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The Constitutional Issues Surrounding the Science-Religion Conflict in Public Schools: The Anti-Evolution Controversy

Since the infamous Scopes trial the matter of the constitutional validity of the "anti-evolution" laws has plagued both legal scholars and school administrators. The courts have generally invalidated legislation which bans outright the teaching of evolution in public schools, but with the advent of the "balanced treatment" acts, a revival of this litigation has begun. The author examines the constitutional analysis utilized by the courts in dealing with the "anti-evolution" and "balanced treatment" acts and provides an historical perspective of the first amendment to question the Court's response to the issue.

"ALL FLESH IS NOT THE SAME FLESH, BUT THERE IS ONE FLESH OF MEN, ANOTHER FLESH OF BEASTS, ANOTHER OF FISHES, AND ANOTHER OF BIRDS."

I Cor. 15:39

I. INTRODUCTION

In the realm of religious freedom in contemporary society, perhaps no issue more appropriately reflects the attitude of the American judicial system than that of the conflict between the divine statement of creation and the scientific theory of evolution, as taught in our public schools. The continued refusal of the courts to recognize the validity of the so-called anti-evolution legislation placed before it illustrates the fundamental precept of the establishment clause of the first amendment and the unwavering judicial guarding of that concept.

At the center of the controversy lie two types of enactments: the first, simply known as anti-evolution laws, provides for a black-letter prohibition on the teaching of the theory of evolution in public schools.¹ The second group of laws, a modern revision

1. Historically, the anti-evolution statutes, commonly known as "monkey" laws, have taken the form of a prohibition on the teaching of the doctrine that mankind ascended from lower forms of animals. An example of these laws is found in ARK. STAT. ANN. § 80-1627 (1960 Repl. vol.) (found unconstitutional in *Ep-person v. Arkansas*, 393 U.S. 97 (1968)). The text of the statute provided:

Doctrine of ascent or descent of man from lower order of animals prohibited. — It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State, which is supported in whole or in part from public funds derived by State and local taxation to teach the theory or doctrine that mankind ascended

of the first, are called balanced treatment acts. They require a public school which chooses to teach the theory of evolution to also teach the theory of divine creation.² Both types of legislation, although quite different in language, have been viewed by the courts as similar in impact and have been found to be invalid intrusions of religious ideology into public institutions.

Notwithstanding the often predictable result of the litigation surrounding the enactments, examination of the topic is essential to a thorough understanding of the constitutional clauses involved. Both modern and traditional anti-evolution laws demonstrate a persistent fundamentalist effort to restrict the scope of the scientific concepts presented in public schools. Treatment of the laws, therefore, has displayed a unique balancing of interests and has clearly indicated the extent to which the courts are willing to permit religious ideology to effect public institutions. In this respect the anti-evolution litigation has been instrumental in the development and redefinition of the constitutional framework utilized in the resolution of the issue.

In light of the importance of the distinction between the two opposing accounts of creation,³ a highlighting of the fundamental aspects of each may be helpful. The doctrine of organic evolution is

or descended from a lower order of animals and also it shall be unlawful for any teacher, textbook commission, or other authority exercising the power to select textbooks for above mentioned educational institutions to adopt or use in any such institution a textbook that teaches the doctrine or theory that mankind descended or ascended from a lower order of animals.

393 U.S. at 99 n.9. In the period from 1921 to 1929 twenty states introduced similar legislation, often resulting in their repeal. See *Epperson v. Arkansas*, 393 U.S. 97, 101 n.8 (1968).

2. ARK. STAT. ANN. § 80-1663 (Supp. 1981), the object of the most recent litigation on the subject, (*see infra* note 58 and accompanying text) is entitled "Requirement for Balanced Treatment of Creation-Science and Evolution-Science," and is directed toward equal exposure of students to both dogmas, through classroom lectures, textbook material, and other educational programs. See *also* ARK. STAT. ANN. § 80-1664 (Supp. 1981), which requires both theories to be taught exclusively through scientific evidence without reference to religious writings of any kind. Similar "balanced treatment" acts have been passed or are currently being considered in 18 states. *Darwin Wins, Creationism "Is Not Science"*, TIME Jan. 18, 1982 at 63.

3. Recognition of the distinguishing factors of the two doctrines is illustrated by the following excerpt from *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927):

[The Statute] indicates an intention to set over, one against the other, the theory, or 'story,' of man's Divine creation and the antagonistic and materialistic theory, or 'story,' of his origin in the animal kingdom, to the exclusion of God. The phraseology is antithetical — a favorite form of strengthening statement — 'Measures, not men,' Springing from God, not animals. The two theories of man's origin are placed in direct opposition. . . .

Id. at 125, 289 S.W. at 369 (Chambliss, J., concurring). C. HICKMAN, C. HICKMAN JR., F. HICKMAN, L. ROBERTS, *INTEGRATED PRINCIPLES OF ZOOLOGY*, 875 (6th ed. 1979).

premised upon the theory that all forms of advanced life inhabiting the earth originated as lower forms of life, and through a process of evolutionary transformation ascended to their current status.⁴ This teaching notes that man is, in actuality, the mere result of automatic evolution without any intervention or spontaneous creation by a superior being or god.⁵ The divine account of creation is a doctrine derived from the Bible and espoused by both Jew and Christian as the inspired word of God.⁶ Perhaps the most accurate description of this belief is found in the Bible itself, in the Book of Genesis, where it is proclaimed:

And God said, Let us make man in our image, after our likeness. . . . So God created man in his own image, in the image of God created he him; male and female created he them. . . . And the Lord God formed man of the dust of the ground, and breathed into his nostrils the breath of life;

4. This theory is primarily credited to Charles Darwin (1809-1882) (although it did not, in fact, originate with him) and has come to be known appropriately as "Darwinism." The primary contribution of Darwin to the idea of organic evolution was his doctrine of natural selection, which is viewed as a logical explanation for evolutionary change. The human species was not included in the evidence used to support Darwin's theory but the implication was overwhelmingly clear; humans had evolved from lower forms of life. Ironically, Darwin never argued that humans were *directly* descended from apes, but rather that apes are merely the closest relative of humans. PRINCIPLES OF ZOOLOGY, *supra* note 3 at 875, 903. See C. DARWIN, THE ORIGIN OF SPECIES (1859), for an indepth study of Darwin's work.

The primary thrust of the theory of evolution with respect to mankind centers upon an examination of the evolutionary process surrounding the vertebrates. Evolutionists proclaim that there is clear evidence of a development from fish to amphibian, from amphibian to reptile and from reptile to mammal. Authority for this conclusion is centered upon research of the stratum of the earth and the corresponding fossils found in each horizon. KOENIGSWALD, THE EVOLUTION OF MAN 2 (1962).

The first joint classification of man with apes as primates was made approximately two hundred years ago by Linnaeus. Based upon anatomical, physiological, embryological and serological investigations, modern evolutionists consider this classification to be correct. *Id.* at 24. The most important primates from the standpoint of human evolution are the Tarsioids, which live in Borneo and the Philippines. The Tarsioids share many of the reproductive characteristics of the higher apes and are considered to be the last descendants of a group of prosimians which share a common precursor with Anthropoidea. The anthropomorph is the family most directly related to the history of man, and includes the Malay gibbon, the orangutan, and the chimpanzee. *Id.* at 25, 28. The commonalities of modern man and the large anthropoid apes suggest to the evolutionists that a common ancestral link in the distant past — a missing link, existed. The characteristics or timing of this link are unknown, but somewhere between the specific human trend of evolution starting approximately 10,000,000 years ago in the Pliocene, and the emergence of the first hominids 500,000 years ago, its existence is said to have occurred. *Id.* at 130.

5. Wooten, *The Scopes Case*, 1 NOTRE DAME LAW, 11, 13 (1925).

6. *Id.* at 13-14.

and man became a living soul.⁷

The biblical version of creation emphasizes a single divine act rather than a process-result approach, and is based upon the idea that God created the first man with virtually the same form and characteristics as modern man. The relevancy of this distinction to the litigation surrounding the issue becomes readily apparent as the religious ramifications permeating the biblical account of creation are introduced into the classroom setting. The controversy raises both moral and legal questions which have been dealt with by the legislatures and courts with varying degrees of success.

While the importance of the characteristics and nature of the two accounts of creation as seen through the eyes of scientists and theologians cannot be downplayed, it is evident that a legal analysis centered upon the impact of the two theories in the legal realm must emphasize the legal, rather than philosophical arguments involved. For this reason, the particular characteristics of the two accounts will only be presented in this article where necessary to highlight certain legal issues and principles.

With this in mind, the primary purpose of this article will be to examine the prevalent judicial response to the issue of theories of creation in public schools and to evaluate this response in light of traditional constitutional analysis. Reference will be made to both historical and current decisions of the courts involving the issue in question, with the goal of providing an understanding of the constitutional questions involved.

II. THE SCOPES CASE

No in-depth study of the judicial treatment of the anti-evolution statutes can properly be completed without consideration of the initial and most notable case on the subject: *Scopes v. State*.⁸ The case arose from the conviction of John Scopes on a violation of a 1925 anti-evolution statute when he taught Tennessee public school children a theory which denied the story of the divine creation of man and instead espoused the idea that man descended

7. *Genesis* 1:26-27, 2:7 (King James). The Book of Genesis is not only an account of the birth of mankind but is a detailed examination of the origin of the earth itself. For one analysis and explanation of Genesis see *Is the Bible Really the Word of God?* WATCH TOWER BIBLE & TRACT SOCIETY OF PENNSYLVANIA 11-34 (1969).

8. 154 Tenn. 105, 289 S.W. 363 (1927). The initial trial and appeal have received worldwide recognition, and because of the novel issues involved, the proceedings have inherited labels ranging from "bizarre" *Id.* at 121, 289 S.W. at 367, to "the world's most famous court trial," L. LEVY, *THE WORLD'S MOST FAMOUS COURT TRIAL: STATE OF TENNESSEE V. JOHN THOMAS SCOPES* (1971).

from a lower order of animal.⁹ The trial judge assessed a fine of \$100.00¹⁰ and Scopes appealed to the Tennessee Supreme Court.

After discounting arguments that the statute was uncertain in its meaning, the court examined the contention that the Tennessee enactment violated both the Tennessee Constitution¹¹ and the due process clause of the fourteenth amendment, its federal counterpart.¹² The court's rejection of this argument was based upon the power of the state as an employer to regulate the duties of its

9. This anti-evolution law, enacted in March of 1925, entitled "An act prohibiting the teaching of the evolution theory in all the universities, normals and other public schools of Tennessee, which are supported in whole or in part by the public school funds of the state, and to provide penalties for the violations thereof," provided:

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be unlawful for any teacher in any of the Universities, Normals, and all other public schools of the State, which are supported in whole or in part by the public school funds of the State, 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.

Section 2. Be it further enacted, That any teacher found guilty of the violation of this Act, shall be guilty of a misdemeanor and upon conviction shall be fined not less than one hundred (\$100) dollars nor more than five hundred (\$500) dollars for each offense.

Section 3. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

154 Tenn. at 105, 289 S.W. at 363-64 n.1.

It is interesting to speculate about the circumstances which provoked the Tennessee General Assembly to enact such legislation. It has been noted that three main factors contributed to the legislative intent behind the law: 1.) an aggressive drive by members of the religious faction known as Fundamentalists; 2.) lack of knowledge of prevalent scientific and religious thought in the politically controlling rural districts of Tennessee; and, 3.) political cowardice and demagoguery. See Walker, *The Constitutionality of the Tennessee Anti-Evolution Act*, 35 YALE L.J. 191 (1925). It has also been stated that motivations such as a desire to honor God, and the fostering of religious values prompted the legislation. See Note, *An Echo From the Scopes Trial*, 30 DICK. L. REV. 125, 140 (1926).

10. Although the constitutionality of the statute itself was upheld, the assessment of the \$100.00 fine against Scopes was found to be in violation of TENN. CONST. art. VI, § 14, which required any fine in excess of \$50 to be assessed only by a jury. 154 Tenn. at 121, 289 S.W. at 367. Since the statute in question provided for a minimum fine of \$100.00, the court had no power to correct the error and the lower court judgment was accordingly reversed. 154 Tenn. at 121, 289 S.W. at 367. In the interest of putting "the bizarre case" to rest, a nolle prosequi was suggested to the attorney general. 154 Tenn. at 121, 289 S.W. at 367.

11. TENN. CONST. art I, § 8 provides: "That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." At issue in this case was the "law of the land" clause. 154 Tenn. at 111, 289 S.W. at 364.

12. See *infra* note 114 and accompanying text.

servants and the nature of the relationship created in such situations.¹³ Analysis of the court began:

We think there is little merit in this contention. The plaintiff in error was a teacher in the public schools of Rhea County. He was an employee of the State of Tennessee or of a municipal agency of the State. He was under contract with the State to work in an institution of the State. *He had no right or privilege to serve the State except upon such terms as the State prescribed.* His liberty, his privilege, his immunity to teach and proclaim the theory of evolution, elsewhere than in the service of the State was in no wise touched by this law.¹⁴

The court reasoned that “[i]n dealing with its own employees engaged upon its own work, the State is not hampered by the limitations of [the constitutional clauses in question].”¹⁵ To emphasize its view that the anti-evolution law was not an exercise of the police power of the state but rather was a utilization of its proprietary authority,¹⁶ the court cited various cases espousing the state’s power in its capacity as employer.¹⁷ The court then analogized these cases to the *Scopes* controversy and concluded that the state’s power extends to the regulation of what may be taught in its public schools and that such a regulation is consistent with federal due process limitations.¹⁸

A further ground for attack of the anti-evolution statute asserted by *Scopes* was that the statute conflicted with a provision of the Tennessee Constitution requiring the general assembly to “cherish literature and science.”¹⁹ The argument alleged that because the concept of the descent of man from a lower order of animals “is now established by the preponderance of scientific thought,”²⁰ a prohibition on the teaching of such doctrine would

13. See 154 Tenn. at 111-16, 289 S.W. at 364-66.

14. *Id.* at 111, 289 S.W. at 364 (emphasis added).

15. *Id.* at 112, 289 S.W. at 365.

16. The significance of this distinction is that, as an exercise of the state’s proprietary powers, no violation of due process can be asserted with regard to the Tennessee statute. See Note, *The Constitutionality of the Tennessee Anti-Evolution Law*, 6 OR. L. REV. 130, 139-40 (1927).

17. These cases make it obvious that the State or Government, as an incident to its power to authorize and enforce contracts for public services, “may require that they shall be carried out only in a way consistent with its views of public policy and may punish a departure from that way.” 154 Tenn. at 114, 289 S.W. at 365 (quoting *Ellis v. United States*, 206 U.S. 246, 256 (1906)).

18. See 154 Tenn. at 115-16, 289 S.W. at 366.

19. *Id.* at 116, 289 S.W. at 366. TENN. CONST. of 1870 art. XI, § 12 stated in relevant part: “It shall be the duty of the General Assembly in all future periods of this government, to cherish literature and science.” This section was eliminated in the 1978 amendment of the Tennessee Constitution. See TENN. CONST. art XI, § 12.

20. 154 Tenn. at 116, 289 S.W. at 366. The author finds this argument puzzling in that the theory of evolution has been, up to this date, just that — a theory, and current arguments to the contrary, as well as the arguments raised in 1925, fall short of concrete proof.

Darwin had not proved his case. It was still a theory not a fact proved. Science finds some skeletons that it claims are one hundred thousand

clearly be a violation of the constitutional directive to cherish science. The court discounted this argument without regard to the actual merits of the claim, limiting its attack to the objectives and sufficiency of the constitutional provision itself.²¹

Another critical appraisal offered by the appellant of the Tennessee statute focused on its alleged violation of article one, section three of the state constitution, which provides in part: "that no preference shall ever be given, by law, to any religious establishment or mode of worship."²² In disposing of this argument, the court contended that it knew of no religion or faith which premised any creed or law upon the divine statement of creation, thus concluding that a prohibition on the teaching of evolution could not possibly give preference to any religious establishment or mode of worship.²³ To reinforce this argument the court noted that the statute *required* the teaching of nothing; rather, it only forbade the teaching of evolution.²⁴ The court here inferred that since nothing contrary to the theory of evolution *must* be taught in the schools, then a charge that the law prefers a religious establishment would be inappropriate.

The *Scopes* case is deserving of attention in a study of the conflict between science and religion not only for its unique and notable qualities,²⁵ but for its profound influence on the volatile issues

years old, more or less. These skeletons resemble the skeletons of a modern ape. . . . Therefore man is the ascendant of this prehistoric race of jungle inhabitants. . . . How does science know?

Note, *An Echo From the Scopes Trial*, *supra* note 9, at 130.

21. The first assault was formulated by reference to the interpretive case of *Green v. Allen*, 24 Tenn. (5 Humph.) 170 (1844), which held that the provision was directory rather than mandatory. The inference was that failure of a statute to comply was not fatal to its continued validity. Secondly, the provision was seen as simply too vague and uncertain in its meaning to be enforceable. 154 Tenn. at 116-17, 289 S.W. at 366. The final reason for the limited interpretation centered on the court's reluctance to impose its judgment on the school system as to what particular course of study tends to "cherish science." *Id.* at 117-18, 289 S.W. at 366.

22. 154 Tenn. at 118, 289 S.W. at 366. The federal counterpart of this provision is, of course, found in the first amendment. See U.S. CONST. amend. I.

23. 154 Tenn. at 118-19, 289 S.W. at 367. "So far as we know, the denial or affirmation of such a theory does not enter into any recognized mode of worship." *Id.* at 118, 289 S.W. at 367.

24. *Id.* at 119, 289 S.W. at 367.

25. Along with the Sacco-Vanzetti case it was one of the law cases of this century that drew the attention of the world to America. The case is at once regarded as a milestone in the history of American freedom and as a case which made America ridiculous in the eyes of the civilized world.

Kalven, *A Commemorative Casenote: Scopes v. State*, 27 U. CHI. L. REV. 505, 506

surrounding control of public schools in a democratic society.²⁶ The case represents a recognition by the courts of that day of the limitations to which the judicial system must be confined with respect to human lives and values which transcend even legal interference.²⁷

III. THE ANTI-EVOLUTION LAWS AND THE FIRST AMENDMENT

A. *The Establishment Clause*

The establishment clause of the first amendment²⁸ has traditionally been interpreted by the courts as requiring governmental neutrality in religious or theological matters.²⁹ The numerous cases on the subject seem to suggest three guidelines or tests which must be met for a particular enactment to satisfy this requirement of neutrality. First, the primary motive or purpose of the law must be secular. Second, the actual effect of the law must not enhance nor inhibit religion, and third, the law must not foster an active involvement of the government in religious activities.³⁰ Although these general precepts have emerged from the cases, it would be misleading to suggest that analysis of legislation which calls the establishment clause into issue is precise and free from difficulty. Due perhaps to the generality of the clause itself, the opinions of the Court have reflected considerable confusion and internal inconsistency in determining the proper reconciliation of the competing interests involved.³¹

(1960) [hereinafter cited as Kalven]. See also *supra* note 8 and accompanying text.

26. See Kalven, *supra* note 25 at 521.

27. "The *Scopes* case may provide the most interesting example on record of the power of ridicule as precedent and of the power of public opinion to nullify law." See Kalven, *supra* note 25 at 507.

28. The first amendment to the Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

29. See *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968). The *Epperson* case was the Supreme Court's reaction to the anti-evolution controversy. See *infra* notes 39-47 and accompanying text. The Court defined the mandates of the establishment clause as precluding governmental hostility toward any religion, or partiality toward non-religion. It emphasized that no public entity, consistent with the first amendment, may aid, assist, or promote religious theories or philosophies of any kind. 393 U.S. at 104. "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." 393 U.S. at 104.

30. See *Commission for Pub. Educ. & Relig. Liberty v. Nyquist*, 413 U.S. 756, 773 (1973). The case of *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) summarizes these three traditional guidelines in an attempt to illustrate the primary objectives of the establishment clause. The Court refers to governmental sponsorship, financial support, and entanglement with religious matters as the primary evils to be eliminated. 397 U.S. at 668, 674.

31. 397 U.S. at 668.

Perhaps the most frequently cited case for defining the parameters of the establishment clause is *Everson v. Board of Education*.³² In finding that a New Jersey statute which, in effect, authorized free public transportation for children attending Catholic schools³³ did not violate the establishment clause, the *Everson* court stated:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'³⁴

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

Id. See also *Flast v. Cohen*, 392 U.S. 83, 125-26 (1968) (Harlan, J., dissenting).

32. 330 U.S. 1 (1947).

33. See *Everson v. Board of Educ.*, 330 U.S. at 3, n.1 which contains the entire text of the statute. The statute delegated to the local school district the power to make rules and contracts for the transportation of students to and from schools. Acting pursuant to this statute, the township board of education authorized reimbursement to parents for money spent to transport their children on public buses. Part of this public expenditure was payment for transportation of certain children to parochial schools. *Id.* at 3.

34. *Id.* at 15-16. This oft quoted paragraph has become known variously as the "Everson," "wall of separation," "absolutist," or the "no-aid" principle. The Court is suggesting that, although a law may not aid one religion more than another, it may still violate the establishment clause if it benefits all religions alike. The case also suggests that not every law which aids a religious institution in a remote or incidental manner is necessarily invalid. See *Commission for Pub. Ed. & Relig. Liberty v. Nyquist*, 413 U.S. 756, 771 (1973). The critics of the *Everson* opinion, in taking note of the many friendly contacts between government and institutionalized religion at the time of the adoption of the first amendment, claimed that the intention of Congress in adopting the establishment clause could not possibly

The Court noted that the state provided no financial or legislative backing to parochial schools and concluded, pursuant to the guidelines which it furthered, that the legislation in question did no more than provide a general program to assist parents in transporting their children to and from school, regardless of their religion.³⁵

Challenges based upon the establishment clause have generally concerned one of two central issues: public aid to religious schools³⁶ and religious activities in public schools.³⁷ The two areas reflect a larger consideration of the general relationship between religion and education, and have been said to represent governmental drives "to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made."³⁸

Litigation concerning the anti-evolution and balanced treatment laws falls within the classification of religious activities in public schools and provides perhaps the finest example of the implementation of the establishment clause. The issue was brought before the United States Supreme Court in the case of *Epperson v. Arkansas*.³⁹

have been to erect a wall of separation between religion and government. L. PFEFFER, *RELIGIOUS FREEDOM*, 25,26 (1977).

35. 330 U.S. at 18. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here." *Id.*

36. See Commission for Pub. Educ. and Relig. Liberty v. Nyquist, 413 U.S. 756 (1973) (three financial aid programs in form of direct money grants, tuition reimbursement, and tax relief for nonpublic school children found to be in violation of establishment clause); Levitt v. Commission for Pub. Educ. and Relig. Liberty, 413 U.S. at 472 (1973) (legislation appropriating funds to reimburse nonpublic schools for various educational expenses found to be in violation of establishment clause); Lemon v. Kurtzman, 403 U.S. 602 (1971) (Rhode Island legislation providing for a 15% salary supplement to teachers in nonpublic schools found to be unconstitutional); Board of Educ. v. Allen, 392 U.S. 236 (1968) (legislative enactment requiring public school authorities to lend, free of charge, textbooks to students in private school found not to violate establishment clause); 330 U.S. 1 (1947) (New Jersey statute authorizing use of public funds for transportation of students to parochial school found not to be violation of Constitution).

37. The thrust of this comment will be directed at the issue of religion in public schools with respect to anti-evolution laws. Among the prevalent cases to be discussed with respect to parallel sub-issues will be: Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963) (statute requiring that passages from Bible be read in public schools, found to violate first amendment); Engel v. Vitale, 370 U.S. 421 (1962) (legislative enactment allowing for recital of religious prayer in public schools found to be unconstitutional); Zorach v. Clauson, 343 U.S. 306 (1952) (New York statute which permits public schools to release students during school hours to attend religious centers for religious instruction found not to violate establishment clause); McCollum v. Board of Educ., 333 U.S. 203 (1948) (state sanctioned religious instruction in public schools found unconstitutional).

38. 330 U.S. at 63 (Rutledge, J., dissenting).

39. 393 U.S. 97 (1968).

In *Epperson* an Arkansas public school teacher brought an action challenging the constitutionality of Arkansas' anti-evolution statute.⁴⁰ Essentially, the enactment made it unlawful for a teacher in any public school or university to teach the theory of evolution.⁴¹ The controversy arose in the context of the proper instruction of a biology class in a Little Rock high school. The school administration adopted a textbook which contained a chapter concerning the theory of man's evolution from a lower form of animal, and Ms. Epperson was to utilize this book in her classroom instruction.⁴² Faced with the prospect of dismissal for violation of the anti-evolution statute for refusing to use the book, she filed suit seeking declaratory relief.⁴³

Utilizing a variety of cases to illustrate the principle that government must remain neutral in matters of religious doctrine,⁴⁴ the Court found the Arkansas anti-evolution statute to be in violation of the establishment clause.⁴⁵ The Court reasoned that the primary motive behind the prohibition of the teaching of the theory of evolution was to further the beliefs of the fundamentalists and to prevent the dispersion of doctrine contrary to that of divine creation.⁴⁶ As such, the Court concluded, the Arkansas law "cannot be defended as an act of religious neutrality."⁴⁷

The various lower court cases decided subsequent to *Epperson*

40. See *supra* note 1 and accompanying text.

41. *Id.*

42. 393 U.S. at 100.

43. The court of Chancery held that the statute violated the first amendment guarantee of free speech in that it hindered the quest for knowledge, restricted the freedom to learn, and restrained the freedom to teach. *Id.* at 100-01. The Supreme Court of Arkansas reversed the Chancery court's findings by concluding that the statute in question was a valid exercise of the state's power to mandate the curriculum in public schools. *Id.* at 101.

44. See *Id.* at 106-07. See also *supra* notes 36 and 37.

45. The Court concluded that the anti-evolution laws compel a result similar to those cases finding practices such as study of the Bible and free transportation of students to parochial schools, unconstitutional. 393 U.S. at 106-07. "These precedents inevitably determine the result in the present case." *Id.* at 107.

46. 393 U.S. at 107-08.

[T]here can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of State Policy other than the religious views of some of its citizens.

Id. at 107.

47. *Id.* at 109.

involving the anti-evolution issue⁴⁸ resolved the problem in a similar fashion. Relying upon *Epperson*, the respective courts were compelled to find that the laws in question inherently favored religious doctrine and, as such, were in violation of the establishment clause.⁴⁹

Analyzing the anti-evolution statutes in their traditional form, there appears to be little doubt, in light of the *Epperson* decision and numerous analogous holdings,⁵⁰ that the laws cannot survive the strict mandates of the establishment clause. With respect to the three guidelines which have developed to aid analysis in this area⁵¹ we have seen first that generally the primary motivating force behind the enactments has not been secular in nature.⁵² The purpose of the laws has uniformly been viewed as the suppression of the teaching of theories which deny the divine creation of man.⁵³ This factor alone is sufficient to invalidate the anti-evolution statutes according to prevalent views of the Court, but the laws fail in other areas as well. Scrutiny of the primary effect of the laws reveals an inherent enhancement of non-secular beliefs. This observation is based upon the natural result of a prohibition of one mode of thought and the consequent heightened recognition of an opposing view.⁵⁴ It is clear that the prohibition of the teaching of the theory of evolution in public schools advances the doctrinal beliefs of the proponents of divine creation. The third guideline, state entanglement in religious activities, provides further authority for the perceived invalidity of the anti-evolution statutes. The laws have been viewed by the courts as promoting active involvement by government entities in non-secular matters and as such an intrusion by the state upon religion.⁵⁵

48. See, e.g., *Daniels v. Waters*, 515 F.2d 485 (6th Cir. 1975) (This case held that a Tennessee statute requiring: 1.) equal instruction of divine creation whenever any other theory of man's origin is taught, and 2.) that a disclaimer be included with the teaching of theories other than divine creation, to the effect that such concept is only a theory, was in violation of the establishment clause); *Wright v. Houston Indep. School Dist.*, 366 F. Supp. 1208 (S.D. Texas 1972), *aff'd* 486 F.2d 137 (5th Cir. 1973) (action brought by students to enjoin Board of Education from teaching theory of evolution); *Smith v. State*, 242 So.2d 692 (Miss. 1970) (court found Mississippi statute prohibiting teaching of evolution in public schools to be in violation of establishment clause).

49. In each of these decisions attempts were made to distinguish *Epperson*. The attempts were usually based upon differing language in the statutes in question, see, e.g., 242 So.2d at 697.

50. See *supra* note 37.

51. See *supra* note 30 and accompanying text.

52. See *supra* note 46 and accompanying text.

53. 393 U.S. at 107-08 n.15.

54. The effect of the law becomes an issue of greater concern with respect to the current "balanced treatment" enactments. See *supra* note 2 and accompanying text.

55. "The danger of intrusions by organized religious and quasi-religious polit-

The religious affiliations and activities of the proponents of these enactments provide evidence of the blurred division of the roles of church and state in this regard.⁵⁶

Perhaps out of recognition of the futility of attempts to enact a constitutional form of traditional anti-evolution statutes providing for an out-and-out prohibition on the teaching of evolution, anti-evolution laws and litigation surrounding these laws have assumed a new perspective. The current laws are termed "balanced treatment" acts,⁵⁷ and the argument propounded in their favor is based upon the idea that the divine concept of man's creation is not premised upon religious doctrine but is in fact a field of science. The most recent judicial response to this contemporary twist of the controversy is found in the case of *McLean v. Arkansas Board of Education*⁵⁸ and centers upon establishment clause analysis.

In *McLean*, the legislative enactment in question,⁵⁹ entitled the "Balanced Treatment for Creation-Science and Evolution-Science Act" provided in relevant part; "[p]ublic schools within this state shall give balanced treatment to creation-science and to evolution-science."⁶⁰ The primary justification for the law as asserted by the defendants was that the statement of divine creation is supported by empirical scientific data and is to be taught in a manner which highlights scientific rather than religious events.⁶¹

ical groups upon the curriculum of the public schools generates apprehension equal to fears of excessive government direction of church schools and churches." Le Clercq, *The Monkey Laws and the Public Schools: A Second Consumption?*, 27 VAND. L. REV. 209, 226 (1974) [hereinafter cited as Le Clercq].

56. See, e.g., *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982), where in reference to the adoption of ARK. STAT. ANN. §§ 80-1663 to 1669 (Supp. 1981), the court states:

At Reverend Blout's request, the Evangelical Fellowship unanimously adopted a resolution to seek introduction of [the Act] in the Arkansas Legislature. A committee composed of two ministers, . . . was appointed to implement the resolution. [One of the ministers] obtained. . . a revised copy of the model act which he transmitted to. . . a business associate of Senator James L. Holsted, with the request that [the associate] prevail upon Holsted to introduce the act.

Holsted, a self-described "born again" Christian Fundamentalist, introduced the act in the Arkansas Senate.

Id. at 1262.

57. See *supra* note 2.

58. 529 F. Supp. 1255 (E.D. Ark. 1982).

59. ARK. STAT. ANN. §§ 80-1663 to 1669 (Supp. 1981).

60. ARK. STAT. ANN. § 80-1663, (Supp. 1981).

61. 529 F. Supp at 1264. ARK. STAT. ANN. § 80-1666 (Supp. 1981) provides: Definitions. As used in this Act [§§ 80-1663 — 80-1670]:

The court emphatically disagreed with these contentions and concluded that the statute violated the establishment clause.

The court examined the characteristics which must necessarily exist before any ideology may be asserted as a science. Noted were five essential elements: 1.) it is guided by natural law; 2.) it must be explained by reference to natural law; 3.) it is testable against the empirical world; 4.) its conclusions do not necessarily represent the final word; they are tentative; 5.) It is falsifiable.⁶² The court then concluded that by exploring the origins and methodology of the area, creation-science, as defined in the Act, is not a science at all.⁶³ Based upon the true origins of the concept propounded by the defendants, the court proclaimed that it was overwhelmingly clear that "both the purpose and effect of the Act . . . is the advancement of religion in the public schools."⁶⁴ It was asserted that an examination of the statute beyond its scientific mask would reveal the true unmentioned reference to the Book of Genesis as the underlying thesis of the doctrine⁶⁵ and would compel a finding that the Act is unquestionably a statement of religion.⁶⁶ Viewing the enactment in this way, constitutional analysis of the matter became a simple task. The court applied the traditional establishment clause principles as introduced in *Everson* and other similar cases⁶⁷ and concluded that creation-science as expressed in the Act has, as its only real effect, the enhancement of religious principles and as such fails both the first and second

(a) "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds.

Id.

62. 529 F. Supp. at 1267.

63. *Id.* at 1267-69. The court explained that since the concept is based on a sudden creation from total void, it depends upon a supernatural intervention which is not founded on natural law, and is therefore not a science. *Id.* at 1267. The court also pointed out deficiencies in the language of the act and concluded that such pitfalls clearly indicate the concept fails to conform to the essentials of science. *Id.* at 1268. The court was influenced by evidence of inconsistent thinking among proponents of divine creation. Divine creation is classified as a science, and yet, followers practice a dogmatic, absolutist approach to the concept. *Id.* at 1268-69.

64. *Id.* at 1264.

65. *Id.* at 1264-65. "The ideas of 4(a)(1) are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation." *Id.* at 1265.

66. *Id.* at 1264-65.

67. *Id.* at 1257-58. See *supra* notes 30-34 and accompanying text.

portions of the traditional establishment clause test.⁶⁸ With respect to state entanglement with religion⁶⁹ the court noted that under the Act, involvement of the state in screening textbooks for impermissible religious references and monitoring classrooms for prohibited instruction would necessarily require state officials to make delicate religious judgments which would create an excessive and prohibited entanglement with religion.⁷⁰

B. The Free Exercise Clause

The free exercise clause of the first amendment⁷¹ prohibits government entities from enacting legislation which would inhibit the free exercise of religion.⁷² The literal wording of the clause suggests a limitless restriction on such enactments,⁷³ however, subsequent interpretations have placed important qualifications on its meaning.

One of the earliest cases to define the guaranty of the free exercise clause was *Reynolds v. United States*.⁷⁴ The *Reynolds* Court seemed to draw a distinction between religious *belief*, and religious *conduct* pursuant to these beliefs, stating that government may not pass laws which interfere with mere convictions, yet are justified in enacting statutory limitations upon practices.⁷⁵ This principle was subsequently extended in the case of *Minersville*

68. 529 F. Supp. at 1272. See *supra* note 30 and accompanying text.

69. See *supra* note 30 and accompanying text.

70. 529 F. Supp. at 1272.

71. See *supra* note 28.

72. *Id.* "The free exercise clause was designed to allow the individual the freedom to exercise his beliefs without government infringement. This protects the individual's freedom of conscience and mandates that the state remain neutral to avoid infringing upon those beliefs." Note, *Objective Criteria for Defining Religion for the First Amendment — Malnak v. Yogi*, 11 U. Tol. L. Rev. 988, 989 (1980).

73. The clause mandates, without qualification, that Congress shall make "no" law prohibiting or abridging the freedom involved. See *supra* note 28.

74. 98 U.S. 145 (1878). *Reynolds* involved a challenge by members of the Mormon church to an act of Congress making the practice of polygamy a crime in the territories of the United States. The free exercise issue arose out of the asserted Mormon doctrine which imposed upon all male members a duty to practice polygamy. The Court framed the question as "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land." *Id.* at 162.

75. *Id.* at 166-67. "Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice?" *Id.* at 166. See also *Cantwell v. Connecticut*, 310 U.S. 296 (1940), where the Court states: "[T]he Amendment embraces two concepts, —freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303-04.

School District v. Gobitis,⁷⁶ which held that religious convictions could not relieve an individual from obedience to an otherwise valid general law which has a purely secular purpose.⁷⁷ The more recent decisions concerning the free exercise clause have suggested a balancing approach, based upon the competing interests involved and the existence of reasonable alternatives, to satisfy the constitutional commitment to freedom of religion.⁷⁸ This approach, often referred to as the compelling state interest test, mandates that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."⁷⁹

With respect to the anti-evolution and balanced treatment legislation, the issue of the free exercise of religion usually arises in defense of the enactment in question. It has been noted that the subjection of students in public schools to curriculums containing studies of evolution of man from a lower order of animal is, in some instances, contrary to essential religious beliefs and is therefore an infringement upon the student's free exercise rights.⁸⁰ This assertion is based upon the inducement of belief in incompatible views, violation of separatist practices and compul-

76. 310 U.S. 586 (1940), *overruled*, Board of Educ. v. Barnette, 319 U.S. 624 (1943).

77. The facts of the *Gobitis* case provide an excellent example of the concept. In that case a state regulation required all public school students to participate in a daily ceremony of saluting the American flag and reciting the pledge of allegiance. The Court held that conscientious scruples based on religious grounds were insufficient to relieve an individual from obedience to a law which was not directed toward a religious belief. 310 U.S. at 594-95. *Gobitis* was subsequently overruled (*see supra* note 76) but the principle which it established remains intact. *See Pfeffer, supra* note 34 at 34-35.

78. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (attack by members of Amish faith upon the constitutional validity of law which required school attendance until age 16); Sherbert v. Verner, 374 U.S. 398 (1963) (state unemployment benefits unconstitutionally denied to member of Seventh-Day Adventist Church who was discharged from employment because of her refusal to work on Saturdays, the Sabbath Day of her faith).

79. 406 U.S. at 215. "[I]t must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause." *Id.* at 214. The interests of the states in promoting the health, safety, and general welfare are generally seen as "compelling" and will often override individual religious liberties. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971) (military requirements override religious convictions based on particular war); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting minors from selling any item, including religious materials, on public streets upheld as protective of safety needs); Cantwell v. Connecticut, 310 U.S. 296 (1940) (statute requiring license to be acquired before attempting religious solicitation held invalid because statute did more than merely restrict the time or manner of solicitation).

80. Comment, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515, 523 (1978) [hereinafter cited as *Freedom of Religion*].

sion of unconscionable declarations of belief.⁸¹ In support of these contentions, cases such as *West Virginia State Board of Education v. Barnett*⁸² and *Wisconsin v. Yoder*⁸³ are informative. In both cases the court viewed the religious convictions of the individuals involved as overriding the incompatible interest of the state and allowed an exemption of the student from the imposed practices.⁸⁴ The cases seem to suggest that secular views contrary to religious beliefs will generally not withstand attack under free exercise principles in the absence of overriding interests,⁸⁵ and thus may compel the conclusion that the study of evolution in public schools interferes with religious beliefs and practices to a degree sufficient to mandate the prohibition of such study.⁸⁶ In such situations, it is clear that the state, in maintaining instruction in the general theory of evolution, seeks to promote several interests including educating its citizens, designing adequate public school curricula, and presenting the theory in an overall attempt to effectively teach biology.⁸⁷ If the opponents of the study are to be successful, therefore, it is evident that it must be shown that the religious beliefs involved override these interests.⁸⁸

In *McLean v. Arkansas Board of Education*,⁸⁹ the court analyzed the defendants' free exercise argument pursuant to different grounds. The defendants asserted that the concept of man's evolution is, in effect, a religion⁹⁰ which is contrary to other reli-

81. *Id.* at 523-26.

82. 319 U.S. 624 (1943). In *Barnette*, the Court invalidated legislation compelling a salute and pledge of allegiance to the American flag.

83. 406 U.S. 205 (1972). See *supra* note 78.

84. See *supra* notes 78 & 82.

85. See *supra* note 79 and accompanying text.

86. In *Yoder*, an Amish student was granted an exemption from a law which required school attendance until age 16. In *Barnette*, an exemption from a law requiring the student to salute and recite the pledge of allegiance to the flag was given. It would be reasonable to suggest that the exemptions granted in these cases are analogous to the anti-evolution cases and require that students be entitled to an exemption from the study of evolution, if such study interferes with religious convictions.

87. Comment, *supra* note 80, at 541.

88. It has been suggested that the claim of creationists based on the free exercise clause only threatens a small portion of the state interest in education or curricula. Furthermore, these asserted state interests, as compared to other government objectives (i.e., vaccination of pupils, teacher loyalty) cannot be found to be "compelling" in nature. See *Freedom of Religion*, *supra* note 80, at 541-42.

89. 529 F. Supp. 1255 (E.D. Ark, 1982). See also *supra* notes 58-70 and accompanying text.

90. 529 F. Supp. at 1273.

gious views of some students⁹¹ and thus its teaching is a violation of the free exercise clause. The defendants further contended that the only way to remedy this problem would be to give balanced treatment to creation science which is more consistent with their religious beliefs.⁹² The court rejected the defendant's contention that evolution as a religion is inconsistent with clearly established case law,⁹³ but stated that even upon a contrary finding the free exercise contention would fail. Hypothesizing that creation science is, in fact, a science and not a religion, the court failed to see "how the teaching of such a science could 'neutralize' the religious nature of evolution."⁹⁴ Thus, the court rejected the contention.

C. Freedom of Speech

Perhaps the most vital mandate of the first amendment is the guarantee of freedom of speech.⁹⁵ This liberty has been recognized as "the indispensable condition . . . of nearly every other form of freedom"⁹⁶ and essential to the "foundation of a free society."⁹⁷ Though it has been stated in many ways, it is clear that the primary function of the free speech clause is the prohibition of government suppression of ideas.⁹⁸ The overriding objective of

91. 529 F. Supp. at 1273. The court made reference to ARK. STAT. ANN. § 80-1669(d) (1981 Supp.) (referred to in *McLean* as Act 590) which provides in pertinent part: "Evolution-Science is contrary to the religious convictions or moral values or philosophical beliefs of many students and parents, including individuals of many different religious faiths and with diverse moral and philosophical beliefs." ARK. STAT. ANN. §§ 80-1669(d) (Supp. 1981).

92. 529 F. Supp. at 1274. See also *supra* notes 62-66 and accompanying text. Allowing creation science to be taught along with evolution science in public schools may give rise to another free exercise problem. Teaching the doctrine of spontaneous creation pursuant to scientific principles invariably raises questions as to the validity of the theory, and often leads to the conclusion that the doctrine is religious in nature. See *supra* notes 62-66 and accompanying text. If this conclusion is accepted, the religious doctrine will be contrary to other beliefs, and may be prohibited by the free exercise clause. See *Le Clercq*, *supra* note 55, at 228.

93. 529 F. Supp. at 1274.

94. *Id.*

95. The pertinent part of the first amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend I.

The fourteenth amendment has been interpreted to embrace the liberties of the first amendment, and thereby provides protection from impairment by the states. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

96. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

97. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960).

98. See J. NOWAK, R. ROTUNDA, J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 171-18 (1978). Since the truth of any idea or statement can only be determined in the "marketplace" of competing ideas, the government cannot legitimately restrict the dissemination of speech. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

this prohibition is the enhancement of individual contributions to the health and welfare of society.⁹⁹ While it is clear that freedom of speech requires a great degree of judicial protection, it has never been viewed by the Court as absolute,¹⁰⁰ in spite of the literal wording of the clause. Thus, the view that in certain situations an individual's right to freely communicate ideas must give way to other societal interests has prevailed.¹⁰¹ Nevertheless, it is evident that only governmental interests of the highest order will be seen as sufficient to override the guarantee of freedom of speech.¹⁰²

With regard to expression of ideas in the classroom, the Court has stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."¹⁰³ Academic freedom has been seen by the Court to be essential to the future of the growth and stability of our nation and necessary for wide exposure to a robust exchange of ideas.¹⁰⁴ Thus, the Court has demonstrated a willingness to allow the development of widespread academic expression in an effort to create in the classroom a marketplace of ideas.¹⁰⁵

Recognition of these principles delineates the traditional free-

99. J. NOWAK, R. ROTUNDA, J. YOUNG, *supra* note 98, at 718.

100. *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 49-51 (1961).

101. *Whitney v. California*, 274 U.S. 357 (1927).

[T]hat a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question.

Id. at 371.

102. The "clear-and-present-danger" test for determining the limits of speech first appeared in *Schenck v. United States*, 249 U.S. 47 (1919). The Court stated: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52. Among the evils which Congress may protect are threats to the security of the state, disorder in the public forum and threats to the psyches of the people. See generally HAIMAN, *FREEDOM OF SPEECH* (1977).

103. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). "Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . ." *Keyrshian v. Board of Regents*, 385 U.S. 589, 603 (1967).

104. 385 U.S. at 603. The Court in *Sweeny v. New Hampshire*, 354 U.S. 234, 250 (1957) stated: "Scholarship cannot flourish in an atmosphere of suspicion and distrust."

105. See *Le Clercq*, *supra* note 55, at 235. See also 354 U.S. at 262-63 (Frankfurter, J., concurring). It has been asserted that the proper foundation in aca-

dom of speech arguments asserted in opposition to the anti-evolution laws. In the situation where an enactment prohibits the teaching of the theory of evolution, the statute may be attacked as contrary to the state interest of requiring that science or biology be taught in a professionally acceptable manner and thus as an invalid restraint on free speech.¹⁰⁶ It has been noted that the proper teaching of biology necessarily entails examination of evolution, and that deprivation of instruction as to this prevailing scientific thought would result in the denial of a significant part of science education to the student and thus frustrate a fundamental objective of the public schools.¹⁰⁷ Additionally, proponents of the anti-evolution laws offer no interest in support of the enactments, which could be seen to be of a sufficient magnitude to justify the suppression of the teaching of evolution.¹⁰⁸

With regard to the balanced treatment acts, illustrated by the recent case of *McLean v. Arkansas Board of Education*, analysis pursuant to the free speech clause similarly revolves around the infringement of the academic freedom of teachers and students. In *McLean*, it was contended that a law which required the equal treatment of divine creation whenever the theory of evolution is taught in effect "prohibits teachers from teaching what they believe should be taught or requires them to teach that which they do not believe is proper."¹⁰⁹ The court noted that such an enactment is contrary to the freedom traditionally allotted to school teachers to teach and emphasize those subjects which he or she considers to be important¹¹⁰ and could result in the omission of

demic studies requires that public school teachers be secure in their right to teach subjects in a professionally responsible manner. Le Clercq, *supra* note 55, at 236.

106. See Le Clercq, *supra* note 55, at 235. "The biology or science teacher's interest in communicating concepts that are commonly regarded as valid by the scientific community constitutes preferred speech whose social value should effectively insulate it against any conceivable state interest." Le Clercq, *supra* note 55 at 236.

107. 529 F. Supp. 1255 at 1273.

Evolution is the cornerstone of modern biology, and many courses in public schools contain subject matter relating to such varied topics as the age of the earth, geology and relationships among living things. Any student who is deprived of instruction as to the prevailing scientific thought on these topics will be denied a significant part of science education. Such a deprivation through the high school level would undoubtedly have an impact upon the quality of education in the State's colleges and universities. . . .

Id.

108. See *supra* notes 53 & 54 and accompanying text. See also Le Clercq, *supra* note 55, at 234. The laws are generally viewed as fundamentalist attempts to introduce religious doctrine into public schools. "The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account. . . ." 393 U.S. at 109.

109. 529 F. Supp. at 1273.

110. *Id.* The court considered evidence which indicated that the State Depart-

subjects by teachers which might trigger the balanced treatment aspects of the enactment.¹¹¹ To require a public school teacher to devote class time to coverage of a judicially proclaimed non-scientific theory of creation¹¹² has thus been viewed as an invalid restriction upon the freedom of speech of school teachers.¹¹³

IV. THE ANTI-EVOLUTION LAWS AND DUE PROCESS

The due process clause of the fourteenth amendment¹¹⁴ protects individuals from arbitrary and irrational government interference with personal liberties.¹¹⁵ The determination as to the validity of a governmental enactment under the substantive aspect of the clause involves an examination of the conflicting interests involved and the relation of the enactment to the government objectives sought to be achieved.¹¹⁶ The level of protection generally offered to a particular liberty has been seen to be commensurate with the viewed importance of that liberty.¹¹⁷ With regard to first amendment rights, it has been stated that "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of these rights]."¹¹⁸

ment of Education, local school boards, and administrative officials generally exercise little or no influence upon the subject matter taught in public schools. *Id.*

111. *Id.*

112. See *supra* notes 61-66 and accompanying text.

113. See *Le Clercq, supra* note 55, at 235.

114. The fourteenth amendment states in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, § 1.

115. *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

116. See generally *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

117. "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." 348 U.S. at 488. In *Williamson*, the Court held that an Oklahoma statute, making it unlawful for any person who is not a licensed optometrist or ophthalmologist to fit, duplicate or replace any optical appliances, was not in violation of the due process clause. The Court weighed the interests involved and determined that all that would be required to sustain the legislation would be a *rational relation* to a *legitimate* government interest. *Id.* at 491. This must be compared to the higher level of review generally accorded where the liberty involved is of a more "fundamental" nature. See *Roe v. Wade*, 410 U.S. 113 (1973), where the Court held that infringement of a fundamental right by state legislation would only be upheld were *necessary* to support a *compelling* state interest. *Id.* at 155-56.

118. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Id.*

Although due process arguments offered in opposition to anti-evolution legislation have generally been preempted by narrower first amendment contentions,¹¹⁹ the arguments are nonetheless valid and often persuasive. With respect to a teacher's liberty to speak out concerning matters of academic relevance and importance (such as the theory of evolution), it is clear that this right may only be sacrificed at the hands of a sufficiently compelling state interest.¹²⁰ This argument is equally persuasive as applied to the balanced treatment acts, in that the teacher must be free from arbitrary enactments that impose upon him unreasonable burdens to expand upon matters which have no bearing or relation to academic topics.¹²¹

Although the decision in *Epperson v. Arkansas*,¹²² which invalidated an Arkansas anti-evolution law, was not premised upon due process grounds,¹²³ the Court did examine authority for the contention. The Court noted that the earliest cases on the subject of constitutional guarantees with regard to classroom activities were decided pursuant to the due process clause.¹²⁴ The case of *Meyer v. Nebraska*¹²⁵ was referred to as one such decision and was discussed by the Court as analogous to the anti-evolution factual setting.

In *Meyer*, the Court invalidated, pursuant to the due process clause, an act of the State of Nebraska which made it a crime to teach any academic subject in any language other than English to students who had not passed the eighth grade.¹²⁶ In examining the state interest asserted as justification for the law¹²⁷ the Court proclaimed that such interest was not adequate to override the

119. "For purposes of the present case, we need not reenter the difficult terrain [of the Due Process Clause]. . . . Today's [anti-evolution] problem is capable of resolution in the narrower terms of the First Amendment's prohibition of laws respecting an establishment of religion or prohibiting the free exercise thereof." 393 U.S. at 105-06.

120. See *supra* note 117 and accompanying text. "[T]he right. . . of the teacher to organize a biology course that includes evolution free from state requirements incorporating religious or other extraneous doctrines — [is] especially deserving of protection." Le Clercq, *supra* note 55, at 238.

121. See Le Clercq, *supra* note 55, at 239.

122. 529 F. Supp. at 1255. See also *supra* notes 39-47 and accompanying text.

123. See *supra* note 119.

124. 393 U.S. at 105. "[A]s early as 1923, the Court did not hesitate to condemn under the Due Process Clause 'arbitrary' restrictions upon the freedom of teachers to teach and of students to learn." *Id.*

125. 262 U.S. 390 (1923).

126. *Id.* at 396.

127. *Id.* at 398. The state contended that the object of the legislation was to create an "enlightened American citizenship" in the children, and to prevent students from learning foreign languages before adequately mastering English. *Id.* at 393-94.

fundamental liberties asserted by the teachers and students.¹²⁸ Thus the challenged statute unreasonably interfered with rights guaranteed by the due process clause.

With reference to the anti-evolution and balanced treatment legislation, the asserted interests propounded in their favor have, as we have seen,¹²⁹ not been considered "compelling"¹³⁰ and as such have not been successfully defended on due process grounds.

V. EVALUATION OF THE JUDICIAL RESPONSE TO THE ANTI-EVOLUTION LEGISLATION

It is overwhelmingly clear that the case law comprising the interpretation of the first amendment has developed many strong and unyielding principles, long recognized as impregnable against legal attack. The preeminence of these principles is nowhere more evident than in the area of the anti-evolution legislation. Notwithstanding this realization, it becomes necessary, in the interest of stimulating growth and scholarship, to analyze past judicial treatment in this area and evaluate its impact *and validity* in light of the underlying principles which the decisions are founded upon.

It has been noted that the establishment clause of the first amendment does not require a complete separation of church and state in all respects.¹³¹ The cases on the subject, although prohibiting concert or dependency among government and religion, have recognized the difficulty in promoting hostility, suspicion, and unfriendliness among the two.¹³² The Court has made allowance for a wide variety of creeds and beliefs, and has been seen to sponsor an attitude that shows no partiality to any one group or ideology yet allows each to flourish according to the spiritual needs of its dogma.¹³³ As the Court in *Zorach v. Clauson*¹³⁴ stated:

128. *Id.* at 399-403.

129. *See supra* note 53 and accompanying text.

130. The state interest, however, in prescribing a legitimate and academically sound school curriculum has been viewed as "legitimate and substantial." Le Clercq, *supra* note 55, at 240.

131. *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

132. *Id.* The Court made reference to situations where intermingling of the two are inevitable and healthy: prayer in legislative halls, appeals to God in presidential messages, and oaths in courtrooms. *Id.* at 312-13.

133. 343 U.S. at 313.

134. *Id.* at 306 (1952). In *Zorach*, the Court upheld a New York statute which

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹³⁵

The necessary overlap of government and religion is traceable to the very foundation of American constitutional government.¹³⁶ As the concurring opinion in the famous *Scopes* decision¹³⁷ noted, even sources as fundamental to United States history as the Declaration of Independence and the Articles of Confederation and Perpetual Union rely heavily upon religious conviction to convey their meanings.¹³⁸ Similarly, early United States Supreme Court cases promoted a complete advocacy of religion in everyday society and a recognition of the Christian affirmation in the origin of American culture.¹³⁹ Perhaps these authorities suggest that the harsh judicial treatment of religious matters in public schools as typified in our contemporary judiciary is a result not contemplated by the framers of the first amendment and is deserving of reexamination. The holding in the early *Scopes* case¹⁴⁰ is perhaps illustrative of the initial and intended treatment of a law which prohibits the teaching of evolution in public schools. Although modern courts have uniformly invalidated these enactments it is important to analyze these decisions in light of traditional prece-

permitted public schools to release students during school hours to attend religious classes conducted outside school premises.

135. *Id.* at 313-14.

136. "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Everson v. Board of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting).

137. *See supra* notes 8-27 and accompanying text.

138. The opinion noted such phrases as: "the laws of nature and of nature's God," "to be self-evident, that all men are created equal; that they are endowed by their Creator," found in the Declaration of Independence, and language such as, "[A]nd whereas it hath pleased the Great Governor of the world," found in the Articles of Confederation. *Scopes v. State*, 154 Tenn. 105, 122, 289, S.W. 363, 368 (1927) (Chambliss, J., concurring).

139. *See e.g.*, *Vidal v. Girard's Ex'rs*, 43 U.S. 127 (1844), where the Court proclaimed: "[w]e are compelled to admit that. . . Christianity [is] a part of the Common law of the State. . . [and] its divine origin and truth are admitted. . . ." The decision was rendered without regard to the particular sect or beliefs involved. *Id.* at 198. *See also* *Holy Trinity Church v. United States*, 143 U.S. 457 (1892) where the Court goes into a detailed discussion of the religious overtones in the language of many documents which comprise American history. *Id.* at 465-70. "There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning; they affirm and reaffirm that this is a religious nation." *Id.* at 470.

140. *See supra* notes 8-27 and accompanying text.

dent and to resist approaching the problem from trends of modern thought which are often divorced from sound legal doctrine.

It has been noted that, although modern interpretation of the establishment clause prohibits the adoption by a state of a program or practice in a public school which aids or opposes any religion, it nonetheless allows the study of religions and the Bible from a literary and historic viewpoint, objectively presented as part of a secular educational program.¹⁴¹ Certain activities in a public school environment such as legislatively mandated prayer¹⁴² or Bible reading¹⁴³ immediately conflict with the establishment clause, as such practices obviously cannot be effectively carried out in a secular manner. However, with respect to the teaching, in public schools, of the divine creation of man as typified by the balanced treatment statutes,¹⁴⁴ the issue is clearly different. It has already been asserted that divine creation is, in effect, a science and can be taught as such.¹⁴⁵ Even amidst the nonacceptance of these arguments,¹⁴⁶ it is not beyond realization to embody the subject in a nonbiased neutral manner into a school curriculum with the objective of exposing the student to all areas of thought on the subject.

With regard to the court's attention to the free speech issues surrounding the anti-evolution and balanced treatment litigation, perhaps a greater degree of judicial inquiry is called for.¹⁴⁷

It has been said that;

If progress has taught us anything, it is the vital need of freedom in learning. Perhaps this is the most precious privilege of liberty — the privilege of knowing, of pursuing untrammelled the paths of discovery, of inquiry, of invention. . . .

Believing as I do that the freedom of learning is the vital breath of democracy and progress, I trust that a recognition of its supreme importance will direct the hand of power and that our public schools and state universities may enjoy the priceless advantage of courses of instruction designed to promote the acquisition of all knowledge and may not be placed under restrictions to prevent it; and that our teachers may be encouraged to know and to teach the truth, the whole truth, and nothing but

141. 393 U.S. at 106.

142. See *Engel v. Vitale*, 370 U.S. 421 (1962).

143. See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

144. See *supra* note 2.

145. See *supra* note 61 and accompanying text.

146. See *supra* notes 62-66 and accompanying text.

147. As discussed previously, the primary constitutional mandate utilized in the cases has been the establishment clause. See *supra* notes 71-113 and accompanying text.

the truth.¹⁴⁸

This view has apparently been shared by the United States Supreme Court as well. The Court has traditionally expressed its commitment to the safeguarding of academic freedoms, and the vigilant protection of constitutional liberties in the classroom.¹⁴⁹ The traditional judicial treatment of the balanced treatment legislation,¹⁵⁰ however, appears to be in direct opposition to the Court's description of the classroom as the "marketplace of ideas."¹⁵¹ The reluctance of the courts to uphold laws which require treatment of divine creation in the classroom whenever evolution is taught appears to be a direct deprivation of students to gain total knowledge of all the prevalent theories of man's creation,¹⁵² and imposes a straightjacket upon scholastic freedom to learn and teach.

The argument can of course equally be asserted with regard to laws which *prohibit* the teaching of the theory of evolution in public schools. In this regard the academic freedoms have been blatantly violated, and the laws should not survive first amendment scrutiny. As applied to balanced treatment legislation, however, the principle that "the First Amendment, . . . does not tolerate laws that cast a pall of orthodoxy over the classroom"¹⁵³ should override any effort to invalidate the enactment.

VI. CONCLUSION

The courts have traditionally frowned upon state enactments prohibiting the teaching of the theory of evolution in public schools. Similarly, statutory requirements to give the divine statement of creation equal treatment when the theory of evolution is taught have also been generally invalidated. The two types of legislation, however, demonstrate the willingness of state lawmakers to be influenced by nonsecular interests. The repeated appearance of the laws clearly shows the strength in their support. The persistence of the groups which back the bills has been unyielding and the current reappearance of the laws in the form of balanced treatment acts indicate that the controversy is far from resolved.

148. Harper, *An Echo From the Scopes Trial*, 30 *DICK. L. REV.* 125, 126 (1926) (quoting the words of Hon. Charles Evans Hughes).

149. *See supra* notes 103-05 and accompanying text.

150. *See supra* note 2.

151. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

152. Since man has not yet proven either theory of creation, it would be impossible, with any certainty, to teach the true concept. *See supra* note 20. For this reason it is clear that the only equitable means to expose the student to the truth would be to teach him *all* known alternatives.

153. 385 U.S. at 603.

Although various modes of constitutional attack have been utilized, the primary demise of the legislation has been the establishment clause.¹⁵⁴ We have seen that at the heart of the controversy lie two competing interests, each presenting valid and important arguments which create an issue which for years has been hotly debated and has created some of the nation's most controversial litigation.¹⁵⁵ The central issue in this litigation has not been the validity of either asserted theory of man's origin, but rather a determination of the proper role of each in the public school.

This article has examined the traditional constitutional arguments asserted in favor of and against anti-evolution and balanced treatment laws and has evaluated the judicial response to these laws in light of these contended arguments. In examining past and recent decisions on the subject it does not appear that the courts will yield to fundamentalist pressures to allow religion to play a greater role in public school curriculums and will continue to follow rigid past precedent in invalidating the enactments.

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154. See *supra* notes 28-70 and accompanying text.

155. See *supra* note 8.

