2000


Rex R. Schultze

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol79/iss4/9

"It took God only six days to create the universe — it's gonna take the court two weeks to decide if it should be taught."¹

THE "GENESIS" (pun intended)

In March of 1925, the state of Tennessee enacted a law that made it unlawful for any teacher in any of the universities, normals or 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 divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.²

Shortly thereafter, George Rappelyea, a mining engineer, had a conversation with Thomas Scopes, a twenty-four year old science teacher in Dayton, Tennessee. The conversation involved the new antievolution law; specifically, Rappelyea suggested that Scopes teach the forbidden subject to his biology class, thereby securing for Dayton the honor of being the first test case. Scopes agreed. By arrangement, he taught evolution to his class, his friends told the authorities and Scopes was indicted.³

News of the "monkey trial" spread rapidly throughout the country. William Jennings Bryan volunteered to assist the prosecution headed by Attorney General E.T. Stewart. Bryan, as informal head of the fundamentalist movement, had traveled throughout the south urging the adoption of antievolution laws. His offer was enthusiastically ac-

---


² See id.

³ See id.
The ACLU took up Scopes's defense and had its own volunteer, Clarence Darrow.4

The trial began on July 10, 1925. Toward the end of the trial, after Bryan had offered himself as an expert witness, the judge presiding over the case allowed Darrow to cross-examine Bryan on his qualifications outside the presence of the jury. The jurors were the only ones to miss it, as the whole world heard the show by telegraph.5 The point of Bryan's willingness to testify, and Darrow's presence at the trial were summed up by the participants in the following exchange:

General Stewart: I want to interpose another objection. What is the purpose of this examination?

Mr. Bryan: The purpose is to cast ridicule on everybody who believes in the Bible, and I am perfectly willing that the world shall know that these gentlemen have no other purpose than ridiculing every Christian who believes in the Bible.

Mr. Darrow: We have the purpose of preventing bigots and ignoramuses from controlling the education of the United States and you know it, and that is all.6

The trial ended in Scopes's conviction and a fine, but was later reversed by the Tennessee Supreme Court on a legal technicality.7 The Court did, however, uphold the authority of the state to regulate the public school curriculum, stating that if the Legislature thinks that "the cause of education and the study of science generally will be promoted by forbidding the teaching of evolution in the schools of the state, we can conceive of no grounds to justify the court's interference."8

THE "EXODUS"

The exodus of the theory of evolution through legislation and the courts over the seventy-five years since the Scopes trial has had at least two distinct stages: the prohibition stage and the equal treatment stage.9 The issue now appears to be heading into a third stage involving various collateral attacks on the teaching of the theory of evolution in America's classrooms.

4. See id. at ii. This was the only instance in which Clarence Darrow ever volunteered his services.
5. See id.
6. Id. at 39-40. A complete reading of the famous cross-examination reveals that Bryan was not the strict fundamentalist insisting on a literal reading of the Bible; and stated that a "day" may have been "600,000,000 years."
8. Id.
EVOLUTION AND CREATION SCIENCE

STAGE 1 – Prohibition

The first stage involved legislative prohibitions against teaching evolution. Between 1921 and 1929 fundamentalists introduced anti-evolution bills into twenty state legislatures. States such as Mississippi, Arkansas, Florida, and Texas passed such legislation. Under the Tennessee Supreme Court's decision in Scopes, it was presumably legal to ban teaching the theory of evolution in public schools.

In 1928, the Arkansas Legislature enacted a statute making it unlawful for a teacher in any state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals." Violation of the statute was a misdemeanor and grounds for dismissal. That statute hibernated for almost forty years, during which time the theory of evolution became a staple in the curriculum of most classrooms in the United States.

In 1965, nearly forty years later, Susan Epperson, a biology teacher at Little Rock Central High School, filed suit challenging the constitutionality of the statute. In 1968, the Supreme Court ruled that the statute violated the First Amendment because it "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group." In striking down the Arkansas statute, the Supreme Court stated: "The First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."

STAGE 2 – Equal Treatment

The second stage in the legislative and judicial "evolution" of Darwin's theory did not take forty years; it quickly followed the decision in Epperson. Since legislators could not prohibit the teaching of evolution by statute, lawmakers sought to make sure that creationism was given "equal treatment," by giving it the same emphasis and attention whenever evolution theory was taught. The Tennessee Legislature was again in the forefront of "evolution" legislation, passing an act which required that whenever any textbook discussed theories of the origins or creation of human beings, it must give "an equal amount of

11. See Bjorklun, supra note 9, at 278.
13. Id.
16. Id. at 106.
17. See Bjorklun, supra note 9, at 278.
emphasis on the origins and creation of man and his world as the same is recorded in . . . the Genesis account in the Bible.” 18

The Sixth Circuit Court of Appeals addressed the constitutionality of the Tennessee statute in 1975 in Daniel v. Waters. 19 In Daniel, the court found that the statute violated the First Amendment because it gave a "clearly defined preferential position for the biblical version of creation." 20 The apparent problem with the statute's conformity to the First Amendment was its specific reference to the Genesis account of creation. To overcome this hurdle, a case needed to be made for the position that the Genesis account was more than a religious belief and that it was as "scientific" as the theory of evolution. 21

To meet this challenge, several fundamentalist Christian organizations began to promote the idea that the Genesis account is supported by scientific data and referred to it as "creation science" or "scientific creationism." The legislatures of two states, Arkansas and Louisiana, accepted that idea and each state's legislature enacted a Balanced Treatment Act in 1981. 22

When "creation science" reached the federal courts, however, it was not accepted as "science," but was deemed to be simply the advancement of religion. 23

McLean v. Arkansas Board of Education 24

In McLean, the federal district court in Arkansas applied the longstanding "Lemon test" 25 finding that the statute was not adopted for a secular purpose and that it primarily advanced religion. 26 The court found that the creation science law was "simply and purely an effort to introduce the biblical version of creation into the public school curricula." 27 Finding that creation science was based on the first eleven chapters of Genesis, the court rejected the contention that "creation science" is a science, and that "since creation-science is not science,

19. 515 F.2d 485 (6th Cir. 1975).
20. Id. at 489.
21. See Bjorklun, supra note 9, at 278-79.
22. See id. at 279.
23. See infra notes 24-33 and accompanying text.
25. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)(establishing the Establishment Clause test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion.").
27. Id. at 1272.
the conclusion is inescapable that the only real effect of (the act) is the advancement of religion.\(^{28}\)

\textit{Aguillard v. Treen}\(^{29}\)

The Louisiana Balanced Treatment Act received similar treatment by the federal courts in Louisiana. In \textit{Aguillard}, the plaintiffs prevailed on their motion for summary judgment because the statute had no secular purpose and its primary effect “promotes the beliefs of some theistic sects to the detriment of others” and thus “. . . violates the fundamental First Amendment principle that a state must be neutral in its treatment of religion.”\(^{30}\) In affirming the district court, the Fifth Circuit Court of Appeals held that “the Act violates the Establishment Clause of the First Amendment because the purpose of the statute is to promote a religious belief.”\(^{31}\) In June of 1987, the Supreme Court affirmed the Fifth Circuit Court decision stating:

The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose.\(^{32}\)

Following the decision in \textit{Aguillard}, the second stage in the travels of the “monkey” theory came to an end. As one commentator noted, “[s]tates could neither prohibit the teaching of evolution nor could they require creationism to be taught if evolution was covered.”\(^{33}\)

\textbf{STAGE 3 – Collateral Attack}

With the striking down of equal treatment legislation and the prohibition against teaching creation science, one would think that issues relating to the teaching of evolution in the schools were as dead as the dinosaurs (except those found in Jurassic Park, of course). One should think again! Those opposed to the teaching of the theory of evolution in public schools have sought means of collaterally attacking the teaching of the theory of evolution through the assertion of First Amendment rights of instructors. The argument is based on the academic freedom of instructors to teach and express their religious beliefs to their students. The opponents of the theory of evolution also rely on the assertion of First Amendment rights of the public for equal access, by providing equal time to present creation science to students.

\begin{itemize}
  \item \textit{Id.}
  \item 634 F. Supp. 426 (E.D. La. 1985).
  \item \textit{Id.} at 428-429.
  \item \textit{Aguillard v. Edwards}, 765 F.2d 1251, 1253 (5th Cir. 1985).
  \item Bjorklun, \textit{supra} note 9, at 279.
\end{itemize}
and encouraging legislative action to require biology books to state a
disclaimer from endorsement of the theory of evolution by the school
district.

1. Prohibiting the Teaching of Creationism or Creation Science
as Interference with the Academic Freedom Rights of
Teachers and Students

In Webster v. New Lenox School District No. 122,34 the Seventh
Circuit Court of Appeals faced the issue of whether a school district
violated the First and Fourteenth Amendments by prohibiting a
teacher from teaching a nonevolutionary theory of creation. In Web-
ster, a student in Ray Webster's junior high school "social studies class
complained that Mr. Webster's teaching methods violated principles of
separation between church and state."35 In response to the complaint,
"the New Lennox School Board . . ., through its Superintendent, ad-
vised Webster by letter that he should . . . refrain from advocating a
particular religious viewpoint" in his classroom instruction.36 Web-
ster responded by seeking further clarification, and asserting that his
discussion of religious issues was only intended to open the minds of
his students and to encourage students to explore alternative view-
points.37 The Superintendent then sent a letter to Webster stating
that objective discussions of the "historical relationship between
church and state were permissible when such discussions were an ap-
propriate part of the curriculum."38 However, the advocacy of a Chris-
tian viewpoint was prohibited.39 Additionally, Webster was
"specifically instructed not to teach creation science, because . . . this
theory had been held by the federal courts to be religious advocacy."40
Webster filed suit claiming that the prohibition on teaching creation
science was censorship in violation of the First and Fourteenth
Amendments.41

"The district court concluded that Mr. Webster did not have a first
amendment right to teach creation science in a public school."42 Sig-
ificant for school districts in dealing with such personnel matters,
the district court found that the letters between Webster and the Su-
perintendent were critical, particularly the second letter from the Su-
perintendent to Webster wherein the Superintendent "clearly
indicated exactly what conduct the school district sought to pre-

34. 917 F.2d 1004 (7th Cir. 1990).
35. Id. at 1005.
36. Id.
37. See id. at 1006.
38. Id.
39. See id.
40. Id.
41. See id.
42. Id.
scribe.”\textsuperscript{43} The court noted that the wide latitude school boards have in setting curriculum must be tempered by the limitations established by the Constitution.\textsuperscript{44} The court stated that “the school board could not enact a curriculum that would inject religion into the public schools. Moreover, the school district had a responsibility to ensure that the establishment clause was not violated.”\textsuperscript{45} In dismissing Webster’s complaint, the district court stated:

Webster has not been prohibited from teaching any nonevolutionary theories or from teaching anything regarding the historical relationship between church and state. Martino’s [the superintendent] letter of October 13, 1987 makes it clear that the religious advocacy of Webster’s teaching is prohibited and nothing else. Since no other constraints were placed on Webster’s teaching, he has no basis for his complaint and it must fail.\textsuperscript{46}

The Seventh Circuit Court of Appeals affirmed the district court’s dismissal of the complaint.\textsuperscript{47} The circuit court rejected Webster’s assertion that he had a First Amendment right to determine the curriculum content of his class.\textsuperscript{48} Quoting from an earlier Seventh Circuit decision, the court said “[t]here is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens and society. It cannot be left to individual teachers to teach what they please.”\textsuperscript{49} The compelling state interest in this case was “to ensure that Mr. Webster did not stray from the established curriculum by injecting religious advocacy into the classroom.”\textsuperscript{50}

The court relied on the Supreme Court’s decision, which held that school officials do not violate the First Amendment “so long as their actions are reasonably related to legitimate pedagogical concerns.”\textsuperscript{51} The court concluded that the prohibition on teaching creation science to junior high school students was appropriate because of “the school board’s important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations.”\textsuperscript{52}

In a footnote to its opinion, the Seventh Circuit noted that a student, Matthew Dunne, was another plaintiff in Webster’s initial suit in the district court.\textsuperscript{53} Dunne claimed that he had a First Amendment

\begin{footnotes}
\item[43] \textit{Id.}
\item[44] See \textit{id.}
\item[45] \textit{Id.}
\item[47] See \textit{Webster,} 917 F.2d at 1008.
\item[48] See \textit{id.} at 1007.
\item[49] \textit{Id.}
\item[50] \textit{Id.} at 1007.
\item[51] \textit{Id.} at 1008 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988)).
\item[52] \textit{Webster,} 917 F.2d at 1007.
\item[53] See \textit{id.} at 1007 n.2.
\end{footnotes}
right to receive information about creation science and prohibiting Webster from teaching it interfered with that right. The district court dismissed Dunne's complaint on the basis that "the school districts compelling interest in avoiding establishment clause violations and in protecting the First Amendment rights of other students" outweighed Dunne's desire to obtain creation science instruction. Since Dunne did not appeal this decision, the academic freedom rights of students to receive creationism information were not a part of the Seventh Circuit Court decision.

2. The Theory of Evolution as a Religious Belief System, Causing its Teaching to be a Violation of the First Amendment's Establishment Clause

In Peloza v. Capistrano Unified School District a high school biology teacher brought an action "challenging the school district's requirement that he teach evolutionism, as well as a school district order barring him from discussing his religious beliefs with students." Peloza's complaint alleged that the school district violated the Establishment Clause by pressuring and requiring him to teach evolutionism, a religious belief system, as a valid scientific theory. Evolutionism, according to Peloza, "postulates that the 'higher' life forms . . . evolved from the 'lower' life forms . . . and that life itself 'evolved' from non-living matter." It is therefore "based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process." Peloza claims that evolutionism is not a valid scientific theory because it is based on events which "occurred in the non-observable and non-recreatable past and hence are not subject to scientific observation." Finally, in his appellate brief he alleges that the school district is requiring him to teach evolutionism not just as a theory, but rather as a fact.

The court characterized Peloza's complaint as follows:

Charitably read, Peloza's complaint at most makes this claim: the school district's actions establish a state-supported religion of evolutionism, or more generally of "secular humanism." According to Peloza's complaint, all persons must adhere to one of two religious belief systems concerning "the origins of life and of the universe:" evolutionism, or creationism. Thus, the school district, in teaching evolutionism, is establishing a state-supported "religion."

We reject this claim because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes. Indeed, both the dictionary definition of religion and the clear weight of the case law are to the contrary. The Supreme Court has held unequivocally that while the belief in a divine creator of the

54. Id.
55. 37 F.3d 517 (9th Cir. 1993).
56. Id. at 517.
57. Id. at 520 (citations omitted).
universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not.\textsuperscript{58}

The Court of Appeals affirmed the decision of the district court, stating:

The district court dismissed [Peloza's] claim, stating: "Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause. . . . Evolution is a scientific theory based on the gathering and studying of data, and modification of new data. It is an established scientific theory which is used as the basis for many areas of science. As scientific methods advance and become more accurate, the scientific community will revise the accepted theory to a more accurate explanation of life's origins. Plaintiff's assertion that the teaching of evolution would be a violation of the Establishment Clause is unfounded." We agree.\textsuperscript{59}

As such, the court held evolution was not a religion, and its teaching did not constitute a violation of the Establishment Clause of the Constitution.

3. \textit{Free Speech and the Right of a School District to Restrict a Teacher's Ability to Talk to Students about Religion During Duty Hours}

In \textit{Peloza}, issues were also raised about whether a school district should regulate a teacher's espousal of his or her religious beliefs to students during duty hours, whether such action was a violation of the teacher's rights of free speech, and whether such action was discriminatory under federal law.\textsuperscript{60}

Peloza claimed that "the school district instructed him to refrain from discussing his religious beliefs with students during 'instructional time,' and to tell any students who attempted to initiate such conversations with him to consult their parents or clergy."\textsuperscript{61} The school district had reprimanded Peloza for inculcating his religious beliefs to his students. As set forth in the complaint, the reprimand stated:

You are hereby directed to refrain from any attempt to convert students to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day.\textsuperscript{62}

Peloza sought a declaration that the school district's "definition of instructional time is too broad, and that he should be allowed to participate in student-initiated discussions of religious matters when he

\textsuperscript{58} Id. at 521 (citations omitted).

\textsuperscript{59} Id. at 521-22 (citations omitted).

\textsuperscript{60} See id. at 522-24.

\textsuperscript{61} Id. at 522.

\textsuperscript{62} Id. (citations omitted).
is not actually teaching class." The court found that "[t]he school district's restriction on Peloza's ability to talk with students about religion during the school day is a restriction on his right of free speech," but found that such restriction was justified by citing U. S. Supreme Court precedent: "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."64

The court also noted:

"[T]he interest of the State in avoiding an Establishment Clause violation may be a compelling one justifying an abridgement of free speech otherwise protected by the First Amendment...." This principle applies in this case. The school district's interest in avoiding an Establishment Clause violation trumps Peloza's right to free speech.65

The court went on to state that:

While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman ....66

4. Discrimination

In Helland v. South Bend Community School Corporation,67 a substitute teacher, Helland, sued the school district for allegedly violating Title VII and section 1983 by removing him from a list of teachers eligible for substitute teacher positions.68 The United States District Court for the Northern District of Indiana granted the corporation's motion for summary judgment.69 Helland appealed. The Court of Appeals held that "(1) teacher failed to show that corporation's proffered reasons for its actions were pretext for discrimination in violation of Title VII, and (2) removing teacher from list was least restrictive

63. Id.
65. Id. at 522 (quoting Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993)).
66. Id. at 522 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)).
67. 93 F.3d 327 (7th Cir. 1996).
68. See id. at 328.
69. See id.
means of furthering compelling government interest in avoiding unconstitutional interjection of religion into public school classrooms."

From May 1979 to June 1980, and again from August 1985 to November 1993, Helland worked as a substitute teacher for the South Bend Community School Corporation. During that time, several principals and teachers for whom he had substituted submitted negative evaluations of Helland's performance and requested that he not return to their schools or classrooms. The evaluations indicated that Helland failed to follow lesson plans left for him by the teachers for whom he substituted and that he failed to maintain control of his classes. One teacher complained that Helland drank a nonalcoholic beer in class, and that the students believed it was alcoholic. Two teachers commented on Helland's lack of understanding of high school students, noting an incident where Helland gave his car keys to a student who had been suspended from the school grounds. In addition, several teachers complained that Helland proselytized in his classes by reading the Bible aloud to middle and high school students, distributing Biblical pamphlets, and professing his belief in the Biblical version of creation in a fifth grade science class. After the latter incident, Helland agreed not to give the students an assignment if they agreed not to tell anyone about the discussion.

The School Corporation warned Helland numerous times that his poor performance as a substitute and his improper interjection of religion into the classroom were grounds for removing him from the substitute teacher list. Finally, in November 1993, it notified Helland that it no longer would hire him as a substitute teacher because he did "not follow lesson plans, [had] problems with classroom management and on some occasions . . . interjected . . . religious-oriented materials into portions of your classroom presentation.

Helland filed a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days of his removal from the School Corporation's substitute teacher list. 42 U.S.C. § 2000e-5(e)(1). The EEOC declined to bring an action on Helland's behalf. Helland then commenced this lawsuit in federal court, alleging that the School Corporation discriminated against him because of his religion in violation of Title VII, section 1983, and RFRA.

a. Title VII and Section 1983 Claims

In response to Helland's Title VII and section 1983 claims, the Seventh Circuit found Helland had no direct evidence of intentional discrimination. The court then considered whether Helland had proven that the "legitimate" reasons for the school district's actions were not its true reasons, but were a pretext for discrimination. The burden was on the school district to articulate a "legitimate nondiscriminatory reason" for removing Helland from the substitute teacher list. The court cited the two reasons given by the school district to justify its actions:

First, it stated that it removed Helland from the substitute teacher list because his job performance had not been satisfactory. In support of this con-
tention, the School Corporation offered negative evaluations submitted by a number of teachers who criticized Helland’s failure to follow the lesson plans the teachers left for him, and some of whom specifically requested that Helland not substitute for them again. Second, the School Corporation stated that it had dismissed Helland because he defied repeated warnings against interjecting his religious beliefs into the classrooms.\textsuperscript{74}

The court found both of these were legitimate nondiscriminatory reasons for dismissing him.\textsuperscript{75}

The Seventh Circuit then reviewed the evidence and found that Helland had failed to produce evidence that the school district had a pretext, a “lie,” for discrimination.\textsuperscript{76} The court found that the administration relied upon numerous reports that provided sufficient nondiscriminatory reasons to conclude that Helland’s work was below average, and that the school district’s removal of Helland was not because of his religion itself.\textsuperscript{77}

\textit{b. Religious Freedom Restoration Act}

Helland’s complaint also alleged that by “terminating [him] for refusing to cease from carrying his Bible to work and to cease reading his Bible in privacy during job breaks, [the school district] substantially burdened [his] free exercise of religion,” and therefore violated the Religious Freedom Restoration Act (“RFRA”).\textsuperscript{78} “Under RFRA, the government may substantially burden a person’s exercise of religion only if it demonstrates that its action furthers a compelling governmental interest and that its action is the least restrictive means of furthering that interest.”\textsuperscript{79}

The court found that the school district had a “compelling governmental interest” to prevent the teaching of religion in public schools:

Helland appropriately “does not dispute that there is a compelling governmental interest against teaching religion in public schools.” Indeed the Constitution requires governmental agencies to see that state-supported activity is not used for religious indoctrination. . . . Thus, the issue for us is whether removing Helland from the substitute teacher list was the least restrictive means of furthering the school district’s compelling governmental interest.\textsuperscript{80}

Helland also contended that the school district infringed on his right to carry his Bible to work and to read the Bible in privacy during job breaks. The court found no merit in this part of Helland’s complaint:

What the school district frowned upon was not Helland’s carrying the Bible to work and reading it in privacy, but his reading the Bible aloud to students and

\textsuperscript{74} Id. at 330.
\textsuperscript{75} See id.
\textsuperscript{76} Id.
\textsuperscript{77} See id.
\textsuperscript{78} Id. at 330; 42 U.S.C. § 2000bb (1994).
\textsuperscript{80} Helland, 93 F.3d at 331 (citations omitted).
discussing religion during class, in contravention not only of the Constitution, but also of the lesson plans left for him. A school can direct a teacher to “refrain from expressions of religious viewpoints in the classroom and like settings.” And in fact the School Corporation has a constitutional duty to make “certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.”

5. Providing Creation Science Supporters Equal Time to Present Theories on the Origin of Life to Students

The ruling of the Supreme Court in Edwards v. Aguillard82 established the rule of law that school districts in the United States are to follow regarding the teaching of creationism or creation science in the public schools of the land.83

82. See id. at 589-91. The Supreme Court summarized the line of decisions that set the parameters for religious inculcation in the public schools:

Stone v. Graham invalidated the State’s requirement that the Ten Commandments be posted in public classrooms. “The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.” 449 U.S. at 41, 101 S. Ct. at 194. As a result, the contention that the law was designed to provide instruction on a “fundamental legal code” was “not sufficient to avoid conflict with the First Amendment.” Ibid. Similarly Abington School Dist. v. Schempp held unconstitutional a statute “requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord’s Prayer by the students in unison,” despite the proffer of such secular purposes as the “promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.” 374 U.S. at 223, 83 S. Ct. at 1572.

As in Stone and Abington, we need not be blind in this case to the legislature’s preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. It was this link that concerned the Court in Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed.2d 228 (1968) which also involved a facial challenge to a statute regulating the teaching of evolution. In that case, the Court reviewed an Arkansas statute that made it unlawful for an instructor to teach evolution or to use a textbook that referred to this scientific theory. Although the Arkansas antievolution law did not explicitly state its predominant religious purpose, the Court could not ignore that “[t]he statute was a product of the upsurge of fundamentalist [internal quotations omitted] religious fervor” that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible. Id., 393 U.S., at 98, 106-107, 89 S. Ct. at 267, 271-272. After reviewing the history of antievolution statutes, the Court determined that “there can be no doubt that the motivation for the [Arkansas] law was the same [as other anti-evolution statutes]: to suppress the teaching of a theory which, it was thought, denied [internal quotations omitted] the divine creation of man.” Id. at 109, 89 S. Ct., at 273. The Court found that there can be no legitimate state interest in protecting particular religions from scientific views “distasteful to them,” id., at 107, 89 S. Ct., at 272 (citation omitted), and concluded “that the First Amendment
As one commentator noted:

Religious fundamentalists over the years have attempted to introduce creationism or creation science in public school classrooms in order to counterbalance the teaching of evolution. In light of Aguillard, attempts disguised as balanced treatment acts appear doomed under the Establishment Clause of the First Amendment. The Aguillard court and other courts have looked beyond an expressed secular purpose for balanced treatment acts. Courts have taken into consideration the religious pronouncements of sponsors of the bill and key witnesses, the source of such bills (such as the major creation-science centers nationwide), as well as other legislative history. Courts then used such information to strike down equal time or balanced treatment laws as impermissible advancement of religion in violation of the secular purpose prong of the Lemon neutrality test.\(^4\)

Creationists argue that creation science can be taught in the classroom without biblical reference because it is based on scientific data. However, as noted by Schaeffer, based on a study of the basic tenets of creation-science, the data relied upon is inherently religious and unsubstantiated scientifically.\(^5\) With the line of authority cited in Aguillard prohibiting the "balanced treatment" approach, to avoid violation of the Establishment Clause, it would appear that school districts may not arrange for, sanction, support, or promote presentations by third parties to students of creationism or creation science, either during the school day or after school hours. School districts may, if they have created an open forum, be required to allow the use of school facilities, during nonschool hours by those who wish to make presentations regarding religious issues.

6. **Equal Access to Public Facilities to Present a Program on the Origin of Life**

In *Pfeifer v. City of West Allis*\(^6\) an action was brought under section 1983 to challenge the city's refusal to allow the plaintiff to use a meeting room in the public library to present a program on creationism. Upon cross-motions for summary judgment, the district court, held that: "(1) library's meeting room was a designated public forum for First Amendment purposes, and (2) city's refusal to allow plaintiff to use a meeting room in the public library to present a program on creationism violated his rights under the First and Fourteenth Amendments."\(^7\)

---


\(^5\) See id.

\(^6\) 91 F. Supp.2d 1253 (E.D. Wis. 2000).

\(^7\) Id. at 1253.
The court first considered the applicable law on the issue of whether the First Amendment entitled Pfiefer to use the public library for his program on creationism. It found the following legal tenets to be applicable:

1. A governmental body is subject to the constraints of the First Amendment.  

2. The extent to which a person may engage in expressive activity on government property is determined by whether the property is a "public forum."  

3. "Limitations . . . on classes of speech vary depending upon whether the relevant forum is determined to be a traditional open forum, a public forum created by government designation or a nonpublic forum."  

4. Traditional public forums where government constraint on expression is severely limited have been found to be streets, parks, and other traditional public facilities for the expression of ideas and opinions.  

5. "Reasonable content-neutral time, place and manner restrictions are permissible in a traditional public forum."  

6. "A designated public forum consists of public property that the state has opened for use by the public as a place for expressive activity and is created by the governmental entity opening a nontraditional site for expressive activity."  

7. "Unlike a traditional public forum, the dedication of a designated public forum may be revoked" by the governmental entity.  

8. A designated public forum can be created for a limited purpose such as:
   A. Use by certain groups;
   B. Discussion of certain subjects; and the subject matter can be limited in accordance with the character of the forum, e.g., and is called a "limited public forum."  

9. Restrictions on speech in a limited public forum are subject to strict scrutiny and regulations of speech in that the forum must be reasonable and viewpoint neutral.  

88. See id. at 1258.  
89. Id.  
90. Id.  
91. See id.  
92. Id.  
93. Id.  
94. Id.  
95. See id at 1259.  
96. See id.
10. Nonpublic forums are public property that is neither a traditional nor dedicated public forum; they are not open to the general public. "In a nonpublic forum courts give great weight to the government's desire to preserve the property for its intended, usually limited, use. Regulation of speech in a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the form and are viewpoint neutral."\(^97\)

The court noted that the rules governing public and nonpublic forums are "intended to strike a balance between the interest in free speech and the countervailing interest in efficient operation of government."\(^98\) In Pfiefer's case, the court looked to the policy and practice of the city to ascertain whether it intended to designate the room that Pfiefer requested for his presentation to be open to assembly and debate as a public forum. The court noted that a governmental entity, by affirmative action, can transform a nonpublic forum into a public forum by permitting a wide variety of persons or groups to hold meetings in such facilities.\(^99\)

In applying these principles, the court held that the most relevant factor is the governmental entity's "intent" as exemplified by the nature of the property and its compatibility with the expressive activity sought. The second relevant factor is the "extent of use granted."\(^100\) Pfiefer had requested the Constitution Room in the library. The library's policies allowed the room to be used for public programs sponsored by nonprofit educational and cultural agencies, and encouraged availability of the room to local community organizations. The court found that "community" included the neighborhood and the public, and those included groups with a religious message. The court also looked at the wide variety of groups whose applications to use the room were approved. The court then considered whether the room was compatible with the expressive activity, e.g., whether the room use was consistent with oral communication.\(^101\)

Finally, the court noted that Pfiefer was denied use of the Constitution Room because his presentation was religious in nature. In finding that the city was not justified in denying Pfiefer use of the room, the court stated:

Because the library granted access to a wide variety of nonreligious private organizations, . . . there is no "realistic danger that the community would

\(^97\) Id. at 1259.
\(^98\) Id.
\(^99\) See id. at 1259-60.
\(^100\) Id. at 1261.
\(^101\) See id. at 1265.
think that the [Library] was endorsing religion or any particular creed, and any benefit to religion or the Church would have been incidental."102

School districts should apply the criteria set forth in Pfiester to determine if they have created a dedicated public forum, or transformed their facilities, or a portion thereof, into a public forum or limited public forum when confronted with persons who wish to make presentations with religious content, including presentations on creation science.

7. The "Scientific Theory of Evolution Disclaimer" Policy

The Seventh Circuit Court of Appeals, in Freiler v. Tangipahoa Parish Board of Education,103 decided the constitutionality of a school board policy which required teachers to disclaim any endorsement of the theory of evolution by the school district before teaching it. In Freiler, parents of public school students brought an action against a parish school board and its individual members, challenging the constitutionality of the board's resolution and seeking injunctive and declaratory relief. The district court held that the board's resolution, requiring teachers to disclaim the board's endorsement of the theory of evolution, was passed for religious reasons and had the effect of endorsing religion in violation of the Establishment Clause. The Seventh Circuit's opinion cited the exact language of the disclaimer:

On April 19, 1994, the School Board adopted the following resolution, which shall be referred to as "the disclaimer":

Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation, the following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.104

The plaintiffs challenged the disclaimer based upon the First Amendment to the United States Constitution, which states that:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and on the basis of Article 1, § 8 of the Louisiana Constitution, which states that "No law shall be enacted respecting

102. Id. at 1264.
104. Id.
an establishment of religion or prohibiting the free exercise thereof." The issue presented [to the Court was] whether the disclaimer violated the Establishment Clause.105

The court started its analysis by finding that the prohibitions contained in the First Amendment to the United States Constitution were rendered applicable to the states in the Fourteenth Amendment. The court then stated:

There is a plethora of jurisprudence interpreting this clause. While there have been decisions which have not named it specifically, the decision in Lemon v. Kurtzman . . . enunciated the seminal method of analysis (dubbed the Lemon test) to be employed when determining whether governmental action runs afoul of the Establishment Clause, as follows:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion" . . . If the proposed legislation does not satisfy each of these prongs, it violates the Establishment Clause.106

The court went on to find that, in order to satisfy the first prong of the Lemon test, the resolution must have a secular legislative purpose, noting:

The Supreme Court in Edwards v. Aguillard, . . . studied the legislative purpose underlying the passage by the Louisiana Legislature of the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act (Creationism Act). The Edwards Court analyzed both the official stated purpose and the motivations behind the promulgation of the statute, as evidenced by the discussion of the legislative sponsor and other legislators, to determine the true purpose. The Court explained:

A governmental intention to promote religion is clear when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general [citation omitted], or by advancement of a particular religious belief [citation omitted]. If the law was enacted for the purpose of endorsing religion, "no consideration of the second or third criteria [of Lemon] is necessary."107

The court then discussed the rationale of the Supreme Court:

[The Supreme Court] has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.108

In finding that the disclaimer resolution mandated by the School Board was unconstitutional, the court stated:

105. Id. at 824-25 (citations omitted).
106. Id. at 824-25.
107. Id. at 826 (quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985)).
108. Id. at 826 (citing Edwards v. Aguillard, 482 U.S. 578, 584 (1987)).
As hard as it tries to, this Court cannot glean any secular purpose to this disclaimer. While the School Board intelligently suggests that the purpose of the disclaimer is to urge students to exercise their critical thinking skills, there can be little doubt that students already had that right and are so urged in every class. The School Board also stresses that the point is that the teachers advise the students that they have the right to form their own opinions or maintain the beliefs taught to them by parents or in Sunday School on the origin of life. This Court can hardly conceive that students do not already have that right, or are unaware that they have it, or conversely, in its absence, that teachers in Tangipahoa Parish public schools teach students that they do not have the right to believe in Divine Creation, if they so choose. As the Wallace Court recognized, if there is no clearly secular purpose to the act, the Court is left with but two conclusions: (1) the act was enacted for religious purposes, or to convey a message of endorsement of religion; or (2) the act had no purpose. In the absence of a finding that the School Board passed a meaningless or irrational resolution, the Court must find that the disclaimer was passed for religious reasons. A review of all of the evidence presented leaves little doubt that the reasons for the adoption of the resolution were religious. Even the School Board acknowledges the religious underpinnings of the disclaimer, if somewhat indirectly. It states in its Trial Brief that the “School Board approved the resolution as a means of responding to the sensibilities and sensitivities of a diverse, pluralistic student population and their parents” and as “a disclaimer from an official orthodoxy concerning a controversial topic upon which many hold strong but differing opinions.” These “sensibilities and sensitivities” are religious ones, however, because they relate to the espousal of parents and students of religion, “the expression of man’s belief in and reverence for a superhuman power recognized as the creator and governor of the universe.” What offends parents, students, and School Board members about the teaching of evolution, and the reasons which underlay the Creation Science proponents, is that the teaching of the scientific theory of evolution in public schools is not accompanied by the theory, indeed the belief, that a Supreme Being was the designer and creator of humankind.109

The plaintiffs in Freiler petitioned the United States Supreme Court for a writ of certiorari. That petition was denied on June 19, 2000, but went down fighting. In dissenting from the denial of certiorari, Justice Scalia, who was joined by Chief Justice Rehnquist and Justice Thomas, opined that the Fifth Circuit erroneously applied the Lemon test in a manner “so erroneous as independently to merit the granting of certiorari, if not summary reversal.”110 Scalia notes that under the second prong of the Lemon test, the “principal and primary effect of state action must be one that neither advances nor inhibits religion.”111 Scalia then states:

Far from advancing religion, the “principal or primary effect” of the disclaimer at issue here is merely to advance freedom of thought. At the outset it is worth noting that the theory of evolution is the only theory taught in the Tangipahoa Parish schools. As the introductory paragraph of the resolution suggests, the disclaimer operates merely as a (perhaps not too believable) “disclaimer from endorsement” of that single theory, and not as an affirmative endorsement of any particular religious theory as to the origin of life, or even of religious theo-

109. Id. at 829.
111. Id. at 2708.
ries as to the origin of life generally. The only allusion to religion in the entire disclaimer is a reference to the "Biblical version of Creation," mentioned as an illustrative example—surely the most obvious example—of a "concept" that teaching of evolution was not "intended to influence or dissuade." 112

Justice Scalia asserts that the disclaimer merely affirms "the basic right and privilege of each student to form his/her own opinion," maintain their own beliefs, and encourages students to closely examine each alternative before forming an opinion. 113 In his concluding paragraph Justice Scalia aptly summarizes the state of the law today, and recognizes that the "Monkey Business Continues . . . ."

In Epperson v. Arkansas, . . . we invalidated a statute that forbade the teaching of evolution in public schools; in Edwards v. Aguillard, . . . we invalidated a statute that required the teaching of creationism whenever evolution was also taught; today we permit a Court of Appeals to push the much beloved secular legend of the Monkey Trial one step further. We stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration. I dissent. 114

THE CONCLUSION

In the play and movie "Inherit the Wind," Matthew Harrison Brady (William Jennings Bryan) is at a rally in support of his prosecution of the young teacher (Thomas Scopes). At the rally a fundamentalist minister is railing against those who do not accept the literal reading of the Bible, stating that all evolutionists are condemned to eternal damnation, including his daughter's fiancé, the young teacher (Scopes). To soothe the preacher, Bryan quoted Proverbs: "He who brings trouble on his family will inherit only the wind, and the fool will be the servant to the wise." 115

At the end of the play, Henry Drummond (Clarence Darrow), in fighting to allow schools to teach the theory of evolution, cites Brady's quoting of this verse as the moral of the trial: One who forces his ideas of how things are upon others, without allowing them to think for themselves, shall "inherit the wind." After seventy-five years, the pendulum has swung to the other extreme, with Justice Scalia opining that the disclaimer in Freiler only encourages freedom to consider theories of the origin of life other than the theory of evolution. The contest over whose ideas will be presented to the public school children of our land remains a significant issue. Schools must be vigilant to protect their curriculums from violations of the Establishment Clause while allowing for free expression of ideas at appropriate times in ap-

112. Id. (emphasis added).
113. Id.
114. Id. at 2709 (Scalia, J., dissenting) (citations omitted).
propriate places. As that most famous American philosopher Yogi Berra said, “It ain’t over ’til it’s over.” The struggle to address the teaching of the origin of life on our tiny blue planet “ain’t over;” the monkey business continues . . . .