November 2017

Persistent Monkey on the Back of the American Public Education System: A Study of the Continued Debate Over The Teaching of Creationism and Evolution

Gabriel Acri

Follow this and additional works at: http://scholarship.law.stjohns.edu/tcl

Part of the Education Law Commons

Recommended Citation
Available at: http://scholarship.law.stjohns.edu/tcl/vol41/iss1/7

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.


PERSISTENT MONKEY ON THE BACK OF THE AMERICAN PUBLIC EDUCATION SYSTEM: A STUDY OF THE CONTINUED DEBATE OVER THE TEACHING OF CREATIONISM AND EVOLUTION

GABRIEL ACRI

[T]he power to judge well, and to distinguish the true from the false . . . is naturally equal in all men; and thus that the diversity of our opinions comes not therefrom that some are more reasonable than others, but solely therefrom that we conduct our thoughts on diverse paths and do not consider the same things.¹

—René Descartes

INTRODUCTION

Comprehending that which is readily apparent has seldom satisfied human curiosity. Throughout history humankind has evinced an inherent and enigmatic compulsion to explain the unexplainable. Specifically, since the beginning of critical thought, scholars have been obsessed with resolving questions regarding the origins of the universe. Questions such as “where

---

* J.D. Candidate, June 2001, St. John’s University School of Law; B.A., Loyola College in Maryland.

¹ Rene Descartes, Discourse on the Method of Conducting One’s Reason Well and of Seeking the Truth in the Sciences 15 (George Heffernan, ed., trans., University of Notre Dame Press 1994).
did it all begin” and “why are we here” have served as the central motivating force underlying numerous philosophical, anthropological, religious, and scientific pursuits. Nevertheless, “[t]he origin of the universe remains one of the greatest questions in science.”2 Despite our seemingly evolved state of higher thinking, the answers to these questions have successfully eluded humankind and are likely to remain unanswered for years to come.

As a consequence of this unyielding curiosity, humankind has embraced religion to fill the void resulting from that which is beyond comprehension. Furthermore, humankind has conflicted, often violently, over which or whose religion, or even if religion itself, is ultimately valid. On the other side of this spectrum lies science. Scientific theory, in its varying forms, often opposes religion ideologically, thereby serving to undermine many religious beliefs. It has become increasingly more difficult for theologians and scientists to reconcile their opposing beliefs. Yet science and religion are similar in that both seem to stem from a uniquely human, and often promethian, desire for knowledge and an irrepressible need to understand what is inexplicable. Both religion and science have inspired varying opinions and theories regarding the creation of the universe, our Earth, and humanity.3 Two of the most dominant and conflicting of these theories are creationism and evolution. Consequently, the teaching of these theories in the American public school system, a system already rife with problems,4 has proven to be the source of much

---


The primary objective of the American public education system is to fashion youth in the democratic mold, ultimately preparing individuals for participation as citizens. America's public education system has been the subject of much critical discussion and reformist debate. The subject of these debates often center around differing ideals of how to remedy problems such as racism and the chilling of free speech and expression in our public schools. Underlying each of these very real problems is a more basic tension. This tension results from a disregard for America's cultural and ideological diversity, and a refusal to acknowledge children's rights on a broad scale. Narrowing curricula and teaching one particular view or theory when many alternatives exist undermine the stated objectives of the American public education system by ultimately promoting single-mindedness and foreclosing exposure to diverse ideals. The Kansas State Board of Education remains reluctant to embrace any one point of view wholly.

In 1999, the Kansas State Board of Education adopted standards effectively repealing a requirement that state public schools teach evolution as part of their science curriculum. More recently, in February 2001, the Board repealed its earlier decision in an attempt to reflect the ideals of the ever-shifting political majority. Although upon first glance, it may have appeared that the Board's 1999 actions were inherently destructive, this may not necessarily have been the case. What is certain, however, is that approximately 75 years after the now constitutional debate.


5 See Ambach v. Norwich, 441 U.S. 68, 76 (1979) (noting "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests"). This concept of democratic preparation has been reaffirmed on numerous occasions, both in the courts and in academic writings. See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (discussing the importance and "process of educating our youth for citizenship in public schools"); Rosemary C. Salomone, Visions of Schooling: Conscience, Community, and Common Education 197 (2000) (noting that the recognized objective of the American public school system is "to prepare the young for democratic citizenship").

6 See supra note 4 and accompanying text.

7 Id.

8 See supra note 5 and accompanying text.
infamous Scopes Monkey trial, Kansas' actions have added fuel to a fire, which although at times showing signs of dissipation has never quite turned to a forgotten pile of ash. The result is a renewed debate and a resulting fire with flames potentially capable of consuming all in its path, including key constitutional provisions upon which our republic was founded. This Note utilizes the Kansas case to highlight certain inherent problems in the American educational system.

Part I of this Note briefly discusses the history of the creationism debate, focusing on significant legal events, such as the Scopes Monkey Trial. Parts II and III inquire into the arguably semantic distinction between what is commonly labeled as science, and that which is commonly called religion. Furthermore, theories posited by various scholars regarding "truth" and "falsity" are also discussed. Parts IV, V, and VI include an overview and analysis of preceding constitutional case law concerning the creationism debate. The analyses applied to resolve such issues and the various rights implicated are also discussed. Furthermore, inspection of the different types of Monkey Laws reveal subtle, yet important distinctions significant to constitutional resolution of the Kansas issue. Part VII analyzes the recent Kansas Board of Education actions in both 1999 and 2001. Part VIII explores, in depth, the underlying policy concerns of the American public education system, applying those concerns to the debate at hand.

I. HISTORICAL OVERVIEW OF THE CREATIONISM AND EVOLUTION DEBATE

In 1925 the world watched as America played host to yet another case of hypocrisy. John Thomas Scopes, a football coach and mathematics teacher-turned-government scapegoat and American Civil Liberties Union guinea pig, found himself at the
DEBATE OVER CREATIONISM AND EVOLUTION

center of a constitutional debate which still generates immense controversy some 75 years after Scopes' initial conviction. In *Scopes v. State*, civil libertarians and science enthusiasts found themselves the ideological and constitutional underdogs. They were victims of the majority, persecuted by the popular will of religious fundamentalists subscribing to the Biblical creation story. Ironically, today, the fundamentalists are the ones fighting vehemently to have their story told in American public schools.

The original "Monkey" law at issue in *Scopes* sought to proliferate the religious majority's standards and beliefs regarding creation from within the public education system. The Butler Law, named after its proponent, was the Tennessee anti-evolution statute at the center of the Scopes controversy. Following the Great War, America witnessed a revival of strict religious sentiment resulting in the direct influence of many religious, often Christian fundamentalists, on political reform. This law, and others substantially similar that existed in other

(visited July 24, 2001). The American Civil Liberties Union, however, had other ideas, and actually solicited candidates to test the law. See id. (noting that the ACLU took out a newspaper advertisement to recruit potential cases); see also infra note 11 and accompanying text.

11 Despite the melodramatic portrayal of the Scopes trial in the Hollywood epic *Inherit the Wind*, the trial was somewhat anti-climatic. Although John Thomas Scopes was technically "convicted" for teaching evolution in violation of Arkansas State law, he was merely fined $100, the minimum fine permitted by law. See The Scopes 'Monkey Trial', http://www.dimensional.com/~randl/scopes.htm (last visited July 24, 2001). Furthermore, the conviction was ultimately reversed on a rather menial and inconsequential point. See infra note 23 and accompanying text.

12 289 S.W. 363 (Tenn. 1927). The actual trial which led to Scopes' conviction remains unreported except for transcript excerpts that may be found in various materials citing the trial. *Id.* This citation is to the appeal of Scopes' conviction and is perhaps more pertinent to the issues discussed herein. It is in the appeal that the Supreme Court of Tennessee actually discussed the constitutionality of the act. *Id.*

13 See id. at 367. The Supreme Court of Tennessee ultimately upheld the constitutionality of the Anti-Evolution Law, yet reversed Scopes' conviction. *Id.* The conviction was overturned upon the advice of the Attorney General and for the ultimate "peace and dignity of the State." *Id.*

14 See Epperson v. Arkansas, 393 U.S. 97, 98–99 (1968) (discussing the political climate surrounding the adoption of the Tennessee anti-evolution statute).

15 See id.; see also The Scopes 'Monkey Trial' supra note 10 (noting that although the Tennessee governor was opposed to enacting the anti-evolution statute, his fundamentalist constituents secured its enactment).
states,\textsuperscript{16} was the product of post-World War I religious fundamentalism.\textsuperscript{17} These laws were, by modern standards, a blatant violation of the Establishment Clause,\textsuperscript{18} having avoided constitutional inspection due only to the fact that those in positions of power at the time subscribed to the very beliefs that the monkey laws protected; namely, the biblical story of creation.\textsuperscript{19}

The Tennessee Monkey Law forbade the teaching of Darwin’s theory of evolution in state science classes.\textsuperscript{20} The text of the statute stated that “it shall be unlawful for any teacher in any . . . public schools of [Tennessee], . . . to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.”\textsuperscript{21} The law remained unchallenged until the American Civil Liberties Union published an advertisement in a local newspaper in an attempt to solicit a test case.\textsuperscript{22} John Thomas Scopes was chosen to lead the charge. Following a highly publicized trial, Scopes was ultimately convicted and the law was found to be constitutional.\textsuperscript{23} It was not until 1968, more than four decades after Scopes’ conviction, that the Monkey Laws

\textsuperscript{16} A number of other “fundamentalist states such as Florida, Oklahoma, Mississippi, and Arkansas had also enacted similar anti-evolution legislation.” See id.

\textsuperscript{17} See Epperson, 393 U.S. at 98 (noting that the “anti-evolution” statute “was a product of the upsurge of ‘fundamentalist’ religious fervor of the twenties”); see also The Scopes ’Monkey Trial’, supra note 10.

\textsuperscript{18} These anti-evolution laws were finally held to be unconstitutional in Epperson. See Epperson, 393 U.S. at 103.

\textsuperscript{19} See The Scopes ’Monkey Trial’, supra note 10.


\textsuperscript{21} See Public Schools Acts of 1925, Tennessee, Chapter 27 (reprinted in Scopes, 289 S.W. at 363–64 n.1.

\textsuperscript{22} See The Scopes ’Monkey Trial’, supra note 10 (noting Scopes’ initial reluctance to assist the American Civil Liberties Union in its plight).

\textsuperscript{23} See Scopes, 289 S.W. at 367 (failing to see “how the prohibition of teaching the theory that man has descended from a lower order of animals gives preference to any religious establishment or mode of worship”). It is interesting to note that Scopes’ conviction was ultimately overturned on the grounds that the jury and not the judge were to levy the fine for the conviction. In fining Scopes the $100 for violating the statute, the judge essentially exceeded his authority and on those grounds the conviction was overturned. See id. at 367. The judge ultimately found that for the sake of the “peace and dignity of the State” a judgment of nolle prosequi be entered, effectively reversing the conviction. See id. John Thomas Scopes never spent a day in jail.
finally failed constitutional inspection.\textsuperscript{24}

In \textit{Epperson v. Arkansas}\textsuperscript{25} the United States Supreme Court held that an Arkansas State statute banning the teaching of evolution in public schools violated the Establishment Clause.\textsuperscript{26} The Arkansas statute at issue in \textit{Epperson} was found to cross the line of religious establishment, violating a constitutional prohibition on any law that was found to "aid, foster, or promote one religion or religious theory against another or even against the militant opposite."\textsuperscript{27} Specifically, the Court found that "[t]he First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."\textsuperscript{28}

\textit{Epperson} signified a change in the popular mentality regarding the proper place of religion in public school curricula. It also represented the popular approval of science, replacing religious fundamentalism on a broader scale. Furthermore, \textit{Epperson} articulated a seemingly coherent "neutrality" standard against which to measure the constitutionality of similar laws. \textit{Epperson} signified the end of the majority's use of slanted curricula as a means of dogmatic persuasion. It also seemed to place a judicial stamp of approval on evolution theory. Subsequently, creationist adherents have repeatedly attempted to circumvent \textit{Epperson}'s application.

\textbf{II. DISTINGUISHING EVOLUTION THE "SCIENCE" FROM "CREATION" SCIENCE}

Proper classification of theories regarding the origins of humankind is essential to a coherent evaluation of their constitutionality. There is no constitutional prohibition against the public teaching of scientific theory. The Constitution does, however, prevent government from establishing and teaching "religion."\textsuperscript{29} Therefore, if creation science were considered a purely scientific theory, the debate regarding a potential Establishment Clause or Free Exercise violation would become moot. The Supreme Court has thus far refused to make the leap

\begin{itemize}
\item \textsuperscript{24} \textit{See} \textit{Epperson v. Arkansas}, 393 U.S. 97, 103 (1968) (striking down Arkansas' Monkey Law).
\item \textsuperscript{25} 393 U.S. 97 (1968).
\item \textsuperscript{26} \textit{See id.}
\item \textsuperscript{27} \textit{Id.} at 104.
\item \textsuperscript{28} \textit{Id.}
\item \textsuperscript{29} U.S. CONST. amend I.
\end{itemize}
of defining "religion" in concrete constitutional terms.\textsuperscript{30} As a result, what is religion, and what theories are considered religiously rooted and potentially violative of the Constitution, are subject to interpretation.

\textbf{A. The Theory of Evolution}

What allows evolution theory to be included in public school curricula without constitutional implication is its classification and recognition as a scientific theory.\textsuperscript{31} The theory of evolution is based on Charles Darwin's studies and findings regarding the origins of species.\textsuperscript{32} Darwin's theory ultimately holds that the earth is millions of years old and humans have descended from a lower species of apes.\textsuperscript{33} Many key elements of Darwin's theory, such as mutation, natural selection, and ancestry common with apes, are "offensive" to, and directly conflict with, varying religious beliefs.\textsuperscript{34} It is this conflict that serves as the center of the contemporary creationism/evolution debate. The theory of evolution itself, though not free from flaws,\textsuperscript{35} has become the most widely accepted scientific theory of human origins. Recently, it has been challenged as inaccurate and unreliable.\textsuperscript{36} The same religious fundamentalists, whose own ideals regarding creation directly oppose those of Darwin and his progeny, have led the charge to discredit evolution.

There can be little dispute over the classification of evolutionism as a "science." That is, it may be categorized as

\begin{itemize}
\item \textsuperscript{31} See \textit{U.S. CONST.} amend. I; see also \textit{supra} notes 26–29, and accompanying text.
\item \textsuperscript{32} See generally \textit{DARWIN, supra} note 3.
\item \textsuperscript{33} See \textit{id.}; see also Wendell R. Bird, \textit{Freedom of Religion and Science Instruction in Public Schools}, 87 \textit{YALE L.J.} 515, 521–22 (1978) (discussing the major elements of Darwin's theory of evolution).
\item \textsuperscript{34} See Bird, \textit{supra} note 33 (noting that Darwin's "general theory involves evolution of present living forms from this first organism through mutation and natural selection, and entails evolution of human beings from ancestry common with apes").
\item \textsuperscript{35} See Michael D. Lemonick & Andrea Dorfman, \textit{Up from the Apes; Remarkable New Evidence is Filling in the Story of How We Became Human}, \textit{TIME}, Aug. 23, 1999, at 50 (discussing the potential holes in Darwin's theory, resulting from the discovery of "remarkable new evidence").
\item \textsuperscript{36} See \textit{id.}; see also \textit{Evolution Proponents Refuse to Look at Reality}, \textit{THE PANTAGRAPH}, Sept. 3, 2000, at A13 (criticizing Darwinism by noting that "there are no fossils of transitions between species supporting evolution").
\end{itemize}
scientific, in accord with the generally applicable majority conception of what science is and how it is defined. In contemporary terms “science” may be defined as “the human activity of seeking logical explanations for what we observe in the world . . . through the use of observation, experimentation, and logical argument while maintaining strict empirical standards and healthy skepticism.”

Evolution theory is reliant upon empirical data and scientific experimentation and therefore fits this definition neatly. Evolution is not religion, nor is it necessarily inspired by any one particular religious faith, at least not as defined above. It is in fact a theory, based on certain generally recognized scientific principles, continual testing, and experimentation. These principles, however, are not absolute. Thomas Kuhn, philosopher and science critic, has claimed that underlying all science is a “paradigm” serving to prove and ultimately disprove, in cyclical fashion, all scientific theory.

Ultimately, “science is all theoretical talk and negotiation, which never really establishes anything.”

It may be argued that scientific principles are derived from a certain subjective set of beliefs. When stripped down to their barest essentials, at the beginning of any given experiment or otherwise accepted scientific theory, there is a leap of faith. Many scientific theories regarding origins make certain presumptions unexplainable by scientific method. For example, the Big Bang theory presumes the existence of hydrogen and a super-dense state, yet does not purport to explain how, or what caused the hydrogen to come into being. This initial, leap, or


38 See generally, Thomas Kuhn, The Structure of Scientific Revolutions 43–51 (1962).


40 See, e.g., Bird, supra note 33, at 554 (noting that certain presumptions lie at the beginning of many, if not all “scientific theories of origin”).

41 See id.

42 See id. at 554, n.190 (citing Scientific Creationism: Public School Edition, 17, 28 (H. Morris ed. 1974)). This issue of unexplainable presumption
presumption may be classified as spiritual, or even religious. It is the undeniable existence of this initial leap that may allow one to consider science a highly evolved state of religion. When juxtaposed, religion is essentially science's predecessor; science in its most basic form, whereby abstract principles are filtered through a method contrived to satisfy the very theories it purports to affirm. Furthermore, it has been noted that "scientific evaluation requires withstanding scientific method where an event is reproducible." Evolution theory, and the events upon which the theory rests cannot be recreated. Regardless, evolution theory, has been undeniably classified as a science. The fact remains that in our constitutional scheme, science is not only accepted but also embraced, and scientific pursuits promoted. Greater difficulty results when trying to classify creationism as scientific theory.

III. THE STRUGGLE TO APPROPRIATELY CLASSIFY CREATIONISM

Creation science, or "scientific creationism," contrary to the theory of evolution, claims to provide objectionable scientific evidence that the earth was created approximately 10,000 years ago, and ultimately that, the universe was created by a single presents a tricky question of philosophical interpretation. Is this initial presumption tantamount to the scientists belief in a divine being or inexplicable supernatural force? It would appear to be so. In that respect scientific elitism seems equitable with fundamentalist extremism. This minor philosophical tangent serves as an illustration of both religious and scientific adherents' unwillingness to compromise, work together, or simply admit when they have been stumped!

43 See id.

44 Evolution Proponents Refuse to Look at Reality, supra note 36.

45 See id. (noting that "we [can] not recreate . . . events debated").

46 The Institute for Creation Research, the organization responsible for the conception and dissemination of creation science, points out that there are three distinct types of creationist theory. See Henry M. Morris, The Tenets of Creationism, http://www.icr.org/pubs/imp/imp-085.htm (last visited July 21, 2001) [hereinafter Morris]. "Scientific creationism" purports to be the most scientific, therefore the most pertinent to this Note. It does not claim any reliance on the Bible, and purports to utilize "only scientific data to support and expound the creation model." See id. "Biblical creationism," on the contrary, relies solely on the Bible for support, and does not claim to be supported by any scientific data or findings. See id. The third and final form of creationism, "scientific Biblical creationism," combines "full reliance on Biblical revelation but also using [sic] scientific data to support and develop the creation model." See id.
divine and omnipotent being—God. Perhaps one of the greatest obstacles obstructing the path of creationism and preventing its mainstream acceptance is its unfortunate association with the radical religious right. Consequently, any validity creationism may actually have as an alternative “scientific” theory of human origins, is almost immediately discarded because of its association with certain extreme Christian fundamentalist groups. The question of creationism’s validity should not be evaluated based on who subscribes to its tenets, but instead should be looked at through unbiased and objectionable eyes. Creationism is often thought of as a refusal to accept and embrace science and technology. In a society that has effectively reduced religion to a hobby, it is easy to see why fundamentalist ideals are immediately dismissed as archaic. What is seemingly overlooked is that the greater majority of Americans believe in some supernatural, otherworldly, divine figure or being, which has had a hand in either creation, or has somehow otherwise guided evolution. The views and ideals of a majority of Americans cannot be held to be collectively invalid simply because they are rooted in some sort of spiritual base, a base lacking empirical or otherwise provable scientific evidence as it has come to be known and accepted.

Numerous philosophers and scholars have claimed a certain inherent validity exists in beliefs genuinely perceived to be true. Michael J. Perry, legal professor and scholar, has taken a unique approach to defining truth and falsity. Perry, in Kierkegaardian fashion, claims that groups of individuals create, amongst

47 See Bird, supra note 33, at 554; see also Morris, supra note 46.
48 Creationism is actually subscribed to by a number of religions such as Baptists, Jehovah Witnesses, Orthodox Jews, Lutherans, and Pentecostals. See Bird, supra note 33, at 519–20 (noting the link between creationist theory and these varying religions).
themselves, webs of belief. Truth can only be effectively challenged from within that particular web. Perry claims that "the truth... of any belief is always relative to a web of beliefs." Employing this logic, it would be futile to attempt to invalidate the beliefs of creationists. Instead, perhaps they should be accepted not as valid, from within a non-adherent's "web" but acceptable as an alternative theory, held to be valid by some other community. Although this point of view may not be terribly useful in constitutional analysis, it does however, help to explain the existence of the tensions relevant to and resulting from the creationism debate. The fact that a theory may be considered "subjectively valid" does not necessarily imply that such beliefs warrant constitutional sanction or support. It is this tension created by conflicting points of view, subjectively valid to those who possess the belief, that carries over into the public education system. It is this tension that needs to be acknowledged and addressed.

A more cynical approach to accepting another's beliefs, whether proven or solely spiritually motivated may be to suggest that even ideals and beliefs ultimately proven to be false, benefit society. Essentially, to discount or discredit one's beliefs simply because they are considered to be rooted in religion or spiritually motivated would be self-defeating. Furthermore, to ignore the religious simply because it is a religion one finds offensive, or does not consider to be as essential as their own, is pure ignorance.

Assume that creationism is in fact a theory of "religion," incapable of being classified as anything other than a religious theory in form and substance. Suppose further that it is deemed or considered absurd and wholly false by a majority of people. There still exists a certain worth in religious conjecture, and ideas ultimately proven to be false. Umberto Eco, professor of semiotics, has observed that, "[b]elief in gods, of whatever description, has motivated human history, thus if it were argued that all myths, all revelations of every religion, are nothing but lies, one could only conclude that for millennia we have lived

53 See id. at 40.
under the dominion of the false." A false dominion that has ultimately given rise to the very science that is at direct odds with religious beliefs. Furthermore, "given that in the course of history many have acted on beliefs in which many others did not believe, we must perforce admit that for each, to a different degree, history has been largely the Theater of an Illusion." Essentially, challenge arises, from erroneous beliefs and ultimately lead to a more efficient truth. Although Eco's insight is intriguing and historically accurate, it is unlikely to become the basis for American reform and does not suffice to remove perceived religious ideals from constitutional entanglement. Yet again, it may help foster a more compassionate view toward non-conforming, albeit erroneous, ideals.

Ultimately, it would take little more than semantical persuasion on the part of the court to recognize a certain inherent worth in the false or misconceived, if convinced that creationism is in fact false or misconceived. This is an extreme likely to be unnecessary. Conceivably, a law or resolution may be passed sufficient to remove creationism from the religious realm and thereby avoid altogether any constitutional entanglements. Such a result would necessarily rely partially on policy considerations regarding public schooling. Whether religion is narrowly or broadly construed, any religious, or pseudo-scientific theory rooted in religion is likely to meet constitutional challenge.

IV. CONSTITUTIONAL IMPLICATIONS—THE ESTABLISHMENT CLAUSE

It is not mere philosophical speculation and scientific elitism that obstructs the teaching of creationism. Something more concrete prohibits the unfettered dissemination of "creation science." The prohibition on the teaching of alternative scientific theories of origin does not rest solely on judicial whim and individual subjectivity, but instead, there are very definite constitutional implications intertwined within the debate. The teaching of creationism alone, unless judicially placed outside of

---

55 Id. at 2.
56 Id. at 2-3.
57 It would appear that in modern times Darwinism is the truth that has replaced the "erroneous" creationism theory.
a universal definition of religion, would likely result in clear constitutional violation. Furthermore, the teaching of solely creationism would result in a constriction of liberal ideals in the public school realm, ultimately hindering the broader goal of the public education system. In an attempt to predict how courts would rule if the Kansas State Board of Education actions are ever legally challenged, it is necessary to first evaluate the constitutional grounds for any potential challenge in light of preceding legislative and school board actions.

The Establishment Clause, found in the First Amendment of the United States Constitution, states that "Congress shall make no law respecting an establishment of religion." The Establishment Clause, along with the Bill of Rights in its entirety, is applicable to the states via the Fourteenth Amendment. The ideals embodied by the Establishment Clause are therefore held to govern the actions of state agents and instrumentalities, and ultimately, public schools. Since the Scopes decision in 1925, the cases contending with the various permutations of laws attempting to combat the evolution/creationism debate have ended in defeat for the fundamentalists. The laws seeking to sneak creationism into public school curricula have been struck down as unconstitutional, found to have violated the Establishment Clause. In resolving these disputes, the Supreme Court has

58 The Supreme Court has yet to, and is unlikely to adopt a universal definition of religion. See generally Feofanov, supra note 30.
60 See infra Part VIII.
61 U.S. CONST. amend. 1.
62 Whether the states were bound to abide by the guarantees of the Bill of Rights was once the source of extensive constitutional debate. It has in recent years, however, become settled law that the states are bound to the guarantees in the Bill of Rights, by the due process clause of the Fourteenth Amendment. See JOHN E. NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW 940, 1278 (5th ed. 1995). Specifically, the Establishment Clause has been held to have applied to the states in a number of cases. See, e.g., Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947).
63 See id. at 5.
65 See id.; Epperson, 393 U.S. at 103.
consistently applied the controversial, and often criticized *Lemon* test.\(^{66}\)

**A. An Overview of the Lemon Test**

The *Lemon* test, perhaps appropriately named for its continued failure to generate consistent and structured guidance to judges and legislators, was first used by the Supreme Court in *Lemon v. Kurtzman*.\(^{67}\) The test has since dominated Establishment Clause jurisprudence.\(^{68}\) *Lemon* involved a law that provided direct aid to parochial schools, and government reimbursement for certain academic supplies, such as textbooks.\(^{69}\) Ultimately, this reimbursement program was found to have violated the Establishment Clause.\(^{70}\) In striking down the law, the Supreme Court articulated a three-pronged test, seemingly rigid and favoring a strict-separationist view of the Establishment Clause. The three prongs of the *Lemon* test look to whether (1) there is a "secular legislative purpose" underlying the government action or enactment; (2) the "effect" of the action is to inhibit or advance religion; (3) there is an "excessive government entanglement with religion."\(^{71}\) The seeming straightforwardness of *Lemon's* three-pronged test has seldom resolved constitutional questions without prompting debate and dissent.\(^{72}\) Despite the reluctance of courts to wholly embrace the *Lemon* test, it has been applied to resolve Establishment Clause

\(^{66}\) See Shahin Reza, Note, County of Allegheny v. ACLU: Evolution in Chaos in Establishment Clause Analysis, 40 Am. U.L. Rev. 503, 516–17 (1990) (noting that the *Lemon* test was the then prevailing method of Establishment Clause resolution).

\(^{67}\) 403 U.S. 602 (1971).

\(^{68}\) The *Lemon* test has been the subject of numerous law review articles and other literary critiques. See James M. Lewis & Michael L. Vild, *A Controversial Twist of Lemon: The Endorsement Test as the New Establishment Clause Standard*, 65 Notre Dame L. Rev. 671, 673 (1990) (discussing the dominance of the *Lemon* test and noting that because of its inconsistent application it may be replaced entirely by the "endorsement test").

\(^{69}\) See Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971). The statutes being challenged in *Lemon* provided direct aid to parochial schools in the form of monetary reimbursements and supplemental teacher salaries. See id.

\(^{70}\) See id.

\(^{71}\) Id. at 612–13.

Specifically, the *Lemon* test has often been applied in cases implicating the teaching of creationism.

1. *Lemon’s* Application to Louisiana’s Equal Treatment Provision

There have been three main variations of Monkey Laws, each attempting to insert creationism into the public school science curriculum in one form or another. Each has been met with fierce opposition, and ultimately failed to survive constitutional scrutiny. The original Monkey Laws, which banned the teaching of evolution entirely, were deemed unconstitutional in *Epperson.* The second variation of these laws sought to establish equal treatment for creationism and evolution. The Louisiana statute at issue in *Edwards v. Aguillard* demanded an all or nothing treatment of the two subjects. This legislation attempted to neutralize science curricula and avoid constitutional implication by demanding the two points of view be presented in teaching theories of origin. Legislators hoped that by requiring only equal treatment for creation science, as opposed to an outright ban on evolution, the Act would survive constitutional analysis. The Louisiana statute took an original approach to the teaching of creationism. The “Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction” Act (“Creationism Act”) appeared facially valid in that it did not demand that any one of the two

---

73 Efforts have been made by varying members of the bench to replace the *Lemon* test with a more coherent and easily applicable standard. In fact, at least with regard to holiday display cases, Justice O'Connor's endorsement test has become the preferred method of resolving such issues. See, e.g., County of Allegheny v. ACLU, 492 U.S. 573 (1989).


75 See Edwards, 482 U.S. 573 (equal treatment statute); Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolution statute); Freiler, 185 F.3d 337 (disclaimer statute).

76 See infra notes 77–78 and accompanying text.

77 See *Epperson,* 393 U.S. at 103.

78 See Edwards, 482 U.S. at 581–82.


80 See id. at 581.

preferred theories of human origin be taught exclusively.82 Instead, the Creationism Act provided that if a school elected to teach evolution, it must also give equal treatment to creationism. Essentially, the Act effectively forbade the teaching of evolution unless it was accompanied by the teaching of creation science as an alternative theory of origin, or vice versa.83

The stated purpose of the Creationism Act was to foster or promote "academic freedom."84 Legislators, in drafting the Louisiana Creationism Act, found it necessary to include such a statement of purpose so as to avoid constitutional entanglement. Their intentions were found to be transparent, and the Supreme Court declared that although the "stated purpose" may have been to foster academic freedom, in practice, the act did not further a secular purpose.85 Instead the Creationism Act, by downplaying the validity of evolution, could only be viewed as embracing a purpose that sought to promote religion.86 Specifically, the Court found that the ultimate purpose of the Creationism Act was not to promote academic freedom, as stated, but instead to promote the Biblical story of Genesis.87 The Supreme Court applied the Lemon test to evaluate the Act's constitutionality.

In applying Lemon's first prong, the district court focused on the Creationism Act's "purpose." The court found that "there can be no valid secular reason for prohibiting the teaching of evolution, a theory historically opposed by some religious denominations."88 The Supreme Court agreed, noting that the purpose of the Creationism Act could not be fulfilled by applying the Act. The Court questioned how "academic freedom" could be promoted by effectively removing a certain flexibility for the schools to tailor their own curriculum in terms of what they have determined to be the most efficient means of educating.89

---

82 See id. The Louisiana statute provided that "public schools within [the] state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given . . . . When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." Id.
83 See id.
85 Id. at 586.
86 See id. at 585 (noting that "[i]n this case, appellants have identified no clear secular purpose for the Louisiana Act").
87 See id. at 593-94.
88 Id. at 582 (citing Aguillard v. Treen, 634 F. Supp. 426 (E.D. La. 1985)).
89 Id. at 586.
Specifically, the Court stated that "[t]he [Creationism] Act actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation science, even if teachers determine that such curriculum results in less effective and comprehensive science instruction."90 Ultimately, the application of the first prong of Lemon sufficed to invalidate the Louisiana Creationism Act.

B. Potential Guidance Evident in Edwards

Edwards may prove instructive to future legislators. As illustrated in Edwards, the Court was most concerned with the fact that the application of the Creationism Act would not accomplish the stated purpose of the act.91 In conclusion, the Court found that the wording and inevitable practical application of the Creationism Act would only serve to either promote a specific religious theory or prohibit the teaching of evolution merely because it is found to be offensive to certain religions.92 Therefore, both the purpose and effect of the legislation would result in a violation of the Establishment Clause.

Interestingly, the Court recognized that academic freedom was an important concern and valid purpose for legislation.93 The Court went a step beyond traditional analysis by inspecting the "actual" intent of the legislators. The Court found that despite the "stated" secular purpose, the "actual" purpose of the Act was to promote religious ideals.94 The Court recognized that "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."95 The "sham" was revealed through the legislative history and the Act's demand for the teaching of creationism specifically, to counterbalance the teaching of evolution.96 The Creationism Act therefore, elevated a religiously based theory of origins above other theories, and allowed it to be considered tantamount, if not superior to,
evolution. This created an unacceptable governmental endorsement of a particular religious view, creating a clear violation of the Establishment Clause. The court, almost cynically, declared "it is not happenstance that the legislature required the teaching of a theory that coincided with this religious view." Ultimately, the Court found itself scrutinizing legislative sincerity in an attempt to discern the actual intent of the Creationism Act.

Technically, the legislation failed the first prong of the Lemon test. It was deemed unconstitutional, because the "purpose" of the legislation was to advance religion, specifically those religions subscribing to the biblical story of creation as articulated in the book of Genesis. Upon closer inspection it would appear that the real problem with the legislation was that it singled out a specific theory, religiously and spiritually rooted, as a prescribed theory, sufficient to counterbalance the teaching of evolution. It also appears that the promotion of "academic freedom" would be a concept, rightfully so, embraced by the high court, if it could in fact be furthered in a secular manner. It would seem then that if legislation was enacted de-emphasizing evolution, calling for alternative theories to be taught, but yet did not specifically demand a particular alternative be put in place, such as creationism, "academic freedom" would therefore be recognized as a valid secular purpose underlying the act. Dicta found in the majority opinion in Edwards may prove instructive to future legislators:

[w]e do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught . . . . In a similar way, teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction. But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.

These words are significant for a number of reasons and are sure to be cited by advocates for teaching alternative origin

---

97 Id. at 592.
98 Id. at 593–94 (emphasis added).
theories in years to come. The Court here is implicitly acknowledging that it not only may be possible to draft secular legislation calling for the teaching of creationism in public schools, but also, and perhaps of greater constitutional significance, that creationism may in fact be considered a scientific theory. Additionally, it would appear that in stating that the "primary" purpose must not advance religion, perhaps if religious advancement were a secondary or otherwise underlying purpose, the enactment may pass constitutional muster. The Court's instructive dicta here may prove dangerous to strict separationists on a number of levels. It gives rise to additional questions further complicating the debate at hand. What is creation science, and perhaps more accurately, is the Supreme Court prepared to accept it as a "scientific theory" removing it from the realm of constitutional inspection? Furthermore, to what degree may religious ideals and beliefs underlie and motivate the enactment of legislation?

C. Louisiana's Second Try

A third variation of Monkey Law touched just slightly on creation science in an attempt to reestablish its validity in the face of a curriculum that required the teaching of evolution only. In Freiler v. Tangipahoa Parish Board of Education,99 the Fifth Circuit Court of Appeals found unconstitutional a Louisiana law that required a disclaimer accompany the teaching of evolution. The law demanded:

[w]henever, in classes of elementary or high school, the scientific theory of evolution is to be presented ... the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory. 'It is hereby recognized by the Tangipahoa Parish Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.'100

99 185 F.3d 337, 349 (5th Cir. 1999), cert. denied 530 U.S. 1251 (2000).
This resolution, much like its predecessor, failed the rigors of the Lemon test, and was found to ultimately violate the Establishment Clause. Similar to Epperson, the district court found that the resolution lacked a secular purpose, and therefore failed the first prong of the Lemon test. The Fifth Circuit Court of Appeals affirmed the district court decision relying on a different analysis. The Court of Appeals found the resolution to satisfy the “purpose” prong of Lemon. The resolution however, failed to pass the “effects” prong of the Lemon test. The primary effect of the resolution was found “to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation.” Again, as was the case in Epperson, although passing the purpose prong, the Court took issue with the fact that “the ‘Biblical version of Creation’ [was] the only alternative theory explicitly referenced in the disclaimer.” Therefore, the Board of Education resolution unconstitutionally stepped over the bounds of the second prong of the Lemon test. The Supreme Court subsequently denied certiorari, prompting a rather lengthy dissent from Justice Scalia.

D. Alternative Establishment Clause Analyses

Due to the ever-growing volatility surrounding Establishment Clause jurisprudence, and its significance in the American constitutional scheme, Establishment Clause questions have been guarded with a sharp eye. They have also proved the

---

(Scalia, J., dissenting) (quoting the text of the Louisiana statute).

102 See id. at 829.
103 In a unique decision, the Court of Appeals began by acknowledging the alternative tests that have been applied to resolve establishment clause questions, and nevertheless opted to apply the often-controversial Lemon test. See Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343–44 (5th Cir. 1999). Among the alternative tests acknowledged by the Fifth Circuit in their decision were Justice O'Connor's endorsement test, originally articulated in the tragically fragmented decision Lynch v. Donnelly, 465 U.S. 668, 690 (1984), and the “coercion test” of Lee v. Weisman, 505 U.S. 577, 597–98 (1992).
104 See Freiler, 185 F.3d at 345–46.
105 Id. at 346.
106 Id.
107 See Tangipahoa Parish Bd. of Educ., 530 U.S. 1251 (2000). Scalia believed that the Lemon test firstly should not have been applied, and regardless, the Circuit Court erroneously applied the test. See id.
source of much judicial discontent. As alluded to above, the Lemon test has fallen dangerously out of favor with a number of the members of the current Supreme Court. As a result, the Court has struggled to apply it consistently, and currently does not apply it to all types of Establishment Clause questions. Varying tests have been developed to resolve Establishment Clause questions, such as Justice Kennedy’s “coercion test” and Justice O’Connor’s “endorsement test.” Kennedy’s test is applied only in certain specific instances of Establishment Clause implication, and is clearly the most forgiving, accommodationist test circulating the courts. O’Connor’s endorsement test, in contrast, is commonly viewed as the potential replacement for Lemon.

Justice O’Connor’s endorsement test first surfaced in her concurrence in Lynch v. Donnelly. The test was thereafter adopted by the Supreme Court in County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter. Since Allegheny, the endorsement test has become the prevailing mode of analysis employed by the Supreme Court in resolving Establishment Clause issues concerning holiday displays. The test was introduced as an accommodationist derivative of the separationist Lemon test. The endorsement test purported to

---

108 See Douglas Laycock, The Supreme Court and Religious Liberty, 40 CATH. LAW. 25, 48 (2000) (discussing the Establishment Clause); see also Lewis & Vild, supra note 68, at 671 n.6 (acknowledging “sharp philosophical divisions among the Justices”).
109 See Huleatt, supra note 72 at 657 (noting that Scalia has called the current state of affairs “embarrassing”).
111 See Lee, 505 U.S. at 589.
113 See Rezai, supra note 66, at 520 (discussing the reformation of the Lemon test).
116 See Rezai, supra note 66, at 533–34.
117 See id. at 520 (tracing endorsement roots to the first two prongs of Lemon).
simplify the *Lemon* analysis, a test that was in Justice O'Connor's eyes, too harsh on minority religions.\(^{118}\)

The endorsement test utilizes a relatively straightforward analysis. It asks whether the government action in question has the purpose or effect of “endorsing” a particular religious belief.\(^{119}\) The test looks specifically to whether the “message”\(^{120}\) of the governmental action is one of endorsement of a particular set of religious beliefs. O'Connor's endorsement test borrows key concepts of the *Lemon* test. It is essentially a derivative of the first two prongs of the *Lemon* test, tailored to better accommodate the views of minority religions.\(^{121}\) The result is that the endorsement test is a consolidated, more forgiving *Lemon*. The test scrutinizes governmental action by looking mainly to its purpose. Specifically, the test inquires into “whether government's actual purpose is to endorse or disapprove of religion.”\(^{122}\) Ultimately, consistent with O'Connor's compassion for minority religions, the endorsement test is concerned with the message sent by the government action in question.\(^{123}\) It was her concern that “[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”\(^{124}\) The endorsement test has, since its adoption in *Allegheny*, enjoyed continued use by the court. Yet to be determined is whether the Supreme Court is ready to expand the test's applicability.

**VI. FREE EXERCISE IMPLICATIONS**

The Free Exercise Clause of the First Amendment, similar to the Establishment Clause, has often proved controversial.\(^{125}\) Free Exercise claims have also sparked dissent within the

---

\(^{118}\) See id.


\(^{120}\) See id. at 593 (focusing on the message sent by the government action).

\(^{121}\) See Rezai, *supra* note 66, at 520.


\(^{123}\) See *supra* notes 119–120 and accompanying text; see also *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

\(^{124}\) See id.

The Free Exercise Clause attempts to prevent government from enacting laws that "prohibit[] the free exercise" of any religion. Generally, neither Congress nor any state may impinge on a citizen's fundamental constitutional rights without first articulating a compelling interest. The Free Exercise Clause demands that government neither burden nor deny benefits to a citizen because of the manner in which they choose to freely exercise their religion, thereby protecting citizens from governmental sanction or punishment. In recent years, the Supreme Court has been torn between applying a more traditional compelling interest test, similar to the one articulated in Sherbert v. Verner, or any of the other varying tests that have been applied to resolve Free Exercise claims. As a result, Free Exercise jurisprudence has remained an unsettled body of law with few decisions providing clear guidance to the courts below.

Creationist advocates may seek to challenge pro-evolution laws on Free Exercise grounds. Creationist claimants would need to allege that they hold sincere religious beliefs contrary to the teachings of evolution theory. Additionally, by subjecting a claimant to a curriculum that teaches only evolution, the state is effectively forcing the claimant to subscribe to those beliefs, thereby violating Free Exercise principles. In light of contemporary Free Exercise case law, it is highly unlikely that such a claim would be successful. Secondly, even if the claim were successful, it would not necessarily result in the inclusion of creationism in science curricula. Ultimately, a successful Free Exercise claim would not be an effective means of compelling the

---

126 See id.
127 U.S. CONST. amend. I.
128 As is the case with the Establishment Clause, the Free Exercise Clause is applicable to the states through interpretation of the Due Process Clause of the Fourteenth Amendment. See, e.g., Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (signifying the initial application of the free exercise clause to state action).
129 See NOWAK & ROTUNDA, supra note 62, at 1281–82.
130 See id. at 1278.
131 See id. at 1279.
134 Many religions, minority and majority alike find evolution theory to be directly contrary to their religious beliefs. See Feofanov, supra note 30, at 319–20.
teaching of creationism.\footnote{135} An anti-evolution Free Exercise claim stands little chance in light of contemporary rulings such as the Supreme Court’s decision in \textit{Employment Division v. Smith},\footnote{136} and the Sixth Circuit’s decision, \textit{Mozert v. Hawkins County Board of Education}.\footnote{137} In \textit{Smith} the Court evaluated a generally applicable state law that banned the use of the controlled substance peyote. Claimants challenged the law, claiming that they used peyote religiously, and thus the law, by prohibiting their use of peyote for religious purposes, violated their Free Exercise rights.\footnote{138} Justice Scalia delivered the opinion of the court and articulated a rather rigid and unforgiving standard.\footnote{139} Ultimately, the Court found that the law was constitutional, and an exemption was not warranted, because the law was generally applicable, and duly enacted pursuant to a valid state interest.\footnote{140} Applying this “general applicability” standard to a creationist claimant would likely result in an immediate dismissal of the claim. The \textit{Smith} standard, however, is not likely to be applied to a claim arising in the public school context. Other more pertinent standards, similar to the principles set out in \textit{Mozert}, are more likely to apply.\footnote{141}

Traditional free exercise analysis was seemingly embodied in \textit{Sherbert}.\footnote{142} Yet, \textit{Sherbert} is rarely applied when supplementary “educational”\footnote{143} rights, are implicated.\footnote{144} These two cases effectively sealed the fate of creationist’s Free Exercise arguments. Claimants would need to argue that a specific government program burdened their right to freely exercise their religion. Essentially, fundamentalists may state that the

\footnote{135} They have to be careful to leave “creationism” out of any Free Exercise claim, so as not to cause it to be inextricably linked to religion. \textit{See} Edwards v. Aguillard, 482 U.S. 578, 582 (1987).
\footnote{136} 494 U.S. 872 (1990).
\footnote{137} 827 F.2d 1058 (6th Cir. 1987).
\footnote{138} \textit{See Smith}, 494 U.S. at 874–76.
\footnote{139} \textit{See id.} at 878–79.
\footnote{140} \textit{See id.}
\footnote{141} \textit{See infra} notes 144–51 and accompanying text for a full discussion of the principles applied in \textit{Mozert}.
\footnote{142} The \textit{Smith} holding has limited the application of the \textit{Sherbert} test dramatically. Essentially, the \textit{Smith} holding has all but explicitly overruled \textit{Sherbert}.
\footnote{143} \textit{See generally, infra} notes 158–175 and accompanying text.
teaching of evolution is offensive and directly contrary to their religious beliefs, thereby creating an impermissible burden on their free exercise rights. By being compelled to attend classes that teach a particular theory contrary to their beliefs, and by not being allowed to remove themselves from these classes, their free exercise rights are effectively being breached. The claimants in Mozert articulated a similar argument.

In Mozert, parents brought a Free Exercise claim, on their children’s behalf, against their children’s school. The public school in Mozert was using a textbook that contained certain “controversial” subject matter. The claimants in Mozert alleged that the school’s use of a text that included ideas offensive to their religious beliefs, violated their Free Exercise rights. The primary issue arising in Mozert was “whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person’s religion as forbidden by the First Amendment.” The claimants in Mozert were not concerned primarily with being exposed to objectionable ideas, but instead claimed that these “ideas were being inculcated as truth rather than being offered as examples of the variety of approaches possible to a particular question.” Evolution was one of the subjects taught by the text that the claimants alleged to have violated free exercise rights. Claimants went so far as to describe a reading that advocated the “use of imagination as a vehicle for seeing things not discernible through our physical eyes” as an “occult practice.” Ultimately, the court found that

145 See supra note 134 and accompanying text.
147 See id. at 1062.
148 Id. at 1063.
149 Id. at 1064.
150 The claimant acknowledged that almost everything offended her and the court agreed that there were few things the claimant would not find offensive to her religious beliefs. See id. at 1064. Clearly, Mrs. Frost, one of the fundamentalist claimants in Mozert was not your typical open-minded individual, as her own testimony proved. Specifically, “Mrs. Frost testified that many political issues have theological roots and that there would be ‘no way’ certain themes could be presented without violating her religious beliefs.” Id. She went on to identify “evolution” as one of many of these themes. See id.
151 Id. at 1062. Hopefully, liberalizing education will ensure that children are not conditioned to believe in what their less than accepting parents believe.
because there was no finding that students were compelled to affirm or subscribe to any of the lessons taught, there was no evidence of constitutional breach.\textsuperscript{12} Additionally, since the claim arose in the context of public schooling, the Sixth Circuit Court of Appeals granted additional leeway to the school, relying on the school's recognized power to choose its curriculum. Ultimately, the use of the text did not burden the free exercise of claimants' religion.\textsuperscript{153} \textit{Mozert} is a Sixth Circuit decision, yet one of the leading free exercise cases controlling claims in the public school context. Applying the principles enunciated in \textit{Mozert} to a potential creationist claim, it is likely that they would suffer the same fate as the claimants in \textit{Mozert}. Creationists would be saddled by enormous burden of proof problems. Merely showing exposure to objective material is insufficient to prevail on a Free Exercise claim. Creationists would additionally need to show that through exposure, they were forced to subscribe to the views presented, in direct contravention of their own beliefs. Under a \textit{Mozert} analysis, creationist claims would surely fail.

Despite the straightforward constitutional analyses applied to resolve questions concerning other fundamental rights, there are additional factors serving to further complicate the creationism debate. The first is the fact that the debate arises in the context of public education. The Court has often departed from traditional constitutional analyses in resolving varying constitutional issues once considering the public school factor.\textsuperscript{154} Furthermore, the Court has often recognized that the state has plenary power in choosing its public school curriculum.\textsuperscript{155} This power often contradicts varying individual fundamental rights, such as a parent's, and a child's, right to receive and direct education.\textsuperscript{156} The Court has often confused its audience when dealing with issues concerning an intersection of parental and

\textsuperscript{12} See id. at 1066 (noting that "the exposure to [the] materials... did not compel the plaintiffs to 'declare a belief'... of the ideas presented").

\textsuperscript{153} See id. at 1070 (noting that the school authorities did "not create an unconstitutional burden under the Free Exercise Clause when the students [were] not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion").


\textsuperscript{155} See id.

\textsuperscript{156} See Yoder v. Wisconsin, 406 U.S. 205, 213 (1972) (noting that control of the public schools "ranks at the very apex of the function of a State").
children rights to receive and guide education, as plotted against
a state's recognized power to choose its curriculum.\textsuperscript{157}

\textbf{A. Parent's Right to Direct the Education of Their Children}

The Supreme Court has recognized a parent's right to direct or participate in his/her child's education on numerous occasions.\textsuperscript{158} This right, however, is subject to traditional constitutional limitations, and has rarely constituted a governmental burden on free exercise.\textsuperscript{159} A parent's right does not include the right to make demands on a school board that will result in the teaching of a concept potentially violative of the Establishment Clause. The history regarding this area of constitutional law is extensive and somewhat amorphous. \textit{Meyer v. Nebraska},\textsuperscript{160} was one of the earliest cases to recognize a parent's right "to control the education of their own [children]."\textsuperscript{161} This right or "power" is derived from a broad reading of constitutional "liberty," and signifies a pure product of substantive due process and a "libertarian" reading of the constitution.\textsuperscript{162} This right has since been acknowledged both implicitly and explicitly in a number of cases.\textsuperscript{163} Since \textit{Meyer}, however, the notion of parental rights has begun to wane, proving less successful in contemporary cases.

Perhaps the most unique case concerning a parent's right to direct a child's education was \textit{Yoder}. In \textit{Yoder}, the Supreme Court ultimately allowed members of the "old order" Amish to disregard state laws requiring mandatory school attendance until age sixteen. \textit{Yoder} is significant not necessarily because of the case's content or issues that arose from it, but because of its unique outcome. In \textit{Yoder}, the Supreme Court affirmatively upheld a parent's right to direct a child's education in contravention of a duly enacted, generally applicable, state law,

\begin{itemize}
  \item \textsuperscript{157} See \textit{id}. at 213–15.
  \item \textsuperscript{158} See \textit{id}. at 213–14.
  \item \textsuperscript{159} See \textit{id}. at 214–15 (noting that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion").
  \item \textsuperscript{160} 262 U.S. 390 (1923).
  \item \textsuperscript{161} \textit{Id}. at 401.
  \item \textsuperscript{162} See \textit{SALOMONE, supra} note 5, at 76–79.
  \item \textsuperscript{163} See \textit{Pierce v. Soc'y of Sisters}, 268 U.S. 510, 534–35 (1925) (acknowledging the "liberty of parents and guardians to direct the upbringing and education of children under their control").
\end{itemize}
implicating reasonable and potentially compelling state interests. The Court held that the Amish children were not required to attend school past the eighth grade, despite state law requiring mandatory education through high school. Yoder has provided little support for those seeking constitutional refuge under its holding. It is unlikely that those subscribing to creationism would be able to sufficiently analogize Yoder so as to tailor an argument that will result in a successful Free Exercise claim. The parent’s interest in Yoder was unique and encompassed a major part of their religion. Demanding attendance would potentially, undermine core religious beliefs, and potentially, the religion. Simply claiming that exposure to evolution offends one’s religion would not suffice. Furthermore, only a part of creationists’ religious beliefs would be affected by the teaching of evolution, whereas compelling a child to attend high school was directly contrary to the old Amish way of life, thereby burdening their religion dramatically. Also implicated in Yoder was the child’s right or interest in education. This right is often overshadowed by that of the parent. Yet, it is the child’s right that should be the focus of the creationism debate.

B. Child’s Rights and Interests in Education

Hidden within, and somewhat lost in the Yoder case majority opinion, were the interests of the child. Justices Douglas and White, however, did not overlook this issue. Essentially, Justice Douglas, in his partial dissent, recognized both the

165 See id. at 234.
167 See Yoder, 406 U.S. at 235–36.
168 See id. at 235.
169 See Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1065 (6th Cir. 1987); see also supra notes 158–61 and accompanying text.
170 See Yoder, 406 U.S. at 239 (White J., concurring). Justice Douglas also was concerned with the child’s right. See id. at 241 (Douglas J., dissenting in part).
171 See id. at 239–40 (White, J., concurring).
172 See id. at 240–45. White alluded to the intent of the public education system and the need to be aware of the child’s rights as they interact within the system. See id. Similarly, perhaps more to the point, Justice Douglas also discussed the child’s right in his dissent. See id. at 244–45 (Douglas J., dissenting).
parent's and the child's rights in education. Douglas was concerned primarily with the child's interest, the one receiving the education, rather than with the interests of the parents. Justice White expressed similar concerns but expressed them in subtler terms than Douglas.

In *Yoder*, Douglas noted that "the religious interest of the child as a factor in the analysis" was "essential" to its resolution. Douglas was concerned primarily with the fact that often times, children are placed, involuntarily, in the precarious situation of being subject entirely to the direction and control of their parents. As a result, the child's choice is glossed over and rarely paid deference. This is an unfortunate result, and clearly inconsistent with the objectives of the public education system. Similarly, White found that in *Yoder* the State is not concerned with the maintenance of an educational system as an end in itself, rather it is attempting to nurture and develop the human potential of its children, whether Amish or non-Amish: to expand their knowledge, broaden their sensibilities, kindle their imagination, foster a spirit of free inquiry, and increase their human understanding and tolerance.

Justice White's concern for the maintenance of a public education system fixated on guaranteeing a child's right is apparent in the quote above. It is the disregard of White's concern that makes the creationism debate even more tragic. As a result, the creationism debate highlights many of the problems that result when a child is effectively ignored by parental, political, and governmental self-interest.

VII. THE CASE OF KANSAS

Over the past few years, the Kansas School Board of Education has become increasingly reliant on swing votes and bare majority rule in passing their science curricular standards. On February 14, 2001, the Board reintroduced evolution into the state science curriculum. The Board voted 7 to 3 to reinstate evolution, effectively reversing its 1999 decision.

---

173 See *Yoder*, 406 U.S. at 242 (Douglas J., dissenting).
174 See id. at 239 (White, J., concurring).
176 See id.; see also *KANSAS STATE BOARD OF EDUCATION*, supra note 37.
DEBATE OVER CREATIONISM AND EVOLUTION

to remove evolution from mandatory state teaching and testing. The 1999 curriculum escaped constitutional challenge and was reversed before being subject to judicial scrutiny. The imposition of the new standards, however, has not ended the debate. Religious conservatives, once representing the majority, have since lost considerable political influence yet their passion for their religious convictions remain. As a result, over the past few years Kansas has been the site of an ideological tug-of-war. The reinstatement of evolution in the curriculum may serve to worsen educational turmoil within the state. The challenge is to impose a curriculum representative of the convictions of both evolutionists and creationists alike. Although the 1999 standards effectively removed evolution from the state curriculum, the standards articulated may have been the best means of promoting the ideals of both religious conservatives and evolutionists. Furthermore, if these standards were enforced while heading the interests of both sides, it is possible that they would have passed constitutional muster.

A. The 1999 Kansas State Board of Education Curricular Standards for Science Education

The former science curriculum may not have been invalid, per se, and could potentially have survived a facial challenge. To accurately predict the outcome of a potential challenge, the nature of the Board’s 1999 standards must be carefully scrutinized. First, contrary to widespread belief, the Kansas

---

177 See Fountain, supra note 175.
178 See id.
179 See Kate Beem, Conferees Keep Debate on Darwin Stirring, KAN. CITY STAR, June 30, 2001, at B1 (stating the debate on evolution is “far from dead in Kansas”).
180 See Ted Halstead, Bush Wanders Off Center, N.Y. TIMES, Jan. 18, 2001, at A23 (stating that as the interests of centrists has grown, “that of religious conservatives and liberal special-interest groups is shrinking”); David Gibson, Religious Backlash? Politicians’ Overt Religious Remarks Stir Fears of “Use and Abuse of God,” SEATTLE TIMES, Aug. 29, 2000, at A3 (citing the “decline of the political influence of hard-line religious conservatives”).
181 See Dan Lynch, Evolution Raises Issue of Religion, STUART NEWS, Sept. 20, 1999, at A9 (stating that “the Kansas State Board of Education essentially removed the teaching of evolution from the state’s school curriculum”); Todd Ackerman, Decades After Monkey Trial, Debate Hasn’t Evolved Much: Theory’s Detractors Say “Popular Revolt” Under Way, HOUS. CHRON., Sept. 19, 1999, at A1 (describing the Kansas Board’s decision that “de-emphasized” evolution, as though the Board affirmatively imposed some set of criteria that must be
School Board’s actions were not embodied in any law or statutory provision.\textsuperscript{182} At the heart of the current controversy is the Kansas Curricular Standards for Science Education,\textsuperscript{183} which were drafted, endorsed, and adopted by the Kansas State Board of Education.\textsuperscript{184} The standards were neither a list of demands nor a statute criminalizing behavior, as was the case in Scopes\textsuperscript{185} and Epperson,\textsuperscript{186} nor a statute imposing any civil penalties, as was the case in Tangipahoa.\textsuperscript{187} The 1999 curricular, similar to the current standards, is a simple, albeit rather lengthy, statement of intent and purpose of what is to be taught in Kansas public school science classes.

The 1999 curriculum was essentially a set of detailed guidelines, aspirational in nature, aimed at assisting independent Kansas public schools in teaching science. They were not governmental mandates. To the contrary, they were “standards, benchmarks, indicators, and examples designed to assist Kansas educators in selecting and developing local curricula, carrying out instruction, and assessing students’ progress.”\textsuperscript{188} Specifically, the Kansas Board cautioned in the curricular that “[t]hese standards should not be viewed as a state curriculum nor as requiring a specific local curriculum.”\textsuperscript{189} As a result, the Kansas Board did not make any demands on its educators, schools, students, or citizens.\textsuperscript{190} Furthermore, although implicitly de-emphasizing evolution, the standards did not in any way prohibit its teaching, nor did they make specific reference to creationism.\textsuperscript{191} The standards simply removed the

\textsuperscript{182} See Kansas Curricular Standards, supra note 2.
\textsuperscript{183} See id.
\textsuperscript{184} This curricular, as it appears today, was ultimately adopted on December 7, 1999. See id.
\textsuperscript{185} The statute at issue in Scopes v. State made it a misdemeanor to teach in the Tennessee public schools, “that man has developed or descended from some lower type or order of animals.” Scopes v. State, 289 S.W. 363, 364 n.1 (Tenn. 1927).
\textsuperscript{186} See Epperson v. Ark., 393 U.S. 97, 98–99 (1968) (stating that Arkansas made it “unlawful” to teach evolution in any “state supported school or university”).
\textsuperscript{187} See Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 341 (5th Cir. 1999).
\textsuperscript{188} See Kansas Curricular Standards, supra note 2, at 3.
\textsuperscript{189} See id.
\textsuperscript{190} See id.
\textsuperscript{191} See id.
explicit demand that evolution be taught, and granted greater autonomy to the individual schools. Couched in such neutral language, it would be difficult to have invalidated the state curriculum on constitutional grounds. The Board liberalized their curriculum by removing evolution impliedly, but not explicitly. If individual schools exploited the liberal curriculum, then constitutional challenge would surely have followed. This was not the case. Instead the curriculum stood in place for almost two years. The liberal curricular, however, may have allowed schools the constitutional means to better public education within Kansas by allowing the teaching of alternative views of creation.

B. Distinguishing Prior Precedent

As alluded to above, the Kansas School Board action differs from preceding constitutionally challenged state action regarding creationism. First, unlike the mandates at issue in *Edwards* and *Tangipahoa*, the 1999 curriculum did not make specific reference to the teaching of creationism. Instead the standards avoided mentioning that any one theory should be necessarily taught. The Court in *Edwards* was extremely concerned with the specific demand to have creationism, and only creationism taught alongside evolution. In this context, it became impossible to extricate creation science from its religious underpinnings, and therefore its teaching was clearly at odds with the Establishment Clause. The Act in *Edwards* incorporated a “discriminatory preference for the teaching of creation science...against the teaching of evolution.” The 1999 Kansas Board standards did not appear to further the same type of discriminatory preference. The standards did not demand that

---

192 See id.
193 The statute at issue in *Edwards v. Aguillard*, was the Creationism Act, which prohibited the teaching of evolution “in [Louisiana] public schools unless accompanied by instruction in ‘creation science.’” 482 U.S. 578, 581 (1987).
194 The resolution at issue in *Freiler v. Tangipahoa Parish Board. of Education*, required a disclaimer when evolution was taught in the Tangipahoa Parish public schools so as not to “influence or dissuade the Biblical version of Creation or any other concept.” 185 F.3d 337, 341 (5th Cir. 1999).
195 See Kansas Curricular Standards, supra note 2.
196 See Edwards, 482 U.S. at 588.
197 See id. at 588, 593.
198 Id. at 588.
creation science be taught. On this basis alone, any court would be able to sufficiently distinguish Edwards. Merely distinguishing Edwards on this basis however, is not enough to guarantee that the standards would have passed constitutional inspection.

Despite the fact that creationism was not singled out in the standards, and not explicitly called for as an alternative theory necessary to place an academic check on disfavored evolution theory, there is still the underlying problem of the categorization of creation science. It is still unclear whether the Court deems creation science an actual valid scientific theory, or whether it is considered solely a religious doctrine. The Court in Edwards carefully tiptoed around conclusively answering that question. It was more concerned with the fact that the Act could not further its stated purpose of promoting academic freedom by teaching creationism. Instead both evolution theory and creationism were discredited to an extent by the structure of the Act. Specifically, the Court noted that, “the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting ‘evolution by counterbalancing its teaching at every turn with the teaching of creationism...’”

The Court placed much emphasis on the legislative history of the act. In the state senate, the teaching of creationism was framed as a religious argument. Specifically, Senator Keith, the main proponent of the Creationism Act, sought to promote one religious view to counterbalance what he thought was another religious viewpoint, specifically secular humanism, and the teaching of evolution. The entire argument in Edwards was framed in religious terms.

C. The Teaching of Creationism in Light of Lemon

Analysis under Lemon's three-pronged test may have served to uphold the constitutionality of the former standards. Application of Lemon's first prong to the Board's actions would result in an analysis of its purpose. The 1999 standards had the potential to promote "academic freedom." If in fact creationism is taught as an alternative theory, along with others, it would
simply be another theory in a liberal curriculum. In such a context, it would be feasible for a court to find that the purpose of the action was to promote liberalized education or academic freedom. Such a purpose would suffice to survive the first prong of *Lemon*. Regardless of the fact that creationism may still include a “secondary” sectarian purpose, as long as the “primary” purpose is secular, it would survive the first prong of *Lemon*.203 Additionally, any religious undertones inherent in the teaching of creation science theory is likely to be overshadowed and subdued when taught amongst numerous other theories. Therefore, the “effect” of its teaching would not necessarily promote or advance any religion. Finally, in this broad context, surrounded by alternative theories there would be little evidence of government entanglement with religion, and therefore *Lemon*’s third prong would be satisfied.

The above analysis is conditioned on a number of factors being present. Specifically, it is unlikely that the teaching of creationism would survive constitutional scrutiny if it were the sole theory presented in a public science class. The analysis and its successful resolution is, therefore, contingent on the presence of other alternative theories in the curriculum. The analysis is not intended to provide a clear cut answer to the debate but instead offers a potential means by which schools may constitutionally include creationism, as well as evolution, in their curricula.

**D. Endorsement Analysis**

It is unclear whether the Supreme Court will expand its application of the endorsement test into a larger number of areas of Establishment Clause law, as opposed to restricting its applicability to holiday display resolution.204 If the court were to apply the test to a curricular which allowed for the teaching of creationism it is likely that under O’Connor’s endorsement

---

203 See id. at 594 (stating that “because the primary purpose of the Creationism Act is to endorse a particular religious doctrine,” it violates the Establishment Clause); see also *Lemon v. Kurtzman*, 403 U.S 602, 612 (1971) (stating that the first test in determining whether a statute violates the Establishment Clause is whether it had secular legislative purpose).

204 The endorsement test has, however, been applied to resolve a “football prayer” issue in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
analysis, the Kansas Board's action would be constitutional. Simply stated, as applied, it may be found that the 1999 standards do not send a message that the government is in fact endorsing religion by de-emphasizing evolution and allowing for the teaching of creationism, or any other alternative theory of creation. The answer becomes more convoluted when taken to the next level and applied to a situation where an individual school, acting within the guidelines articulated in the Kansas Board's 1999 standards, decides to teach only creationism. This situation, contrary to the hypothetical above, which allows for the teaching of multiple creation theories, is more likely to send a strong message of endorsement. Specifically, the teaching of creationism only, would necessarily send the message to "non-adherents" that Kansas endorses the story of creation, as subscribed to by primarily Christians and Jews, two majority religions. It is evident that a non-adherent's beliefs would be constitutionally compromised in such a setting. The endorsement test, although potentially useful in other areas of Establishment Clause law, may be inappropriately applied in the creationism context. Therefore, it is uncertain whether the Court will apply the endorsement test in this context at all.205

E. Policy Implications

Ultimately, under either O'Connor's endorsement test or the Lemon test, it is unlikely that creationism may be constitutionally taught unless it is first considered a valid "scientific" theory. Additionally, creationism, must be taught in a course that presents a number of alternative scientific theories,

205 The endorsement test was conceived to simplify and lessen the Lemon stranglehold on minority religions. In this particular context, the test will be evaluating a creation theory subscribed to by primarily majority religions, namely Christianity and Judaism. This is ironic, yet not necessarily a reason not to apply the test to such a situation. Other problems, however, may occur when the endorsement analysis looks to a law or resolution passed in a state which has previously had similar laws invalidated on establishment clause grounds. This may result in great confusion because the test supposedly looks to the "history" and potentially considers the "reasonable observer" ubiquitous. How then can this be applied to a case where a reasonable observer would have known that a prior law was already invalidated. It is likely that the latter law, the one now facing constitutional analysis would be viewed as a way to impose the unconstitutional tenets present in the former invalidated law. These same concerns are present in cases applying the endorsement test to cases of modified holiday displays.
DEBATE OVER CREATIONISM AND EVOLUTION

and not only creationism as a means of counterbalancing evolution. Philosophical debate may continue indefinitely as to whether creationism is in fact a science. Therefore, it becomes necessary to look to the underlying policy concerns of the public education system to resolve the issue. In the context of numerous alternative theories, and neutral legislative intent, creationism would appear more like a science, and less like a fundamentalist's tool to combat humanism. A court is more likely to accept creationism as a science, constitutionally taught, when taught in the midst of other alternative theories. With a straightforward *Lemon* analysis teetering dangerously on the tip of acceptance, an awareness of underlying policy concerns inherent in the public education system may push creationism into the realm of constitutionality. Policy application should ultimately resolve the issue without a need to engage further in judicial interpretation of legislative sincerity and philosophical conjecture.

VIII. BROADER GOAL OF PUBLIC EDUCATION

Imposing strict separationist ideals on public education is likely to result in a heightened tension and strained tolerance for cultural and political diversity. Ultimately, inconsiderate legislation and caselaw may serve to alienate those truly devoted to their respective religions from political participation, ultimately forcing them further away from societal and governmental acceptance. With a strong majority of Americans falling within this devoted class, it would seem rejection of a majority of Americans' genuinely held beliefs, to be both counterproductive, and ultimately detrimental to the democratic process. That is not to say that the judiciary should begin to disregard the Constitution and allow for violation of the Establishment Clause simply to appease religious fundamentalists. A solution such as

---

206 See supra notes 41–46, and accompanying text.
207 See Todd Ackerman, Decades After Monkey Trial Debate, Hasn't Evolved Much: Theory's Detractors Say 'Popular Revolt' Under Way, HOUS. CHRON., Sept. 19, 1999, at A1 (providing extensive Gallup Poll information regarding belief in religion). According to recent Gallup Poll information, strikingly, only 10% of Americans subscribe to Darwinism, whereas 44% believe “God created humans in their present form within the last 10,000 years” and additionally, 39% of Americans believe that “God guided the process of evolution...” *Id.* Accordingly, approximately 83% of Americans therefore believe in God.
this would not serve to foster cultural tolerance. The challenge is to quell this sense of alienation, while enacting legislation that validly and meritoriously satisfies constitutional demands. The former standards presented a potential starting point to achieving a heightened tolerance toward cultural diversity. As it stands now, those truly devout to their faith are forced to resort to often extreme and frightening rhetoric,\textsuperscript{208} which results in their failed credibility in the popular eye, and their dismissal as little more than religious zealots clinging desperately to archaic ideals.\textsuperscript{209}

Another unfortunate consequence of strict separationism is that quite often, many Americans are forced to trivialize their religious beliefs in an attempt to become more politically acceptable civilians.\textsuperscript{210} Religion has effectively been reduced to a "hobby,"\textsuperscript{211} subscribed to on off-hours, and hidden from the public eye.\textsuperscript{212} The average adherent's beliefs are seemingly trivialized by the masses. This is puzzling in light of the fact that such a high percentage of Americans do in fact believe in a divine being, a "god," in one form or another.\textsuperscript{213} In fact it has been noted that legislators often rely on their religious beliefs when voting to either pass or veto varying legislation. Specifically, approximately 90\% of the United States Members of Congress ultimately resort to their religious ideals and beliefs when voting.\textsuperscript{214} This presents an interesting problem for the democratic process. Such numbers ensure that most, if not all, Congressional enactments have been, at least in part, religiously motivated, a notion seemingly violative of the Establishment Clause. Furthermore, although most legislation is rooted in individual religious beliefs and morality, somehow, only a handful of legislative enactments are found to violate the Establishment Clause. The pro-creationism legislation in \textit{Edwards},\textsuperscript{215} and \textit{Tangipahoa}\textsuperscript{216} found itself victim to this

\textsuperscript{210} See Carter, supra note 208, at 995–96.
\textsuperscript{211} See Carter, supra note 50, at 23–26.
\textsuperscript{212} See id.
\textsuperscript{213} See Ackerman, supra note 207 and accompanying text.
\textsuperscript{214} See Carter, supra note 50, at 111.
\textsuperscript{215} 482 U.S. 578 (1987).
unevenly applied rationale. It would appear then that the statutes questioned are selectively, and perhaps discriminately singled out due to their political significance and popular exposure.\footnote{217}

Some scholars, such as Stephen L. Carter, have declared that "[t]he idea that religious motivation renders a statute suspect was never anything but a tortured and unsatisfactory reading of the [Establishment] [C]lause."\footnote{218} Upon first inspection such a bold accusation would seem superficially credible. The idea itself, however, is more likely an example of disagreement with other underlying legal ideals, such as the judicial application of subjective morality, rather than a perceived flaw with the resolution of religious questions. Although certain statutes are singled out, that is not, alone, determinative of their constitutionality. The statutes at issue in \textit{Epperson},\footnote{219} for example, were a clear violation of the Establishment Clause, by any standards.

\textbf{A. Underlying Policy Consideration of the American Public Education System-Pluralism and Our Uniquely Diverse Democracy}

Liberal theory, as it is traditionally understood, demands government "neutrality" toward varying ideals.\footnote{220} On its face, the theory compliments the principles embodied in the Establishment Clause. Liberalizing education, especially when dealing with subjects that potentially implicate religion, must nevertheless be done within constitutional bounds. It is not suggested that in an attempt to liberalize education and allow for the teaching of alternative theories of creation that we ignore the constitutional mandate and disregard the First Amendment. To the contrary, the ideals that it embodies should be carefully heeded.

The stated objectives of American public education are to prepare the youth for democratic citizenship.\footnote{221} Specifically, it has been noted that "curricular requirements . . . reflect some of

\footnotesize
\begin{itemize}
\item \footnote{216}{530 U.S. 1251 (2000).}
\item \footnote{217}{See Carter, \textit{supra} note 50, at 105–06.}
\item \footnote{218}{Id. at 112.}
\item \footnote{219}{393 U.S. 97 (1968).}
\item \footnote{220}{See Carter, \textit{supra} note 208, at 978.}
\item \footnote{221}{See Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986).}
\end{itemize}
the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process." The United States represents a vividly diversified and pluralistic society. It is this very diversity and appeal to cultural and idealistic distinctions that serve as both America's greatest asset and its most volatile liability.

Implicit in the desire to prepare youth for democratic participation and the desire to effectuate the goals of the public education system is the idea that one should be aware of the diversified and pluralistic society that is characteristic of America's unique democracy. Therefore, it has been suggested that "to that end, the educational process must impart to the young the core liberal virtues of autonomy, rational deliberation or critical thinking, and tolerance for differing ways of life." In order to tolerate "differing ways of life" the student must first be made aware of the fact that not all rational minded Americans think alike. Therefore, public education must first attempt to heighten one's awareness of ideological diversity. Children therefore, in order to "tolerate," as a means toward accepting, and in hopes of becoming democratically functional, must first become aware of and gain exposure to varying ideals and viewpoints. Perhaps the most straightforward way to foster a heightening of this awareness is to liberalize the curriculum. Allowing for the teaching of alternative creation theories would serve as a first step toward fostering greater cultural and ideological acceptance.

The very notion of democracy, especially in a country as culturally diverse as the United States, implies some sense of non-adherent tolerance and open-mindedness, while remaining objectively committed to majority rule. A paradox is created when juxtaposing the stated governmental objectives of education and democracy with the fact that approximately 83% of the American population believe in a god. The fact remains however, that although a great majority of the American population believes in a god, these beliefs are not in any way universally accepted. Therefore, the democratic youth should be afforded the opportunity to freely interact within our pluralistic

---

223 See Salomone, supra note 5, at 199 (interpreting Amy Gutmann's ideals toward democratic public education).
224 See supra Ackerman, note 207 and accompanying text.
society, with those whose own beliefs and ideals are strongly opposed to their own. A nation ultimately committed to crafting youth in the democratic mold, should employ a means which will allow free thinking, rational youth to extract ideals and beliefs that they find. A broad exposure to diverse ideals is essential to accomplish this goal.

Implementing a stronger form of liberal education in the lower levels of schooling, instead of reserving the notion of individuality and liberal arts curriculum to the college and university levels, may serve to relieve some of the very tensions present in the current public school system. Although an argument may be made that the lower grammar and high school levels of schooling are an inappropriate forum to introduce impressionable youth to a liberal arts education, it should be noted that only a small percentage of Americans actually attend college.\footnote{See Clay Barbour, \textit{Marriage Can Wait}, \textit{The Post and Courier} (Charleston, S.C.), Aug. 26, 2000, at H1.} By reserving the liberal arts ideal for the college level, we may effectively be foreclosing a great majority of children the exposure to varying and potentially profound ideals that may in fact impact and alter their lives. By subscribing to the view that a rigid, often one-sided and special interest governed curriculum is the safest way to publicly educate our youth, we may be losing site of the ultimate objective of American education, as articulated by the Supreme Court—to foster democratic minded citizenry.\footnote{See supra note 221 and accompanying text.} By imposing on students a curriculum which limits rather than broadens their exposure to varying ideals concerning other aspects of their society, aspects and ideals which are vehemently clung to by a great majority of Americans, then we are only worsening an already existent tension in the American educational system. This tension will inevitably permeate and carryover into the adult lives of many students, ultimately hindering democratic participation. Such a system is counter productive, leaving little if any room for political and actual democratic growth.

\section*{B. The Rights of the Child Revisited}

At the heart of the debate is an issue that is typically ignored—the education of the child student. The welfare of the
child is often lost in the struggle between the competing ideals of adults. Diversification of ideals should be the goal that the American education system seeks to promote if the nation and the courts are committed to the idea that the public education system exists to prepare youth for democratic participation.

To achieve these goals, we look toward an education that is both common and diverse at the same time. On the common or universal side, education must strive to achieve a strong influence on the beliefs of students regarding public matters. On the diverse or particular side, it must endeavor to maintain a principled forbearance of influence regarding private matters, avoiding the danger of imposing on children a single correct and comprehensive vision of the good life.²²⁷

This quote proves insightful in that, by imposing on children a curriculum that sanctions one theory of creation over another, it fails to expose children to the good life. In effect, the child’s right is being trampled upon by the self-motivation of adults. It was exactly this disregard for the right of the child that so concerned Justices White and Douglas in *Yoder*.

Essentially, the function of the public education system is to benefit and provide for the nation’s children.²²⁸ Consequently, this system is created and governed by the adults. Often times the actual interest of the child is lost to the interest of the parent, as it was in *Yoder*. Justices White and Douglas were aware of this concern and sought to remedy it.²²⁹ In claiming to choose and implement policies that are alleged to have been intended to benefit the child, those who choose these policies are actually acting in their own self-interests. Often their genuine belief is that these choices, although promoting their own interests, also secondarily benefit the child. This is not always the case. Instead, it would appear that adults enact laws and regulations in hopes of perpetuating and carrying on their own ideals into another generation. These adults typically choose curriculum in order to proselytize their own ideals and not to broaden exposure to other alternative ideals, whatever the context. This is clearly evident in the evolution/creationism debate. Essentially, the

²²⁹ See *id.*
debate exists as a direct result of parents attempting to impose their own subjective ideals on their children, so that they may ultimately ensure that their own beliefs are carried into the future. Acting in such a manner is directly contrary to the underlying stated objectives of public education.\textsuperscript{230} Instead of preparing the youth for democratic citizenship, these narrow-minded individuals are depriving their children of the opportunity to develop as individuals. By being afforded only the opportunity to receive an education in one theory of creation they are foreclosed from any exposure to differing points of view. As a result they are foreclosed from the opportunity to choose for themselves what is or is not valid, whether that be creation science or the theory of evolution.

This Note does not in any way suggest that a ruling class of twelve-year-olds should emerge to take control of the public education system. Nor is it this author's belief that children should be consulted on a wide scale to choose the content of their education. Such a proposition would border on the absurd, despite this author's deeply held conviction that children are highly intelligent and practical thinkers. In fact, it is this conviction that serves as the root of this Note's suggestion to liberalize lower level education. That being said, children do need some guidance, guidance that will afford them greater individual opportunities and not rules that will foreclose them from these opportunities. Therefore, adults must, in choosing curricula, and in passing laws concerning public education, pay keen attention to the interests of the child. The interests of the child should be evaluated, not as adults perceive them to be in light of their own ideals, but as will best benefit the child in remaining consistent with the stated objectives of the public education system. Laws that will benefit children within this democratic ideal of education should exist whether the adults themselves subscribe to these points of view. Directing these children to ultimate subscription in one point of view is to deprive them of an exceptional opportunity, and directly counters the ideals and objectives of the American public education system.

It is recognized that such a quixotic notion of liberalized education is not easily achieved. It is imperative, however, that

\textsuperscript{230} See supra notes 221–23 and accompanying text.
we learn to transcend our own oppressive recalcitrance in order to effectively improve the public education system. This can only be done after an awareness of the problem is achieved. The question should not be framed in terms of what ideals do we feel would better serve political and moral interests of the adult class, but instead, what structure would better afford children a more liberal and well rounded education. An education which would inevitably allow them to choose their own path and debate from a point of view they arrived at through granted exposure to varying ideals, instead of mass imposition of preferred views.

Efficient government should promote robust discussion and debate, allowing for broad exposure to ideas. The concept of promoting diversity is central to our constitutional scheme. Americans are entrenched in a pluralistic society that breeds endless tension amongst the politically and idealistically diverse. It is this diversity that forces the political underdog and religious minority to all too often resort to extreme measures and antagonistic rhetoric in a desperate plea to be acknowledged by the conformist front-running governing class.

CONCLUSION

There is a pressing need in modern society to open the doors of public education to more liberal curricula. By heeding underlying policy concerns, and viewing curricula in light of stated objectives of the American educational system, creationism, along with other alternative origin theories may be taught in public schools without running afoul of constitutional demands and guarantees. There is a need to learn to embrace America’s immutable cultural and ideological diversity. In a country that claims to promote democracy, and a public school system committed to preparing the youth to participate in this democratic system, there must be an emphasis on fostering alternative cultural acceptance, and an acceptance of diverse ideals. The argument to liberalize science curricular is not an argument in favor of the teaching of creationism. Far to the contrary it is an argument supporting the constitutionality of laws that allow for alternative perspectives into the forum of cultural exchange. Ideally, we will succeed in liberalizing public

---

231 See NOWAK & ROTUNDA, supra note 62, at 992.
education and truly preparing youth for participation in our culturally diverse and truly unique democracy.