CREATIONISM'S PUBLIC AND PRIVATE FRONTS: THE PROTECTION AND RESTRICTION OF RELIGIOUS FREEDOM

INTRODUCTION

This Comment speaks of creationists and creationism in a broad, general sense. Creationists are not limited in scope to the small group of scientists who have been appropriately labeled "creation scientists." The descriptive term "creationist" actually encompasses a sizable segment of the United States population. In December of 2010, a Gallup poll asked respondents a question regarding their beliefs as to the origin and development of mankind.[1] The poll posed the following question: "Which of the following statements comes closest to your views on the origin and development of human beings . . . ?"[2] Seventy-eight percent of Americans that responded stated that they believed that either "God created humans in present form," or that "[h]umans evolved, with God guiding."[3] Meanwhile, only sixteen percent of the respondents believed that humans evolved with God having no part in the process.[4]

With a strong segment of the American population believing that a supernatural being had a hand in the creation of mankind, it should be no surprise that the propriety of teaching creationism in America's public schools continues to be discussed in the courts and scientific community.[5] To be sure, such discussion is likely to continue throughout the foreseeable future. However, unlike the discussion concerning the relationship between creationism and public school classrooms, creationism in private school classrooms receives very little attention, even though new developments foreshadow an erosion of religious liberty.

To avoid governmental establishment or endorsement of a particular religion, the Supreme Court has construed the Establishment Clause to prevent the teaching of creationism in

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[1] *Evolution, Creationism, Intelligent Design*, GALLUP, http://www.gallup.com/poll/21814/evolution-creationism-intelligent-design.aspx (last visited Nov. 10, 2012).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See infra* notes 32-33, 53-55, 76, 84-86 and accompanying text.

America's public school classrooms.[6] Despite being fully aware of this constitutional impediment, creationists—and groups representing their interests—continue to push creationist-friendly legislation through state legislatures. In the private arena, an increasingly secular society,[7] combined with creationism's inherent religious nature, has led to an erosion of religious liberty for creationists. Free Exercise Clause jurisprudence has had a tangible, adverse effect on creationists' efforts to teach creationism in private religious schools. Two recent federal court decisions highlight this erosion.

On one occasion, this time in California, an issue arose regarding the accreditation of several private, religious schools' science programs, which primarily taught the theory of creationism. Employees of the University of California school system, responsible for crafting the admission policies for the university system, refused to recognize these high school science programs.[8] One particular policy refused to accept science credits from any high school teaching creationism as a major component of their biology programs. According to the systems' admissions officers, creationism was a religious viewpoint and it was not compatible with the University's requirements for a sufficiently rigorous science curriculum.[9] On another occasion, the Texas Higher Education Coordinating Board rejected the Institute for Creation Research Graduate School's attempt to offer a Master of Science degree with a major in Science Education.[10] The Commissioner of Higher Education determined that the program's

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[6] *See infra* note 13.

[7] Some experts point to numbers showing that the number of secular citizens in the United States has increased two-fold in the past decade. Paul Harris, *Rising Atheism in America Puts 'Religious Right on the Defensive,'* THE GUARDIAN (Oct. 1, 2011, 17:50 EDT), http://www.guardian.co.uk/world/2011/oct/01/atheism-america-religious-right. Atheists are thought to be the "fastest-growing major 'religious' demographic in the country." *Id.* Others have downplayed the trend towards secularism, instead pointing to polls that show that seventy-eight percent of Americans still identify with some form of Christian religion. Jon Meacham, *There Is No 'War on Religion,'* TIME IDEAS (Jan. 30, 2012), http://ideas.time.com/2012/01/30/there-is-no-war-on-religion/?iid=op-main-lede?xid=gonewsedit.

[8] *See* Ass'n of Christian Sch. Int'l v. Stearns, 679 F. Supp. 2d 1083, 1090 (C.D. Cal. 2008), *aff'd*, 362 F. App'x 640 (9th Cir. 2010).

[9] *Id.* at 1089-90.

[10] Inst. for Creation Research Graduate Sch. v. Tex. Higher Educ. Coordinating Bd., No. A-09-CA-382-SS, 2010 WL 2522529, at *1 (W.D. Tex. June 18, 2010).

curriculum did not meet the accepted principles and conventions of science education; therefore, the curriculum was inconsistent with the Board's stringent standards for science curriculum.[11]

Despite these recent challenges to creationist teachings in private school classrooms, advocates of creationism have continued to focus their attention on states' legislative processes, carefully crafting legislation in hopes that creationism can be taught in those states' public schools. Although there have been recent successful efforts in Louisiana and Tennessee, creationists will encounter problems if the constitutionality of these two states' respective bills is challenged. Federal courts have long ruled that the teaching of creationism qualifies as the teaching of a religious belief.[12] Since creationism is a religious belief de jure, the teaching of it in public schools violates the Establishment Clause.[13] While advocates of creationism have fought numerous battles over the teaching of creationism in public school settings, their teachings have largely remained protected from secular challenges in the private arena. Because the Constitution regulates government action only, parochial schools, religious schools, and other private educational institutions have traditionally been able to teach creationism without any interference from federal or state courts.[14] In the past, parents who wanted their children to receive

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[11] *Id.*

[12] *See* Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (invalidating a law preventing the teaching of evolution in Arkansas public schools and stating that "the First Amendment does not permit [a] State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma"); Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987) (stating that creationism is not a scientific teaching and that the teaching of creation science in public schools promotes a particular religious belief thereby violating the Establishment Clause); Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005) (finding a school policy teaching intelligent design endorsed religion and violated the Establishment Clause); McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1273 (E.D. Ark. 1982) (teaching of creation science creates an excessive entanglement with religion because teachers are public officials).

[13] The Establishment Clause states, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

[14] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970) (stating that there is often no constitutional violation where there is no state action); Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947) ("Neither a state nor the Federal Government can set up a church. . . . [or] pass laws which aid one religion, aid all religions, or prefer one religion over another."); The Civil Rights Cases, 109 U.S. 3, 25-26 (1883) (holding that protections afforded under the Constitution are enforced solely against "state

creationist instruction had to send them to private, religious schools. For many, the right to receive a particular religious education is an important component of religious freedom in the United States.

This Comment stresses that the First Amendment's treatment of creationism may either protect or erode religious freedom. Many people of various faiths, as well as many non-religious people, do not accept the teachings of creationism. For these people, the prohibition on creationist teaching protects them from receiving religious instruction in a government-sponsored setting. However, federal courts' rulings regarding creationism in private, religious school settings foreshadow a shrinking of religious liberty. The federal court decisions in California and Texas illustrate future roadblocks to receiving a creationist education in a private school setting. Creationists have not focused any efforts on protecting religious freedom in private, religious schools. Instead, they continue to actively promote creationist teachings in public schools, with a limited chance for success in the federal courts. Even though established precedent suggests such acts are unconstitutional, efforts to promote the teaching of creationism in both Louisiana and Tennessee public schools have been successful.[15]

In Part II, this Comment notes how *Kitzmiller v. Dover Area School District* represents the protection of religious liberty by recognizing creationism's inherent religious nature. Since creationism has been labeled a religious belief by federal courts, creationism encounters constitutional problems when examined under the First Amendment's Establishment Clause. At the same time, categorizing creationism as a religious belief sets the stage for accreditation boards to arbitrarily label it as an inappropriate part of a child's science education, even when the child is receiving that education as part of a private, religious school's curriculum. Part III highlights how, in spite of the limited chance of success, advocates of creationism continue to push creationist-backed bills through state legislatures in hope of having creationism taught in public schools. Finally, Part IV addresses how state educational

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aggression" and "cannot be impaired by the wrongful acts of individuals, unsupported by state authority").

[15] *See infra* notes 32, 53.

authorities have hindered the teaching of creationism in private school classrooms because of the teaching's inherent religious nature.

I. *KITZMILLER V. DOVER AREA SCHOOL DISTRICT*: THE MOST RECENT EXAMPLE OF THE CONSTITUTIONAL BAN ON TEACHING CREATIONISM IN PUBLIC SCHOOLS

Creationism and its newer progeny, intelligent design, lack acceptance as a scientific theory in the scientific community.[16] Most major scientific organizations generally support the teaching of evolution as the sole theory behind the origin of life.[17] Creationism's inherent religious nature was a central component of the most recent federal court decision regarding creationism. In *Kitzmiller v. Dover Area School District*, the United States District Court for the Middle District of Pennsylvania ruled that the Dover Area School Board's policy of informing students that gaps existed in the evolutionary theory, by mentioning alternatives to the theory, violated the Establishment Clause.[18] This decision was an important one. It seriously hampered creationists' goal of attaining acceptance by federal courts.[19] The court ruled that the

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[16] Professor Elaine Howard Ecklund performed a study and found some results that may help explain the general scientific community's opposition to creationism. *See* ELAINE HOWARD ECKLUND, SCIENCE VS. RELIGION: WHAT SCIENTISTS REALLY THINK 5 (2010). She surveyed 1,646 scientists working as researchers at elite universities in the United States. *Id.* at 161. Only nine percent of the respondents responded that they "have no doubts about God's existence." *Id.* at 16. This figure is in stark contrast with the sixty-three percent of the U.S. general population that is confident in God's existence. *Id.* Ecklund found that both "religious" and "non-religious" scientists "had a negative impression of the intelligent design movement." *Id.* at 81. Despite this aversion towards the intelligent design movement, less than five percent of the 275 scientists she personally interviewed were opposed to religion. *Id.* at 78.

[17] Press Release, Am. Ass'n for the Advancement of Sci., Bd. of Dirs., Statement on the Teaching of Evolution (Feb. 16, 2006), http://www.aaas.org/news/releases/2006/pdf/0219boardstatement.pdf; Press Release, Am. Chem. Soc'y, Am. Chem. Soc'y Supports Teaching Evolution in K-12, (Aug. 15, 2005), http://www.eurekalert.org/pub_releases/2005-08/acs-acs081505.php.

[18] Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005). Interestingly enough, John E. Jones III, the presiding judge, was a conservative appointed by President George W. Bush in 2002. *See Biography of Judge John E. Jones III*, U.S. DISTRICT CT. FOR MIDDLE DISTRICT PA., http://www.pamd.uscourts.gov/bios/jones.htm (last visited Nov. 10, 2012).

[19] Brenda Lee, Kitzmiller v. Dover Area School District*: Teaching Intelligent Design in Public Schools*, 41 HARV. C.R.-C.L. L. REV. 581, 584 (2006).

theory of intelligent design was simply a repackaged form of creationism because "a 'hypothetical reasonable observer,' adult or child, who is 'aware of the history and context of the community and forum' is . . . presumed to know that [intelligent design] is a form of creationism."[20]

Once the *Kitzmiller* court ruled that intelligent design was a form of creationism, it was inevitable that the local school board's policy would be struck down for violating the Establishment Clause. The court applied both the endorsement test[21] and the *Lemon* test[22] and determined that the school board's policy violated the Establishment Clause.[23] The school board argued vigorously that intelligent design had a significant basis in science and that it was not a mere repackaging of creationism. After all, there were key differences between creationism and intelligent design. During the trial, both of the board's expert witnesses, Michael Behe, a professor of Biochemistry at Lehigh University in Pennsylvania, and Scott Minnich, an associate professor of microbiology at the University of Idaho, testified that intelligent design's "official position" did not acknowledge that the intelligent designer was God, thereby making it different from creationism because it did not recognize God, or a god, as having designed

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[20] *Kitzmiller*, 400 F. Supp. 2d at 721 (quoting Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist., 386 F.3d 514 (3d Cir. 2004)).

[21] The endorsement test was first introduced by Justice Sandra Day O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'Connor, J., concurring), a United States Supreme Court case in which a group of citizens challenged the constitutionality of a nativity scene in their city's Christmas display, *id.* at 688-89. In *Kitzmiller*, the court stated that "based upon Supreme Court precedent," the endorsement test" [had to] be utilized . . . in [the] resolution of this case." *Kitzmiller*, 400 F. Supp. 2d at 713. Third Circuit precedent dictated that the "better practice is to treat the endorsement inquiry as a distinct test to be applied separately from, and prior to, the *Lemon* test." *Id.* at 714. The endorsement test poses the simple question of whether a government policy "'in fact conveys a message of endorsement or disapproval' of religion to the reasonable, objective observer." *Id.* at 715 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)).

[22] The *Lemon* test originated from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a United States Supreme Court case where citizens of Rhode Island challenged the state's supplementation of teachers' salaries in private, religious schools as compensation for teaching secular subjects, *id.* at 606-07. The *Lemon* analysis requires that a government policy "have a secular legislative purpose" and a "principal or primary effect" that "neither advances nor inhibits religion." *Id.* at 612. Furthermore, the policy must "not foster 'an excessive government entanglement with religion.'" *Id.* at 613 (quoting Walz v. Tax Comm'n of N.Y.C, 397 U.S. 664, 674 (1970)).

[23] *Kitzmiller*, 400 F. Supp. 2d at 765.

life.[24] Despite the two professors' testimony, the court determined that there was no significant difference between intelligent design and creationism and no proof that intelligent design was separate from religious teachings.[25]

Creationism and intelligent design shared a central tenet: they both promoted the existence of a supernatural being.[26] According to the court, one could only believe in intelligent design if he or she was willing to accept that the designer was not a natural entity and the physical rules of science must be bent to include the supernatural.[27] The evidence undermined the school board's argument that intelligent design was separate from creationism.[28] The "history and the historical pedigree" of the intelligent design movement "demonstrate[d] that [intelligent design was] nothing less than the progeny of creationism."[29]

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[24] *Id.* at 718 (internal quotation marks omitted).

[25] *Id.*

[26] *Id.* at 720.

[27] *Id.* at 720-21.

[28] *Id.* at 721. The court reviewed the history and circumstances surrounding the publication of the textbook, which accompanied the school district's new policy. *Id.* The textbook was titled *Of Pandas and People*. *Id.* at 718. It was published by a non-profit organization called The Foundation for Thought and Ethics. *Id.* at 719 n.5. The group was registered as a "religious, Christian organization" with the Internal Revenue Service. *Id.* at 721.

[29] *Id.* The Supreme Court requires courts to undertake a rigorous examination of the history and context surrounding the formation of the contested law or policy when determining whether a government action is religious in nature. *See* Edwards v. Aguillard, 482 U.S. 578, 594 (1987). This examination is part of the "purpose inquiry," which takes place under both the endorsement test and the *Lemon* test. *See* Lynch v. Donnelly, 465 U.S. 668, 691-92 (1984); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The purpose inquiry can be rigorous, expensive, and time-consuming.

In *Kitzmiller*, the judge wrote a fifty-nine-page opinion where he carefully scrutinized every piece of evidence entered into the docket during discovery. *See Kitzmiller*, 400 F. Supp. 2d 707. In his opinion, Judge Jones chastised the defendants and called the litigation a "legal maelstrom," *id.* at 765, most likely due to the onerous amount of work that went into preparation of the case and the resulting opinion. The judge called the litigation an "utter waste of monetary and personal resources." *Id.* at 765.

The sheer amount of evidence entered into discovery can burden a court doing the various analyses mandated by Establishment Clause jurisprudence. One example of an application of the *Lemon* test gone awry took place in *Selman v. Cobb County School District*, 449 F.3d 1320 (2006), where the Eleventh Circuit Court of Appeals remanded a decision by the Federal District Court for the Northern District of Georgia because of an evidentiary problem, *id.* at 1338. The district court found that a disclaimer sticker placed on public school students' textbooks violated the

The district court's decision in *Kitzmiller* illustrates the struggle creationists have when arguing that their theory has any sort of scientific legitimacy. State accreditation boards and school systems continue to adhere to the proposition that "[intelligent design]'s religious nature is evident because it involves a supernatural designer," and "this characteristic remove[s] creationism from the realm of science and ma[kes] it a religious proposition."[30] Creationists have failed to convince legal and scientific authorities that their teachings are separate from religious instruction; thus their teachings lack scientific legitimacy. Their efforts to have the theory taught in a public-school setting are, no doubt, a failing endeavor as they pit themselves against thirty years of Supreme Court precedent and a history of legislative setbacks.

II. STATES FIGHT BACK AGAINST THE ESTABLISHMENT CLAUSE WALL

A. Louisiana

1. Déjà Vu: The Louisiana Science Education Act

Following the *Kitzmiller* decision, efforts by creationists to alter public school science programs have not wavered. On June 25, 2008, the Legislature of Louisiana passed the Louisiana Science Education Act.[31] This act functions to permit "open and objective discussion of scientific theories being studied including, but not limited to, evolution, the origins of life, global warming, and human cloning."[32] The language of the statute states that its purpose is to "support and guid[e] . . . teachers regarding effective

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Establishment Clause after applying the *Lemon* test. *Id.* at 1322, 1327. The sheer amount of evidence entered into the record by both parties caused the court, and the parties themselves, a great deal of confusion, and, as a result, the district judge mistakenly considered a document not properly submitted into evidence when making his decision. *See id.* at 1332-33.

[30] *Kitzmiller*, 400 F. Supp. 2d at 720 (citing *Edwards*, 482 U.S. at 591-92; McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1265-66 (E.D. Ark. 1982)).

[31] 2008 La. Acts 473. The bill passed through the legislature, was codified, and remains current through the 2012 session. *See* LA. REV. STAT. ANN. § 17:285.1 (Supp. 2012).

[32] *Id.* § 17:285.1(B)(1).

ways to help students understand, analyze, critique, and objectively review scientific theories being studied."[33]

The passage of the Louisiana Science Education Act brings to mind past litigation over creationism-friendly legislation. In *Edwards v. Aguillard*, the United States Supreme Court set important precedent when it ruled that a pro-creationism Louisiana statute violated the Establishment Clause.[34] The Louisiana State Legislature passed the Balanced Treatment for Creation-Science and Evolution-Science Act in 1981.[35] The Act required public schools in Louisiana to "give balanced treatment to creation-science and to evolution-science" in "classroom lectures," "textbook materials," "library materials," and in all other "educational programs."[36] The statute served the "purpose[] of protecting academic freedom."[37] The Supreme Court examined the constitutionality of the Act under the Establishment Clause of the First Amendment and applied the *Lemon* test.[38] Under the first prong of the test, the State was not able to provide a clear secular purpose for the enactment of the statute.[39] The court analyzed the legislative history of the statute and determined that the statute's "primary purpose . . . [was] to advance a particular religious belief . . . [and it] endorse[d] religion in violation of the First Amendment."[40]

2. Attempts to Avoid Establishment Clause Problems

In hoping to avoid the failure of the Balanced Treatment for Creation-Science and Evolution-Science Act, crafters of the Louisiana Science Education Act carefully chose their language in hopes of avoiding the same problems with the Establishment

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[33] *Id.* § 17:285.1(B)(2).

[34] *See Edwards*, 482 U.S. 578.

[35] *See* §§ 17:286.1-:286.7 (2001), *invalidated by* Edwards v. Aguillard, 482 U.S. 578 (1987).

[36] *Id.* § 17:286.4(A) (2001 & Supp. 2012).

[37] *Id.* § 17:286.2.

[38] *Edwards*, 482 U.S. at 583-86; *see also supra* note 22.

[39] *Edwards*, 482 U.S. at 585. Academic freedom is only furthered if the goal of a statute provides a "more comprehensive science curriculum." *See id.* at 586. Such a goal cannot be achieved "by outlawing the teaching of evolution or by requiring the teaching of creation science." *Id.*

[40] *Id.* at 593.

Clause.[41] Despite careful crafting, the Act most likely will not pass inspection under the Establishment Clause because of the federal courts' history of invalidating similar acts under the Establishment Clause's various purpose-related inquiries.[42] Such an inspection would undermine the Louisiana Science Education Act because of the controversial history surrounding its passage. For example, various religious groups were heavily involved in its construction.[43] The Act itself draws from language found in the Model Academic Freedom Bill, a document crafted by the pro-creationism Discovery Institute as an example of a law it thought could pass constitutional scrutiny under the Establishment Clause.[44] Furthermore, the Discovery Institute's senior fellow and head legal counsel was instrumental in the creation of the Act.[45] Louisiana's intransigent opposition to evolution could also become a factor in a federal court's analysis under any of the Establishment Clause tests.[46] Louisiana's history, coupled with

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[41] The Act itself attempts to avoid constitutional issues by setting out its purpose. It states that it "shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion." § 17:285.1(D). The stated goal of the statute is to develop critical thinking skills, not to require the teaching of creationism or ban the teaching of evolution. *See id.* § 17:285.1(A)-(C).

[42] *See supra* note 29 and accompanying text.

[43] Robert E. Morelli, *Survival of the Fittest: An Examination of the Louisiana Science Education Act*, 84 ST. JOHN'S L. REV. 797, 819-22 (2010).

[44] *Id.* at 821. The Discovery Institute is a non-profit Christian organization. One of the main goals of the organization is to "demonstrat[e] that life and the universe are the products of intelligent design and the materialistic conception of a self-existent, self-organizing universe and [to challenge] the Darwinian view that life developed through a blind and purposeless process." *About Discovery*, DISCOVERY INST., http://www.discovery.org/about.php (last visited Nov. 1, 2012). In *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), the Discovery Institute played a prominent role in the court's eventual determination that intelligent design was indeed a religious belief and that the teaching of the theory in Dover Area public schools violated the Establishment Clause, *see id.* at 750. The Discovery Institute was very involved in the *Kitzmiller* litigation, even filing an amicus brief in support of the Dover Area School District. Brief for Discovery Institute as Amicus Curiae Supporting Defendant, *Kitzmiller*, 400 F. Supp. 2d 707 (No. 4:04-CV-2688), 2005 WL 3136716.

[45] Morelli, *supra* note 43, at 21.

[46] *See supra* notes 34-48 and accompanying text; *see also* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999). In *Freiler*, the parents of a child challenged the local school board's policy of requiring that a disclaimer be read in coordination with the teaching of evolution in its elementary and secondary classes. *Id.* at 341. The Fifth Circuit Court of Appeals held that such action was a violation of the Establishment Clause. *Id.* The reading of a disclaimer by a teacher "disavows

the Bill's legislative history, will create difficult challenges once a plaintiff with standing challenges the Act's constitutionality.

The permissive language of the Louisiana Science Education Act suggests that while teachers are required to teach the material in the standardized textbook, they "may use supplemental textbooks and other instructional materials" to develop their students' critical thinking skills.[47] Even if teachers in Louisiana are not currently using supplemental creationist texts, the language of the statute permits them to do so.[48]

B. Tennessee

1. H.B. 368 and S.B. 893

Another state is in the midst of implementing a similar act. Tennessee has a storied history involving the creationism-evolution battle. In *Scopes v. State*—a Tennessee Supreme Court case involving the famed Democratic politician and devout Presbyterian William Jennings Bryan as the primary lawyer for the prosecution—the State of Tennessee charged a schoolteacher with teaching evolution in a public school classroom in violation of Tennessee law.[49] The Tennessee law, known as the Tennessee Anti-Evolution Act, made it unlawful for any teacher to teach "any theory that denies the story of divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals."[50] The Tennessee Supreme Court was able

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endorsement of educational materials [and] juxtaposes that disavowal with an urging to contemplate alternative religious concepts." *Id.* at 348. Such action "implies School Board approval of religious principles." *Id. Freiler* was cited by the court in *Kitzmiller* to support its finding that a disclaimer read along with the teaching of evolution was unconstitutional. *See Kitzmiller*, 400 F. Supp. 2d at 726.

[47] LA. REV. STAT. ANN. § 17:285.1(C) (Supp. 2012).

[48] *See id.* Louisiana recently had an opportunity to discredit the teaching of evolution in its public schools. In December of 2010, the Louisiana Board of Elementary and Secondary Education voted six to one to approve new textbooks for students in the state's public schools; however, the biology textbooks included no mention of any challenges to the theory of evolution, much to the chagrin of creationists. Jana Winter, *Louisiana Moves to Block Creationism Debate from Inclusion in Biology Textbook*, FOXNEWS.COM (Dec. 7, 2010), http://www.foxnews.com/us/2010/12/07/louisiana-moves-scrap-creationism-debate-textbook/.

[49] Scopes v. State, 289 S.W. 363, 363 (Tenn. 1927).

[50] *Id.* at 363, 363 n.1.

to save face by finding that the Act was in accordance with the Tennessee State Constitution but throwing the prosecution's case out on a technicality.[51] In the United States Supreme Court's decision in *Epperson v. Arkansas*, such a statute was finally ruled as violating the Establishment Clause.[52]

On April 10, 2012, a Tennessee bill closely resembling Louisiana's Science Education Act became law. House Bill 368 was not a comprehensive education bill like Louisiana's Science Education Act; instead the Bill functioned to amend title 49, chapter 6, part 10 of the Tennessee Code, which deals with the teaching of scientific subjects.[53] The circumstances surrounding the bill's passage were unique. Tennessee Governor Bill Haslam voiced concerns about the bill while it was being debated in the Tennessee legislature, but he allowed the bill to become law without his signature, which was a largely symbolic move displaying his lukewarm opposition to its passage.[54]

The bill itself has several effects. The text of the bill states that science education should "help students develop critical thinking skills necessary to become intelligent, productive, and scientifically informed citizens."[55] The bill requires that state boards, administrators, and officials:

> [C]reate an environment within public elementary and secondary schools that encourages students to explore scientific questions, learn about scientific evidence, develop critical thinking skills, and respond appropriately and respectfully to differences of opinion about scientific subjects

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[51] *Id.* at 367.

[52] Epperson v. Arkansas, 393 U.S. 97, 109 (1968).

[53] H.B. 368, 107th Gen. Assemb., 2012 Sess. (Tenn. 2012).

[54] Chas Sisk, *Debate over Evolution Now Allowed in Tenn. Schools*, USA TODAY (Apr. 11, 2012, 3:10 PM), http://www.usatoday.com/news/nation/story/2012-04-11/evolution-creationism-debate-tennessee-law/54174242/1. Governor Haslam envisioned the problems Tennessee could encounter if there was confusion over curriculums found in Tennessee public school classrooms. David Zucchino, *Creationism Discussions Are Now OK in Tennessee Schools*, L.A. TIMES (Apr. 11, 2012) http://articles.latimes.com/2012/apr/11/nation/la-na-nn-tennessee-creationism-classroom-20120411. Despite allowing the legislation to pass, Haslam stated: "Good legislation should bring clarity and not confusion . . . . My concern is that this bill has not met this objective." *Id.*

[55] H.B. 368 pmbl.

> required to be taught under the curriculum framework developed by the state board of education.[56]

The bill also requires that officials aid teachers in finding effective and efficient ways to teach schools' science curriculum as it "addresses scientific subjects that may cause debate and disputation."[57] Lastly, in pursuit of the aforementioned goals, it prohibits any school authority—whether a supervising teacher, principal, superintendent, or school board—from sanctioning a teacher who "help[s] students understand, analyze, critique, and review in any objective manner the scientific strengths and scientific weaknesses of existing scientific theories covered in [a] course being taught within the curriculum framework developed by the state board of education."[58] In an attempt to deflect constitutional concerns, the bill also contains a religious disclaimer provision like that of the Louisiana Science Education Act.[59]

2. Discussion on the Act: Its True Purpose Examined

With this bill's passing and the law now in effect in Tennessee,[60] a challenge to the Act's constitutionality can be expected.[61] Consistent with Establishment Clause jurisprudence, a federal court would look to the legislative history and context of the Act's passage to determine its purpose under both a *Lemon*

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[56] *Id.* § 1(a).

[57] *Id.* § 1(b).

[58] *Id.* § 1(c).

[59] *Id.* § 1(d). This subsection states that the bill "only protects the teaching of scientific information, and shall not be construed to promote any religious or non-religious doctrine, promote discrimination for or against a particular set of religious beliefs or non-beliefs, or promote discrimination for or against religion or non-religion." *Id.*; *see supra* note 41 for a similar clause in Louisiana's Science Education Act.

[60] Tenn. Code Ann. § 49-6-1030 (2012).

[61] In a *USA Today* article following the bill's passage, Barry Lynn—the executive director for Americans United for Separation of Church and State, a prominent organization that actively litigates Establishment Clause issues—stated that he believed litigation over the constitutional propriety of the bill would be forthcoming. Sisk, *supra* note 54. Lynn also expressed concern that "some small district is going to have to figure out what this statute means, and it will become a party to a very expensive lawsuit." *Id.* (internal quotation marks omitted).

and an endorsement analysis.[62] A comprehensive examination of the Act's legislative history could be troublesome for its proponents. One bill, originating in Tennessee's State Senate, served as a predecessor to House Bill 368 and it contained numerous references to both global warming and evolution; an earlier version of House Bill 368 also contained those same references.[63]

The volumes of video documenting the Tennessee House's discussion of the bill are telling as far as determining the bill's authors' intent. Upon debate of an earlier version of the bill, which took place in the Tennessee House on April 7, 2011, almost a year to date before the bill's passage, video clips show the bill's sponsor tiptoeing around important questions regarding its purpose.[64] Instead of answering each question directly, he consistently assured listeners that the bill was not meant to advance any religious teachings.[65] In one particular exchange, a representative questioned the bill's sponsor about the necessity of the law.[66] The sponsor replied by stating: "One thing [the bill does] is it spells out what's allowed in the classroom. It deals with academic freedom. It does specify that these are objective, scientific facts [being]

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[62] See *supra* notes 21-22 for an explanation of how the analysis is performed. In addition, see *supra* notes 41-44 for the purpose inquiry performed upon Louisiana's Science Education Act. Significantly, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court struck down an Alabama statute that authorized a daily period of silence for meditation or prayer. *Id.* at 60-61. When applying the *Lemon* test to the statute at issue to determine its constitutionality, the Supreme Court recognized that the district court's record included statements made by the bill's sponsor indicating that the legislation was meant to be an "effort to return voluntary prayer." *Id.* at 56-57 (internal quotation marks omitted). Likewise, statements made by Tennessee legislators will be relevant in a *Lemon* analysis as to that bill's purpose.

[63] S.B. 893, 107th Gen. Assemb., 1st Reg. Sess. (Tenn. 2011).

[64] *See House Session-21st Legislative Day,* TENN. GEN. ASSEMBLY (Apr. 7, 2011, 02:41:56), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3989 (video clip of Representative Bill Dunn, sponsor of the bill, introducing the bill and answering questions on it).

[65] *See id.*

[66] Representative Craig Fitzhugh asked the bill's sponsor, "Why now? What are we . . . trying to improve? What problem are we trying to solve? Or are we just creating a problem here?" *Id.* (video clip of Representative Fitzhugh questioning the need for this bill). Governor Bill Haslam later voiced a similar concern, explaining that he did not "believe that [the bill] accomplishes anything that isn't already acceptable in our schools." Zucchino, *supra* note 53.

introduced."[67] He further stated his personal concern that teachers may feel bullied or threatened "if they introduce certain scientific, objective facts [into a] course."[68] Another proponent of the bill noted its importance:

> [E]very theory is just that—it's a *theory*. And many scientific theories that we've heard from, that people claim every scientist believes a certain theory, that's certainly not true. . . . This bill just allows students—it allows teachers—to have questions, to have critical thinking about scientific theories, about other things taught in the schools. And that's what we want to encourage students to do. . . . [E]very theory doesn't have answers, and . . . we have heard from a lot of people [who] seem to imply that certain theories are just fact when they *are not* facts. There are so many things that need to be questioned about theories. And this [bill] just allows that.[69]

Another representative noted that it was critical for the legislature to take action to open discussion and dialogue on controversial topics in the classroom.[70] In his comments on the bill, he referenced a magazine article about the strength of proof behind the evolutionary theory.[71] To him, the bill was necessary to ensure that the evolutionary theory was challenged; and he argued that scientists place an unbelievable amount of "faith" in their theories.[72] It was his understanding, that the bill would allow students and teachers "to question [others'] evolutionary faith."[73]

The bill's sponsor, Bill Dunn, responded by stating that the bill did not promote any religious faiths or dogmas and that the bill's purpose was not to specifically address evolution.[74] In later questioning, the sponsor was specifically asked whether the bill allowed the teaching of creationism. He responded by stating that

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[67] *House Session-21st Legislative Day*, *supra* note 64.

[68] *Id.*

[69] *Id.* (video clip of Representative Joey Hensley speaking in support of the bill).

[70] *Id.* (video clip of Representative Glen Casada speaking in support of the bill).

[71] *Id.* (discussing Glenn Branch & Eugenie C. Scott, *The Latest Face of Creationism*, SCI. AM., Jan. 2009, at 92, 92, 99).

[72] *See id.*

[73] *Id.*

[74] *Id.* (Representative Dunn responding to Representative Casada's statements).

the bill did not allow the teaching of "creationism A to Z," but he sidestepped further questions about the ambiguity of his earlier statements.[75]

On April 20, 2011, the bill was assigned to the General Subcommittee of the Tennessee Senate Education Committee.[76] The tracking of the bill showed it would come up for a vote in the 108th regular session of the Tennessee legislature, but many believed the bill would die in that committee.[77] The bill's Senate sponsor, Bo Watson, encountered criticism from educators in the state, especially from faculty at his alma mater, the University of Tennessee at Chattanooga.[78] Despite Governor Haslam's qualms with the bill, the bill passed by a margin of three to one in both the Tennessee Senate and House.[79] Haslam declined to use his veto power because the overwhelming support of the bill in the Tennessee legislature suggested that there would be enough votes to override any veto by the governor.[80]

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[75] *See id*. (Representative Dunn responding to Representative Mike Turner's questioning). Despite Representative Dunn's statements, the Supreme Court has stated that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979). This principle holds true outside the context of administrative law. The legislative history takes into account the entire context of the bill's passing.

[76] *Tennessee's "Monkey Bill" on Hold*, NAT'L CENTER FOR SCI. EDUC., (Apr. 20, 2011), http://ncse.com/news/2011/04/tennessees-monkey-bill-hold-006631.

[77] *Id.*

[78] *Id.* Faculty at the University of Tennessee at Chattanooga were not the only Tennessee scientists in opposition to this bill. Eight members of the National Academy of Sciences, including a Nobel laureate teaching at Vanderbilt University, signed a letter lobbying the Tennessee Legislature to abandon efforts to pass the bill out of concern that the bill would harm the mainstream science community's view of the state and hurt Tennessee's efforts to recruit scientific research and development companies to the state. Zucchino, *supra* note 54.

[79] *Id.*

[80] *Id.* Even if Governor Haslam's veto could not have been overridden by the Legislature, Haslam had to be careful. Tennessee has an overwhelmingly conservative population. To the extent national election results signal a state's political leanings, John McCain received almost fifty-seven percent of the vote in the presidential election of 2008 compared with Democratic candidate Barrack Obama. Igor Birman et al., *McCain Wins Tennessee, Alexander Re-elected*, USA TODAY (Nov. 5, 2008, 2:33 AM), http://www.usatoday.com/news/politics/election2008/tn.htm.

C. Unsuccessful Efforts in New Hampshire and Other States to Introduce Creationist-Friendly Legislation

Perhaps the developments in Louisiana and Tennessee spurred state lawmakers in New Hampshire to try their hand at crafting creationism-friendly legislation. On December 21, 2011, one member of the New Hampshire State House introduced House Bill 1148, which would require the theory of evolution to be taught in public schools strictly as a theory.[81] Furthermore, when teaching the theory, teachers would be required to inform students as to the religious and ideological viewpoints of the proponents of evolutionary theory.[82] On the same day, two other New Hampshire state representatives introduced a similar creationism-friendly bill which would require science teachers to "instruct pupils that proper scientific inquir[y] results from not committing to any one theory or hypothesis, no matter how firmly it appears to be established, and that scientific and technological innovations based on new evidence can challenge accepted scientific theories or modes."[83] The introduction of these bills could hardly be seen as a serious effort like those in Louisiana and Tennessee.

Shortly after introducing his Bill, the sponsor of House Bill 1148 was quoted by the *Concord Monitor* as saying: "I want the full portrait of evolution and the people who came up with the ideas to be presented. It's a worldview and it's godless. . . . [W]e should be concerned with criminal ideas like this and how we are teaching it. . . . Columbine, remember that? They were believers in evolution. That's evidence right there."[84] Even though the comments by the other two sponsors of creationist-friendly legislation were a little less controversial,[85] the proposed bills

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[81] H.B. 1148, 162d Gen. Ct., 2012 Sess. (N.H. 2011). The bill's summary reads: "Requiring the teaching of evolution as a theory in public schools." *Id.*

[82] *Id.*

[83] H.B. 1457, 162d Gen Ct., 2012 Sess. (N.H. 2011). The bill was described as being "relative to scientific inquiry in the public schools." *Id.*

[84] Kate Sheppard, *New Hampshire Lawmakers Revive the Evolution Wars*, MOTHER JONES (Jan. 3, 2012), http://www.motherjones.com/blue-marble/2012/01/new-hampshire-lawmakers-revive-evolution-wars.

[85] The sponsor of House Bill 1457 stated that he hoped to inform children "that they have a purpose for being here. . . . I want the problems with the current theories

went nowhere. On February 16, 2012, the two bills were dismissed by the New Hampshire House Education Committee.[86] Similar legislation has been introduced and has subsequently died in Florida,[87] Texas,[88] Missouri,[89] Kentucky,[90] Oklahoma,[91] and New Mexico.[92]

Proponents of the successful Louisiana Science Education Act and its Tennessee counterpart overcame great hurdles in allowing the teaching of intelligent design in public school classrooms, and proponents of the laws believed that they advanced true academic freedom, unlike the Balanced Treatment for Creation-Science and Evolution-Science Act at issue in *Edwards v. Aguillard*.[93] While the language in both Acts appears to avoid the problems present in *Edwards*, the district court's finding in *Kitzmiller*—that intelligent design is a mere repackaging of creationism and not a scientific theory—strongly suggests that neither Act would be constitutional under the Establishment Clause.[94] As mentioned earlier, the legislative history and the circumstances surrounding the passage of the legislation in both states most likely will

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to be presented so that kids understand that science doesn't really have all the answers. They are just guessing." *Id*.

[86] *New Hampshire Antievolution Bills Dismissed*, NAT'L CENTER FOR SCI. EDUC. (Feb. 16, 2012), http://ncse.com/news/2012/02/new-hampshire-antievolution-bills-dismissed-0013859.

[87] S.B. 1854, 113th Reg. Sess. (Fla. 2011).

[88] H.B. 2454, 82d Leg. (Tex. 2011).

[89] H.B. 195, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

[90] H.B. 169, 11th Reg. Sess. (Ky. 2011).

[91] S.B. 554, 53d Leg., 1st Reg. Sess. (Okla. 2011).

[92] H.B. 302, 50th Leg., 1st Sess. (N.M. 2011).

[93] *See supra* notes 35-40 and accompanying text. The Balanced Treatment for Creation-Science and Evolution-Science Act mandated that creationism be taught alongside evolution. The Supreme Court ruled that the Act not only harmed the teaching of evolution but also promoted the teaching of creationism. Edwards v. Aguillard, 482 U.S. 578, 593 (1987). In *Edwards*, Justice White noted in his concurrence that the matter was "not a difficult case." 482 U.S. at 608 (White, J., concurring). However, litigation involving the constitutionality of either the Louisiana or the Tennessee Act might be a little less clear. For one, neither Act mandates the teaching of any specific theory. Furthermore, the Acts merely function to allow school boards to promote, and teachers to encourage, open discussion of all theories in a classroom. The Acts also act to prevent discrimination or adverse action against teachers because of such open discussion. *See* LA. REV. STAT. ANN. § 17:285.1 (Supp. 2012); H.B. 368, 107th Gen. Assemb., 2012 Sess. (Tenn. 2012).

[94] *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 721 (M.D. Pa. 2005).

invalidate the Acts under either the *Lemon* test or the endorsement test.[95]

Despite victories in two state legislatures, creationism has failed to make progress in other states post-*Kitzmiller*. In July of 2011, the Texas Board of Education unanimously voted to accept textbook submissions that included no mention of any alternatives to evolution.[96] This surprised many observers considering Texas's strong conservative and evangelical base.[97] Some of the strongest advocates in Texas against creationism curriculum were schoolteachers from various parts of the state. They did not wish to be forced to teach theories they saw as non-scientific in their classrooms.[98]

The actions of the Texas Board of Education and the Louisiana Board of Elementary and Secondary Education[99] suggest that creationists may never see the movement on the public front they wish to see. In the meantime, if creationists want their children to receive creationist instruction, they must send their children to private schools. However, even this right is in danger. Private schools, which are free from the long arm of the First Amendment's Establishment Clause,[100] now must be careful about what is being taught in their biology programs.

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[95] *See supra* notes 43-47, 60-62 and accompanying text.

[96] Jim Forsyth, *Texas Education Board Sticks to the Teaching of Evolution*, REUTERS (July 22, 2011, 3:18 PM EDT), http://www.reuters.com/article/2011/07/22/us-creationism-texas-idUSTRE76L54S20110722.

[97] *Id.* Texas has a population that is overwhelmingly conservative. In the most recent presidential election, over fifty-five percent of Texans voted for Republican candidate John McCain, while less than forty-four percent voted for Democratic candidate Barack Obama. Igor Birman et al., *McCain Wins Texas, Cornyn Maintains Senate Seat*, USA TODAY (Nov. 5, 2008, 1:46 AM), http://www.usatoday.com/news/politics/election2008/tx.htm.

[98] Forsyth, *supra* note 96.

[99] *Id.*

[100] *See supra* note 13.

III. THE WEAK FREE EXERCISE CLAUSE PRESENTS A ROADBLOCK TO THE TEACHING OF CREATIONISM IN THE PRIVATE ARENA

A. Past and Present Free Exercise Jurisprudence

The purpose of the Establishment Clause, as interpreted by the United States Supreme Court, is to protect religious freedom in this country's public schools.[101] By preventing the promotion of a particular religion, it ensures that all individuals are free to believe and practice what they choose. Since the Establishment Clause ensures that laws "neither advance[] nor inhibit[] religion," our government is required to remain neutral on religious matters; this extends to governmental authorities in operation of their schools.[102]

The Establishment Clause's accompanying clause, the Free Exercise Clause,[103] furthers the Constitution's prohibition on legislation promoting or hindering religion. The First Amendment "safeguards the free exercise of [one's] chosen form of religion."[104] The Free Exercise Clause protects both the "freedom to believe" and the "freedom to act."[105] The freedom to believe is "absolute" and not subject to regulation.[106] The "freedom to act" under the Free Exercise Clause, however, is not absolute, and "[c]onduct remains subject to regulation for the protection of society."[107] There are parameters surrounding this freedom to act consistent with one's religion. To fully protect this freedom to act, the freedom "must have appropriate definition to preserve the enforcement of that protection."[108] Therein lies the question: To what extent does the Free Exercise Clause protect the practice of

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[101] The Establishment Clause affects public schools in two manners: (1) it "forbids . . . the preference of a religious doctrine," and (2) it forbids "the prohibition of [a] theory which is deemed antagonistic to a particular dogma." Edwards v. Aguillard, 482 U.S. 578, 593 (1987).

[102] *Id.* at 583.

[103] The Free Exercise Clause is part of the First Amendment. The corresponding portion reads: "Congress shall make no law respecting an establishment of religion, *or prohibiting the free exercise thereof* . . . ." U.S. CONST. amend. I (emphasis added).

[104] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 304.

[108] *Id.*

one's religion? Individuals are free to believe what they may, but when acting in accordance with their beliefs, they are limited in their acts by governmental regulations.

The Supreme Court decision in *Sherbet v. Verner* best demonstrates a strong Free Exercise Clause—one that is protective of religious practice in the United States.[109] In *Sherbert*, a member of the Seventh-Day Adventist Church was fired by her employer for refusing to work on Saturday, because Saturday, for Seventh-Day Adventists, is the holy Sabbath day.[110] Upon her firing, the employee filed for unemployment compensation benefits with her home state of South Carolina.[111] The State found that she did not qualify for the benefits because she was available to work on Saturday and had no good cause, under the South Carolina statute, not to work.[112] The petitioner argued that such a restriction violated her right to free exercise of religion under the First Amendment.[113] The South Carolina Supreme Court affirmed the denial of benefits, and the employee appealed to the United States Supreme Court.[114]

The Court took issue with South Carolina's decision despite acknowledging that an "action . . . in accord with one's religious convictions . . . is not totally free from legislative restrictions."[115] The Court performed a two-pronged analysis to determine if there was a violation of the employee's free exercise right. First, the Court asked if there was a substantial "infringement by the State of her constitutional rights of free exercise;" if there was no infringement, then the employee's claim would fail.[116] In performing its analysis, the Court found that the denial of the employee's unemployment benefits "penalize[d] the free exercise of [the employee's] constitutional liberties."[117] There was a substantial burden, so the Court sought a "compelling state

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[109] Sherbert v. Verner, 374 U.S. 398 (1963).

[110] *Id.* at 399.

[111] *Id.* at 399-400.

[112] *Id.* at 401.

[113] *Id.*

[114] *Id.* at 401-402.

[115] *Id.* at 403 (quoting Braunfeld v. Brown, 366 U.S. 599, 603 (1961)) (internal question marks omitted).

[116] *Id.*

[117] *Id.* at 406.

interest in the regulation of a subject within the State's constitutional power to regulate."[118]

It is the application of this second prong in the analysis that highlights the differences between the free-exercise jurisprudence of the past and the modern form. In *Sherbert*, the Court elevated free exercise of religion, stating that "[i]t is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interest, give occasion for permissible limitation.'"[119] With this statement, the Supreme Court rejected the notion—which it would adopt in a later line of cases—that religious free exercise could be inhibited by an ordinary state interest. Instead, the Court restated its belief that laws affecting religious practices should be highly scrutinized, and the interests backing those laws should be "compelling."[120] South Carolina was unable to articulate any colorable state interests for not allowing such an exception for religious observers except for its concern that employees would abuse this privilege in mass and refuse to work on certain days because of their religious beliefs.[121] The Supreme Court did not believe this concern to be a "compelling state interest."[122] After the Court's decision in *Sherbert*, any generally applicable law that substantially burdened one's religious belief or practice could only be justified by a compelling governmental interest.

The jurisprudential implications of *Sherbert* seemed great. In practice, though, the Supreme Court passed up many opportunities to apply *Sherbert* to strike down generally applicable laws.[123] The Court has struck down laws for violating

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[118] *Id.* at 403, 406 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)) (internal quotation marks omitted).

[119] *Id.* at 406 (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945)).

[120] *Id.*

[121] *Id.* at 407.

[122] *Id.* at 406-07.

[123] While the overly protective *Sherbert* analysis was in place, the Court routinely refused to strike down laws that placed a substantial burden upon religious practices. *See* Gillette v. United States, 401 U.S. 437 (1971) (refusing to find that Selective Service required exemption for those who opposed Vietnam War on religious grounds); United States v. Lee, 455 U.S. 252 (1982) (holding that a compelling state interest supported the imposition of federal taxes upon members of the Amish belief even though the spending of their tax dollars was inconsistent with their religious

the First Amendment's Free Exercise Clause in only a narrow line of cases, most dealing with denials of unemployment benefits (like in *Sherbert*).[124] As the Court shifted its view of the Free Exercise Clause, the reason the Court refused to strike down generally applicable laws burdening religious practices became clear.

Employment Division, Department of Human Resources of Oregon v. Smith represented a dramatic shift from the overly protective Free Exercise jurisprudence of the *Sherbert* era.[125] The Court stated that its hesitancy in applying the *Sherbert* analysis to strike down laws formed the basis of its new position on the Free Exercise Clause.[126] A society that consistently applied the *Sherbert* "compelling state interest" analysis to generally applicable laws would be "courting anarchy" because the strict scrutiny of the courts would strike down almost every scrutinized law.[127] The Free Exercise Clause was not meant to interfere with generally applicable laws that had an incidental effect upon religion, and it would no longer after *Smith*.

The new standard for evaluating whether a law has violated one's constitutional right to Free Exercise of religion considers whether a law is neutral and generally applicable.[128] If that law

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practices); Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (refusing to apply the *Sherbert* analysis to governmental harvesting of timber on Indian reservations).

[124] The limited list of cases where generally applicable laws were struck down includes: Wisconsin v. Yoder, 406 U.S. 205 (1972) (striking down a compulsory school attendance law as it applied to the members of the Amish faith); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981) (finding that denial of unemployment benefits to a man who refused to manufacture guns because of his religious beliefs was a violation of his right of free exercise); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (finding that a denial of unemployment benefits to worker who refused to work on the Sabbath violated the worker's free exercise right).

[125] Emp't Div,, Dep't of Human Res. of Or. v, Smith, 494 U.S. 872 (1990).

[126] *Id.* at 884-85.

[127] *Id.* at 888. The Court stated that it "cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order." *Id.* It listed a host of laws that would not survive *Sherbert*'s strict scrutiny, including compulsory military service, payment of taxes, various health and safety regulations, compulsory vaccination laws, drug laws, and traffic laws. *Id.* at 888-89.

[128] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is *not neutral* . . . ." *Id.* at 533 (emphasis added). To determine whether a law is neutral, the Court looks to see if it is "facially neutral." *See id.* at 534. Obviously, if it is not "facially neutral" a compelling state interest is

meets these two requirements, then the state need not proffer a compelling governmental interest to support it, even "if the law has the incidental effect of burdening a particular religious practice."[129] If the law does not meet these two requirements, the law has to be justified by a compelling state interest and narrowly tailored to meet that compelling interest.[130] Post-*Smith* Free Exercise Jurisprudence dictates that as long as a generally applicable law is neutral, that law will withstand a Free Exercise challenge.[131] Application of the post-*Smith* Free Exercise Clause jurisprudence leaves creationists no remedy outside of free speech arguments when governing authorities pass laws or other regulations indirectly burdening the teaching of creationism in private religious schools.

B. Association of Christian Schools International v. Stearns*: Free Exercise and the Teaching of Creationism in Private Schools*

1. Background

In *Association of Christian Schools International v. Stearns*, the Federal District Court for the Central District of California refused to find the admissions policies of the University of

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demanded. However, just because a law is "facially neutral" does not mean that the non-neutral nature of the law can't be "masked." *Id.* The operation of the law, along with evidence of its adoption, is examined to determine if the law, despite being "facially neutral," represents an impermissible targeting of a religion. *Id.* at 535.

[129] *Id.* at 531

[130] *Id.* at 533.

[131] Congress attempted to overrule the Supreme Court's decision in *Smith*, and re-impose *Sherbert*, by passing the Religious Freedom Restoration Act ("RFRA") in 1993. Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 5 U.S.C. § 504; 42 U.S.C. §§ 1988, 2000bb-2000bb-4 (2006)), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997). The purpose of the Act was to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). In 1997, the Supreme Court declared this Act unconstitutional as it applied to the states. *Boerne*, 521 U.S. 507 (1997). The Act was amended by the Religious Land Use and Institutionalized Persons Act of 2000 to remove the reference to states and is still applicable to the federal government, requiring Congress to be careful in passage of laws that could have an adverse impact upon groups' religious practices. Pub. L. No. 106-274, 114 Stat. 806 (codified as amended at 42 U.S.C. §§ 2000cc-2 to -3 (2006)). After the amendment, the law has been upheld and enforced against Congress. *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006).

California ("University") unconstitutional, even though those policies selectively refused to recognize science credits from private, religious schools' science programs that included creationist instruction.[132] The plaintiffs—Calvary Chapel Christian School, five students of the school, and the Association of Christian Schools International—brought the claim alleging that the University's policies[133] violated the Free Speech, Free Exercise, Establishment, and Equal Protection Clauses.[134] One portion of the policies contained a requirement that an applicant demonstrate proficiency in system-approved–high school courses covering seven general subject areas. These areas included history, social science, English, mathematics, laboratory science, foreign languages, performing arts, and other electives.[135] The plaintiffs challenged the University's method for approving the courses.[136] The University's policy was to not approve courses that failed to teach "topics with sufficient accuracy and depth" or "relevant analytical thinking skills."[137]

2. The Litigation

The plaintiffs alleged that the University's policies "require[d] rejection of courses, regardless of their standard content, that add[ed] a single religious viewpoint, any instance of God's guidance of history, or any alternative . . . to evolution."[138]

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[132] Ass'n of Christian Sch. Int'l v. Stearns, 679 F. Supp. 2d 1083 (C.D. Cal. 2008), *aff'd*, 362 F. App'x 640 (9th Cir. 2010).

[133] *Id.* at 1088. The policy at issue determined which of California's 360,000 high school graduates during any given year would be allowed to attend one of the University of California's ten campuses. *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* To gain approval for its courses, a high school had to provide the University with a detailed, three-to-five-page-long course description. *Id.* at 1089. The University then analyzed the course description to determine if the course "challenge[d] students academically, involve[d] substantial reading and writing, [taught] critical thinking skills, emphasize[d] both analytical thinking and factual content, and develop[ed] students' oral and listening skills." *Id.*

[137] *Id.* (internal quotation marks omitted).

[138] *Id.* at 1089-90 (internal quotation marks omitted). For example, the University had standard form language for instances when it rejected a private, religious school's biology course. The language in the statement informed the school that its course description was "not consistent with the viewpoints and knowledge generally accepted in the scientific community." *Id.* at 1090 (internal quotation marks omitted). Also, see

The University responded to this allegation with evidence of courses they approved, including courses that contained religious textbook materials and textbooks with religious viewpoints.[139] The University conceded that it did not approve "some Christian 'science' textbooks that 'prioritize[d] religion over science,'" especially where those textbooks were utilized as the main text in the course.[140] According to the University, its policies mandated approval of a biology course as long as it contained an "adequate treatment of the theory of evolution and discussion of creationism."[141] As a result, the University would not approve a biology course if it contained the teaching of creationism as the main theory of the course; the policy mandated that evolution be taught in the classroom, with creationism being only supplemental in nature.[142] In looking at the evidence, the district court determined that the University's accreditation policies were not rejecting the private, religious schools' courses merely because they had a religious viewpoint.[143]

The district court rejected each of the plaintiff's allegations of constitutional violations. First, the court addressed the plaintiff's claim that the University's policies were a content-based speech restriction and that the policies required a strict-scrutiny analysis

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supra notes 16-17 for the scientific community's mainstream position on the evolution-versus-creationism debate. The majority of scientists and federal courts have refused to recognize creationism as a valid scientific theory. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 720 (M.D. Pa. 2005) (citing Edwards v. Aguillard, 482 U.S. 578, 591-92 (1987); McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1265-66 (E.D. Ark. 1982)). The plaintiffs argued that the rejections of the private, religious schools' biology course descriptions were based upon the schools' teaching of creationism as an alternative to evolution. *Stearns*, 679 F. Supp. 2d at 1094.

[139] *Id.* at 1091-92. Courses previously approved by the University included a course on prophecy in the Bible and a course on the Jewish experience in western civilization. *Id.* at 1091.

[140] *Id.* at 1092. The University argued that they approved several courses that used creationist textbooks as secondary or supplemental texts. *Id.* The University also introduced into evidence several courses they approved that had textbooks containing religious viewpoints in a secondary or supplemental role. *See id.* In one University-approved chemistry course, the main textbook was titled *Modern Chemistry and Chemistry for Christians*. *Id.* Another University-approved biology course had three texts, one of which was titled *Biology*: *God's Living Creation*. *Id.*

[141] *Id.* at 1094 (internal quotation marks omitted).

[142] *Id.*

[143] *Id.* at 1092.

to determine their legality.[144] This argument failed, as there was no evidence that the University's policies were specifically targeting creationism.[145] The court addressed each of the other alleged free speech violations one by one, dismissing each one as unfounded and unsupported by the evidence.[146] The plaintiffs claimed that the policies functioned so as to be hostile to private, religious schools in violation of the Free Exercise and Establishment Clauses.[147] While the Establishment Clause is often used to evaluate policies that proscribe or benefit religion, it could also be used to examine claims that a government policy is hostile towards religion.[148] Therefore, the court applied the *Lemon* test[149] and determined that under the first prong of the test, the University's policies had a secular purpose, which was to admit the best-qualified applicants who had what the University believed were the qualities necessary to succeed at their institution.[150] As for the second prong, "[n]o reasonable and informed observer could conclude that refusing to recognize intelligent design as science or other religious beliefs as academics ha[d] the primary effect of inhibiting religion."[151] And, under the

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144 *Id.* at 1094-95.

145 *Id.* The court refused to apply strict scrutiny and instead applied rational basis review. *Id.* at 1098. Government authorities are entitled to judge excellence of prospective students where a public benefit is being distributed to students in a competitive process. *Id.* at 1097. The court relied on the analysis in *National Endowment for the Arts v. Finley* where the Supreme Court ruled that judgments on excellence are "inherently content-based," but not facially invalid. *Id.* at 1096-92 (quoting Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 586 (1998)) (internal quotation marks omitted). The court noted that the content of courses an applicant takes is vital in determining whether or not that applicant will succeed in the University's system. *Id.* at 1097. The court also mentioned that an educational institution has the "[d]iscretion to determine, on academic grounds, who may be admitted," which is an "essential freedom[] of a university." *Id.* at 1098 (quoting Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985)) (internal quotation marks omitted).

146 *See id.* at 1094-1108.

147 *Id.* at 1108. The plaintiffs also argued the policy violated the Free Exercise Clause because the policies "prescribe[d] what [should] be orthodox in religion." *Id.*

148 *Id.* (citing Am. Family Ass'n v. City & Cnty. of S.F., 277 F.3d 1114, 1120-21 (9th Cir. 2002)).

149 *See supra* note 22.

150 *Stearns*, 679 F. Supp. 2d at 1109.

151 *Id.* at 1110.

third prong, the court determined that the policies did not create an excessive entanglement with religion.[152]

The Ninth Circuit Court of Appeals affirmed the district court's ruling that the University's policies were not unconstitutional, both on their face and as-applied.[153] The University was free to reject the texts because they framed religious teachings in the Bible as scientific evidence, and the University's decision that the texts were not appropriate for use as primary texts in high school classrooms was well within the confines of the Constitution.[154] Such policies would "not prohibit or otherwise prevent high schools . . . from teaching whatever and however they choose or students from taking any course they wish."[155] Furthermore, it was the Ninth Circuit's belief that the University's policies "[did] not punish a school for teaching, or a student for taking, an unapproved course."[156]

3. The Impact

The Ninth Circuit believed the University of California's policies would not prevent schools from teaching unapproved science classes.[157] The effect of the decision means that students in private, religious schools in California who wish to attend one of the University of California's ten campuses can only receive a creationist view of the origins of life if it accompanies, in a secondary manner, the theory of evolution.[158] It is true that some private, religious schools might not change their science curriculum in response to their course's being rejected by the University's policies as the Ninth Circuit would like to believe. However, what is more likely is that private, religious schools will

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[152] *Id.*

[153] Ass'n of Christian Sch. Int'l v. Stearns, 362 F. App'x. 640, 643 (9th Cir. 2010).

[154] *Stearns*, 679 F. Supp. 2d at 1113. University of California Professor Barbara Sawrey explained that the texts "included scientific inaccuracies, failed to encourage critical thinking, and took an 'overall un-scientific approach to the subject matter.'" *Id.* It was Sawrey who shared her opinion with the course committee, which adopted her opinion and chose to reject the courses using the textbooks. *Id.*

[155] Ass'n of Christian Schs. Int'l v. Stearns, 362 F. App'x. 640, 643-44 (9th Cir. 2010).

[156] *Id.* at 644.

[157] *Id.* at 646-47.

[158] *See supra* notes 144-55 and accompanying text.

interject the teaching of evolution into their biology courses in an attempt to gain approval under the University's policies.

Most parents wish for their children to have a variety of educational opportunities available to them at the university level; the University of California policies could necessitate withdrawing children from schools not teaching University-approved biology courses. On the other hand, there may be parents who vehemently disagree with the theory of evolution, and who may, in fact, wish that their children only learn creationism. In the future, that could no longer be an option.

C. Institute for Creation Research Graduate School v. Texas Higher Education Coordinating Board*: Public Licensing of Degrees in Creationism Science*

1. Background

While *Stearns* affected the decisions of families choosing an education for their children, an unpublished decision by the United States District Court of the Western District of Texas embraced creationism's religious nature in another area of private education. In *Institute for Creation Research Graduate School v. Texas Higher Education Coordinating Board*, a non-profit organization's graduate school, called the Institute for Creation Research Graduate School ("ICRGS"), filed an application for a certificate of authority to the Texas Higher Education Coordinating Board (the "Board") as required by state law in order for ICRGS to offer a Master of Science degree with a major in Science Education.[159] When the Board rejected the application, ICRGS claimed it was because of the school's "openly creationist viewpoint."[160]

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[159] Inst. for Creation Research Graduate Sch. v. Texas Higher Educ. Coordinating Bd., No. A-09-CA-382-SS, 2010 WL 2522529, at *1 (W.D. Tex. June 18, 2010). *See generally* TEX. EDUC. CODE ANN. § 61.304 (West 2005) ("A person may not grant or award a degree . . . on behalf of a private postsecondary educational institution unless the institution has been issued a certificate of authority to grant the degree by the board . . . .").

[160] *Institute*, 2010 WL 2522529, at *1 (internal quotation marks omitted).

2. The Litigation

ICRGS brought a series of constitutional and state law claims that the court specifically addressed one-by-one.[161] The court determined that the Board's policies had only an incidental effect upon the school's free exercise of religious beliefs and, therefore, under *Smith*, only rational-basis review was necessary for the Board's decision.[162] The court applied rational-basis review[163] and found that the state had "a . . . legitimate interest in protecting the public by ensuring any degree offered in Texas is meaningful and is based upon certain uniform institutional and curricular standards."[164] Because the policy was rationally related to the state's interest in protecting the integrity of degrees received by its citizens, the decision was a permissible restriction on the group's religious beliefs.[165]

At issue was commentary by members of the Board. One member of the Board had expressed concern over ICGRS's "very narrow and over-simplified approach to understanding . . . science." [166] He believed the school had the intent to indoctrinate students with religious teachings rather than instruct them on how to teach science.[167] Another Board member found problems with ICRGS's mission statements and course descriptions, as found in its degree catalog.[168] Excerpts from the degree catalog

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[161] *Id.* at *4. ICRGS brought a Section 1983 claim under Title 42 of the United States Code for violations of its First and Fourteenth Amendment rights. *Id.*; *see also* 42 U.S.C. § 1983 (2011) (A Section 1983 claim allows an individual or other party to claim equitable relief when their constitutional rights have been violated by a party acting under state authority.). ICRGS alleged that its free speech, free exercise, equal protection, and due process rights were violated and also brought various state law claims. *Institute*, 2010 WL 2522529, at *4.

[162] *Id.* at *6.

[163] A law that is facially neutral and generally applicable is subject only to rational basis review. The law or challenged policy must be rationally related to a legitimate state interest. *Id.*

[164] *Id.* at *8.

[165] *Id.* at *12. As the court noted, rational basis review usually defers to the government. *Id.* Federal courts will not judge the "wisdom or desirability of legislative policy determinations" or other administrative decisions by governmental bodies. *Id.* at *9 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)) (internal quotation marks omitted).

[166] *Id.* (internal quotation marks omitted).

[167] *Id.*

[168] *Id.* at *10.

included statements that "[i]t is the position of the institute that . . . all *genuine* facts of science support the Bible" and "[t]he creation record is factual, historical, and perspicuous; thus *all theories of origin and development that involve evolution in any form are false*."[169] All of this evidence was used to support the Board's position that the proposed science degree was religious in nature.[170] Therefore, the court accepted the Board's rationale for denying the degree application and found for the Board on the Free Exercise issue.[171] The Board's decision that ICRGS's program inadequately prepared its students for teaching science was rationally related to its legitimate state interest in maintaining the value of post-graduate degrees awarded inside Texas.[172]

Texas Higher Education Coordinating Board is another example of post-*Smith* free exercise jurisprudence at work in private education. As long as educational accreditation boards are granted the power to determine the adequacy of one's education for regulatory purposes, their decisions will be accepted even if they infringe upon a legally cognizable right.

CONCLUSION

The plight of creationism in private, religious schools is the result of changes in First Amendment jurisprudence. In *Employment Division, Department of Human Resources v. Smith*, the Supreme Court decided that it would no longer strike down generally applicable laws that indirectly inhibit religious practices under the Free Exercise Clause of the First Amendment; thus federal courts' analysis should now focus on making sure that the law before them is neutral and generally applicable.[173] Before

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[169] *Id.* at *11 (internal quotation marks omitted).

[170] *Id.* at *12.

[171] *Id.*

[172] *Id.* at *12. The court accepted the Board Commissioner's decision that the ICRGS's program "inadequately cover[ed] key areas of science and their methodologies [rejected] one of the foundational theories of modern science." *Id.* (internal quotation marks omitted). In addition, the court found for the Board on ICRGS's equal protection, due process, and state law claims. *See id.* at 13-20.

[173] Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 892 (1990). The Supreme Court stated that it would disregard its "consistent application of the free exercise doctrine" where a case involved "generally applicable regulations that burden religious conduct." *Id.* (O'Connor, J., concurring). In other words, these incidental

Smith, Free Exercise jurisprudence required that a court apply a type of strict-scrutiny balancing. An incidental burden on the free exercise of religion was only justified where the weight of a compelling state interest outweighed the resulting burden on religion.[174] After *Smith*, there is no longer a need for the government to show a compelling state interest if a generally applicable law or regulation presents a mere incidental burden upon a religion.[175]

Since federal courts have affirmed that creationism, and anything that derives from it, is a religious belief, public universities and state licensing boards have crafted generally applicable, religion-neutral policies that work against the teaching of creationism. The generally applicable policies effectively exclude creationism by stating that it does not fit within their acceptable scientific standards. *Smith* states that these policies only receive scrutiny under a rational basis review and thus these policies do not infringe upon the First Amendment's Free Exercise Clause. States may now apply their religion-neutral, generally applicable laws and policies so as to disfavor creationist teachings. The constitutionality of such negative treatment has withstood recent scrutiny by federal courts.

Some parents wish for their children to receive a creationism-based science education for religious reasons. In the past, children could receive such an education if their parents were willing to pay tuition at a private, religious school. A parent's right to give his or her child this type of education is consistent with principles of American religious liberty and freedom. Of course, private schools will always have the option of teaching creationism regardless of what public universities choose to accredit, but parents may be reluctant to send their children to schools with

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burdens were no longer a concern under Free Exercise jurisprudence, but only needed to pass muster under the extremely deferential standard of rational basis review.

[174] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[175] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); *see also* Cornerstone Christian Sch. v. Univ. Interscholastic League, 563 F.3d 127, 135 (5th Cir. 2009) ("The government does not impermissibly regulate religious belief . . . when it promulgates a neutral, generally applicable law or rule that happens to result in an incidental burden on the free exercise of a particular religious practice or belief.").

science programs that many public and private universities refuse to recognize.

*Charles Cowan**

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