy v. New Hampshire*, 354 U.S. at 262-63 (Frankfurter & Harlan, JJ., concurring).

161. *Parker v. Board of Educ.*, 237 F. Supp. 222 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966), is not contrary to the position urged above. In *Parker*, the probationary contract of a high school psychology teacher was not renewed, apparently because he had assigned a book as *required* reading from a county *optional* reading list that had cautioned, among other things, that the "maturity of the student" should be considered in making assignments. The district court stated that the school system had the right to expect the teacher to exercise the discretion urged in the caution on the reading list. 237 F. Supp. at 229. The court of appeals excluded the constitutional questions and affirmed *per curiam* solely "on the contract" which was probationary and could be terminated with 30 days notice at the end of the first or the second school year. 348 F.2d at 465.

The freedom of elementary and secondary teachers to speak in a professionally responsible manner in the classroom enhances other important social values as well. A substantial portion of the nation's young people do not attend college. For many of these students, the public schools will offer the only institutional opportunity to develop critical intellectual skills. For students who do attend college, the social interest in the freedom of classroom inquiry is equally important. To lay the proper foundation in science or biology for these students requires elementary and secondary teachers who are secure in their right to inquire and to explain matters in a professionally responsible manner. The usefulness of the theory of evolution to explain and to organize empirical data cannot seriously be questioned. The biology or science teacher's interest in communicating concepts that are commonly regarded as valid by the scientific community constitutes preferred speech whose social value should effectively insulate it against any conceivable state interest.

Although the techniques that can be used by teachers to stimulate intellectual inquiry may vary considerably with classroom level, the constantly questioning, nonindoctrinative pedagogy that perhaps characterizes good teaching at any level needs the breathing space afforded by the free speech clause. Limiting the accountability of the teacher for classroom speech to extra-constitutional standards of professional acceptability would seem to be especially important at the secondary and elementary school levels because the guild concepts of academic freedom and tenure do not provide nearly so much protection there as at the university level.¹⁶² The probability of political interference and the injection of community prejudice would appear greater at the public school level than at the college level, and thus the corresponding need for greater protection of first amendment freedoms. The resolution of disputes between teachers and school administrators over the content of classroom speech should be resolved in the vast majority of cases without resort to the judicial process as a result of negotiation or access to administrative hearings. Courts do not and should not interfere in conflicts that arise in the daily operation of school systems and do not sharply implicate basic constitutional values. The problems raised by judicial interposition in the operation of the public school system call for restraint.¹⁶³ On the other hand, the courts should be available to redress clear abuses of administrative discretion. Al-

162. See *Tilton v. Richardson*, 403 U.S. at 685-86.

163. *Epperson v. Arkansas*, 393 U.S. at 104.

though the task of establishing a judicially manageable standard of professionally acceptable classroom conduct is difficult, the task is not insurmountable; comparable standards are regularly applied by the courts in professional malpractice and other tort cases.¹⁶⁴

B. Rational Basis

The earliest cases decided by the Court on the "impact of constitutional guarantees upon the classroom were decided before the Court expressly applied the specific prohibitions of the First Amendment to the States."¹⁶⁵ But as early as 1923, the Court decided *Meyer v. Nebraska*¹⁶⁶ and *Bartels v. Iowa*,¹⁶⁷ invalidating, on due process grounds, state legislation that prohibited the teaching of any modern foreign language below the eighth grade level. The *Epperson* Court's apparent belief that *Meyer* and *Bartels* were decided on substantive due process grounds probably influenced the disposition of *Epperson* on establishment grounds, enabling it to avoid re-entering "the difficult terrain which the Court, in 1923, traversed without apparent misgivings."¹⁶⁸ Much of the language in *Meyer* suggests a substantive due process rationale based upon a fundamental right of persons to pursue a useful occupation without unreasonable interference.¹⁶⁹ Although the decision in *Meyer* declared that the right to pursue one's occupation and hence the right to teach was within the liberty of the fourteenth amendment, the Court did not apply a strict scrutiny standard in evaluating the state's interest in the law. *Meyer* held that a statute is void under the due process clause if it is "arbitrary and without reasonable relation to any end within the competency of the State."¹⁷⁰

The courts have properly declined to invalidate state laws that

164. Cf. Cowan, *Interference with Academic Freedom: The Pre-Natal History of a Tort*, 4 WAYNE L. REV. 205 (1958).

165. *Epperson v. Arkansas*, 393 U.S. at 105.

166. 262 U.S. 390 (1923).

167. 262 U.S. 404 (1923).

168. 393 U.S. at 105. One reason that the Court declined to take advantage of the broad premise of *Meyer* may be attributed to the Court's reluctance to invite "justiciability of the multitude of controversies which hest our [college] campuses" in the mid- and late-sixties. *Id.* at 106.

169. In *Meyer*, the Court recognized as fundamental the rights to teach and to learn, and it declared that the state lacks authority "materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." 262 U.S. at 401. *But cf.* *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. at 519-20 (Black, J., dissenting). *Compare Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

170. 262 U.S. at 403.

regulate business and industrial conditions because they may be imprudent or out of step with a particular school of thought. In *Williamson v. Lee Optical Co.*,¹⁷¹ the Court found the due process claim unpersuasive because there was a rational relation between the law and a legitimate state objective.¹⁷² The Court's holding, however, leaves open the possibility of overturning on due process grounds legislation that has no rational relation to any state objective.

The claim of the teacher on occupational grounds to transmit knowledge established within a discipline is supported by the decision in *Meyer*. The same result, however, can be reached more easily on free speech grounds. State legislation requiring the inclusion of academically irrelevant materials impinges upon teachers' rights of speech secured by the due process clause. The fact that the right of the individual to pursue a useful occupation has long been recognized as an interest of basic importance in our society¹⁷³ might suggest the appropriateness of a strict scrutiny standard, especially in view of the confluence of occupational and free speech rights. Since education is generally recognized as a basic interest of society, occupational rights essential to the educational process—the right, for example, of the teacher to organize a biology course that includes evolution free from state requirements incorporating religious or other extraneous doctrines—are especially deserving of protection.

In *Boddie v. Connecticut*,¹⁷⁴ the Court invalidated fee and cost requirements in divorce actions for persons unable to pay costs by reason of their poverty. The Court weighed the state's asserted interest in the fee and cost system as a mechanism of resource allocation or cost recoupment against the need for access by persons seeking divorces to the only forum empowered to settle their disputes and concluded that, on balance, the state failed to establish a governmental interest sufficient to outweigh the individual right to adjust a human relationship.¹⁷⁵ Although *Boddie* doubtless reflected the Court's concern with procedural due process, it is significant that *Meyer* was approvingly cited as a source of "interests of basic

171. 348 U.S. 483, 488 (1955).

172. *Id.* at 491.

173. See *Meyer v. Nebraska*, 262 U.S. at 399, where the Court cited 14 previous Supreme Court decisions as authority for its conclusion that "the right of the individual . . . to engage in any of the common occupations of life . . . [and] to acquire useful knowledge . . . [are] essential to the orderly pursuit of happiness by free men."

174. 401 U.S. 371 (1971).

175. *Id.* at 376-77, 383.

importance in our society.”¹⁷⁶ Nor does the application of *Meyer* urged here offend the present Court’s penchant for restraint in the delineation and vindication of fundamental liberties.¹⁷⁷ Arguably, the right to teach and the right to learn in the context in which these rights would be asserted in the science teaching and textbook controversy are implicitly guaranteed by the Constitution. The science teaching and textbook controversy involves legislation that “‘deprive[s],’ ‘infringe[s],’ or ‘interfere[s]’ with the free exercise of . . . [a] fundamental personal right or liberty.”¹⁷⁸ The asserted right is that of the science or biology teacher to speak free from arbitrary legislation that unreasonably imposes upon him the burden of providing equal time for nonscientific doctrines bearing no reasonable relation to his discipline. The thrust of the science or biology teacher’s claim is not of the “affirmative and reformatory” type that is regarded with disapproval by the present majority on the Court.¹⁷⁹ Even if the right of the teacher to speak were not considered fundamental in the sense that state interference with the right is deserving of special scrutiny, state interference with science teaching would still be subject to the traditional due process requirement that all state legislation must bear some reasonable relation to a legitimate state interest.

The right of the student to acquire useful knowledge is likewise a recognized basic interest deserving of protection under the due

176. *Id.* at 376; *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. at 506. *See also* *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court cited *Pierce* and *Meyer* approvingly and observed that the state “may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.” *Id.* at 482 (dictum). The Court could hold that academic freedom is a penumbral right emanating from the free speech clause comparable to the right of privacy recognized in *Griswold*. In the context of the controversy of science teaching and textbooks, the question would become whether the state can compel the inclusion of doctrines in an academic discipline when there is no rational relationship between the inclusion and any legitimate state interest. It stands to reason that what the state may not arbitrarily contract it may not arbitrarily expand.

177. *See* *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 36-39. Five members of the present Court are opposed to the extension of the fundamental rights rationale employed in the Court’s equal protection decisions. *Id.* at 30-31. The Court’s caveat that “[v]irtually every state statute affects important rights” coupled with its apprehensions of becoming a “super-legislature” explain the prevailing policy of restraint. *Id.* at 31, *citing* *Shapiro v. Thompson*, 394 U.S. 618, 661 (Harlan, J., dissenting). Presumably, this mood of restraint and deference to legislative authority and competence would apply with equal force to the due process cases.

178. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. at 38.

179. *Id.* at 39. *See also* *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970). It would appear that the judicially disfavored “affirmative and reformatory” claims—at least in civil matters—are simply the ones that cost money i.e., claims that would result in judicial intervention in resource allocation, a peculiarly legislative function.

process clause.¹⁸⁰ To require a student to study material that has no reasonable relationship to the academic course he is pursuing appears arbitrary and unrelated to any legitimate state interest. The state interest in prescribing a school curriculum is admittedly both legitimate and substantial, and the competence of the judiciary in matters of educational policy is slight. This suggests that judicial review of school curriculum policy should be exercised very rarely and with great restraint. It could not be contended seriously, however, that students would be unable to challenge on due process grounds state policies that are arbitrary and bear no reasonable relationship to any legitimate state interest.¹⁸¹

C. Vagueness

It is well established that a statute that "leaves an ordinary man so doubtful about its meaning that he cannot know when he has violated it denies the first essential of due process."¹⁸² Two Justices thought that vagueness was dispositive of the *Epperson* case.¹⁸³ Standards of permissible statutory vagueness are "strict in the area of free expression."¹⁸⁴ If the line drawn between permitted and prohibited activities is an ambiguous one, the courts will not presume that the statute only minimally interferes with constitutionally protected activity.¹⁸⁵ Where first amendment freedoms are concerned, the objectionable quality of vagueness and overbreadth do not depend upon inadequate notice or improper delegation of legislative authority, but only upon an act's susceptibility to improper application so as to infringe upon individual freedoms.¹⁸⁶

180. See note 168 *supra*.

181. Suppose, for example, that the state required that all students in eighth-grade English, as a condition precedent to successful completion of the course, successfully make 3 parachute jumps from an altitude of at least 5,000 feet. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. at 639, where the Court stressed the importance of distinguishing between the due process clause "as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake." Compare *Truax v. Corrigan*, 257 U.S. 312, 331-32 (1921) with *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

182. *Epperson v. Arkansas*, 393 U.S. at 112 (Black, J., concurring).

183. Justice Black thought that the Arkansas statute was vague because "a teacher cannot know whether he is forbidden to mention Darwin's theory at all or only free to discuss it as long as he refrains from contending that it is true." *Id.* Justice Stewart thought that the statute was vague because it was unclear whether Arkansas had forbidden teachers to mention Darwin's theory at all. *Id.* at 116 (Stewart, J., concurring).

184. *NAACP v. Button*, 371 U.S. 415, 432 (1963).

185. *Id.*

186. *Id.* at 433. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438.

Several recent cases have extended procedural protections to protect the classroom speech of teachers from interference by vague regulations.¹⁸⁷ Generally, these cases have involved situations in which teachers have used techniques or language or made assignments considered obscene¹⁸⁸ or inappropriate.¹⁸⁹ State legislation affecting science teaching and textbook selection would likewise be subject to review, although it is unsettled as to whether strict scrutiny should be used.¹⁹⁰

IV. CONCLUSION

How subjects are to be taught in the public schools, which textbooks are to be used, and how they are to be edited are questions that traditionally have been resolved quietly within the framework of the educational system. Recent efforts by religious fundamentalists to win equal time for creation doctrines in science textbooks, however, should remind us of the delicate, highly vulnerable first amendment rights that are exposed in the process of selecting and editing textbooks for use in public schools. This paper has considered at length the constitutional implications of the creationist efforts, and the degree to which the recently enacted Tennessee statute and the California selection guidelines—as well as the plethora of similar proposed legislation—are subject to attack on first and fourteenth amendment grounds.¹⁹¹

187. *Dunham v. Crosby*, 435 F.2d 1177 (1st Cir. 1970); *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). *See also* *Quarterman v. Byrd*, 453 F.2d 54 (4th Cir. 1971) (students afforded procedural due process concerning school policies on the distribution of printed materials). *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (W.D.N.C. 1973) (student teacher who discussed Darwinian theory in seventh grade history class entitled to hearing prior to termination).

188. *E.g.*, *Keefe v. Geanakos*, 487 F.2d 359 (1st Cir. 1969); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970).

189. *E.g.*, *Downs v. Conway School Dist.*, 328 F. Supp. 338 (E.D. Ark. 1971).

190. *See, e.g.*, *Mailloux v. Kiley*, 323 F. Supp. 1387, 1391 n.4 (D. Mass.), *aff'd*, 448 F.2d 1242 (1st Cir. 1971). It is highly questionable whether recent Tennessee legislation, *supra* note 8, could survive such a review on vagueness grounds. For example, the statute fails to define many key terms, including "theory," "scientific fact," "opinion," "occult or satanical beliefs of human origin," and "reference work." Moreover, the statute fails to specify which theories other than the Genesis account—or even which Genesis account—must be treated in the public textbooks, or whether the several theories must be included only in biology textbooks or in all textbooks. Finally, the act leaves open whether it applies to biology teaching or just to biology textbooks, and whether state-supported colleges and universities are included as well as the elementary and secondary schools.

191. That both the present Tennessee legislation, *supra* note 8, and the California

To win equal time for creation doctrine in science and biology texts, the fundamentalist movement has risen phoenix-like from the ashes of *Epperson*. It will probably be consumed once again by the establishment clause, although individual students may well be excused from science and biology classes, or portions thereof, under the free exercise rationale of *Yoder*. But the continuing problems of assuring the integrity of the vast state administrative systems that regulate the flow of textbooks and knowledge to children in the public schools will remain with us for a long time. Only judicial insistence on reasonably ascertainable standards of selection and appropriate procedural safeguards to secure the right of review can forestall the governmental control of the flow of ideas that the first amendment was intended to prohibit.

science curriculum guidelines, *supra* notes 5-7 and accompanying text, under which textbooks are currently being edited, violate the establishment and free exercise clauses is evident. The sectarian purpose of the Tennessee act is apparent both on its face and from the context of its enactment. The impetus for the bill appears to have come from Russell Artist, a professor at the Church of Christ-affiliated David Lipscomb College and one of the contributors to the creationist text, *supra* note 4. Gillem, *Prof's Textbook Campaign Led to Genesis Bill*, *The Tennessean* (Nashville), Apr. 30, 1973, at 1, col. 7. Mr. Artist has tried in vain on several occasions to get the Tennessee Textbook Commission to adopt his text. *Id.* at 7, col. 5. The House bill was handled by Rep. Tommy Burnett, a sometimes Church of Christ lay speaker. *The Tennessean* (Nashville), Apr. 27, 1973, at 3, col. 1. The bill was passed in the Senate without debate and with only one dissenting vote, but the House debates plainly disclose the sectarian purpose and implications of the bill as well as its probable effect in the advancement of religion. *See also* *The Chattanooga Times*, Apr. 27, 1973, at 2, col. 1; *id.*, Apr. 19, 1973, at 2, col. 4. Audio tapes on the debate of the bill in the House of Representatives strongly reinforce the bill's sectarian purpose and probable effect of advancing religion. *See* Audio Tapes of Debate on S.B. 394, April 18 and 30, 1973 in Tennessee State Library and Archives, Nashville, Tennessee.

The author of the two disputed paragraphs in the California science curriculum guidelines was Vernon Grose, whom Gov. Ronald Reagan of California has subsequently appointed to the California Board of Education Curriculum Commission. Mr. Grose disclosed in a recent interview:

[M]y citizenship really is in heaven. *And even though I wasn't trained in biology*, when I got into the issue I believe I must have felt something like Jesus did when he overthrew the tables and the moneychangers in the temple. . . .

The odds were extremely high against success. Yet I believe because my trust was in the Lord and because the issue was a significant one, that He honored the effort.

When I received the invitation . . . to appear before the Board of Education I felt quite inadequate. As I mentioned, my discipline is physics while the subject involved biology. So I requested the elders of the church which I attended to set me apart for this task, *just as in apostolic times men were set apart by the church for a specific ministry*. You will remember this is recorded in the 13th chapter of Acts as happening in the church at Antioch.

. . . I believe we must ask God to give us an anointing of the Holy Spirit to confront the forces of evil. . . . Not simply to withstand their attack, but to attack them. And if I sound excited, I guess I am.

Bredesen, *Anatomy of a Confrontation (An Interview with Vernon L. Grose)*, *J. OF AM. SCI. AFFILIATION* 146, 147-48 (Dec. 1972) (emphasis added).