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The First Amendment and Licensing Biology Teachers in Creationism

Benjamin W. Emerson
University of Richmond

THE FIRST AMENDMENT AND LICENSING BIOLOGY TEACHERS IN CREATIONISM

I. INTRODUCTION

A. *Historical Background*

The constitutional provisions separating church and state have long provided fertile ground for conflict resulting in often-bitter courtroom battles. From the famous Scopes "monkey trials" of 1927 in which Clarence Darrow eloquently argued for the teaching of Darwin's theory of evolution in the public schools,[1] through the decisions of the sixties, seventies, and eighties banning prayer,[2] the posting of the Ten Commandments,[3] and similar practices, the conflict has finally come full circle, with fundamentalist Christian groups now arguing that the Biblical account of creation should be taught in public schools as scientific theory.[4]

The latest courtroom skirmishes have pitted fundamentalists against evolutionists, with creationists attempting to force the public schools to allow or require the teaching of creation-science as well as evolution.[5] The advocates of creation-science, or creationism, allege scientific support for the Biblical version of creation and assert the relatively recent, sudden creation of the earth and the life on it by a divine creator, the separate and distinct ancestry of man and ape, and the existence of a worldwide floor, which accounts for much of the earth's geology. Evolutionary theorists, on the other hand, propose the gradual development of man and other organisms from lower forms of life that slowly evolved in a largely automatic and random process, without intervention by a divine being.[6]

In numerous attempts to bring creation-science into the classroom despite the strictures of the first amendment, creationists have argued variously that creation-science is not religion but science,[7] that teaching only evolution is a violation of the free exercise of religion because it undermines the religious convictions of students who believe in creationism,[8] and that teaching creation-science is necessary to offset the harmful ef-

1. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).
2. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962).
3. Stone v. Graham, 449 U.S. 39 (1980).
4. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982) (Balanced Treatment Act held to violate establishment clause of the first amendment).
5. *Id.*
6. *Id.* at 1264 (quoting Balanced Treatment for Creation-Science and Evolution-Science Act § 4, ARK. STAT. ANN. § 80-1663 (Supp. 1981)).
7. Bird, *Creation-Science and Evolution-Science in Public Schools: A Constitutional Defense Under the First Amendment*, 9 N. KY. L. REV. 159, 167-70 (1982).
8. *Id.* at 197.

fects of teaching evolution.[9] Evolutionists argue that teaching creationism is simply religious instruction cloaked as science and, as such, violates the free exercise and establishment clauses of the first amendment.[10] In addition, many scientists argue that the content of science courses should be determined by the scientific community objectively weighing scientific evidence and not by religious sects or politicians catering to various interest groups.[11]

B. *Biology Teacher Licensing Controversy*

The most recent controversy, and one that has yet to enter the courts, involves whether or not a state can, or should, license teachers to teach biology when their training is in creation-science rather than evolution.[12] Previous cases have dealt with the constitutionality of including creation-science in the curriculum,[13] but not with the constitutionality of the licensing question. Licensing a biology teacher who has been trained in creationism rather than evolution raises four distinct issues under the first amendment:

1. Does denial of licensing violate the teacher's free-exercise-of-religion rights?

2. Does denial of licensing violate the teacher's freedom-of-speech rights?

3. Does licensing violate the establishment clause by establishing the religion of creationism?

4. Does denial of licensing violate the establishment clause by establishing Secular Humanism as a religion?

C. *Scope of Comment*

This comment will analyze these issues in an attempt to predict their treatment by the courts, under the general assumptions that the teacher

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9. *Id.* at 204; *see* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255.

10. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

11. Roark, *A 'New Synthesis' in Evolution Leads Scientists to Ask When and How Life Began*, CHRON. HIGHER EDUC., Mar. 23, 1981, at 3-4.

12. In Virginia, the controversy has centered on whether the State Board of Education should license graduates of Liberty Baptist College to teach biology in the public schools. Because its graduates are trained in creationism and because evangelist and spiritual leader of the college, Jerry Falwell, has said that Liberty Baptist professors will teach that evolution is "foolish . . . invalid, . . . that the Bible account [of life origins] is true and all others are not," many educators fear that graduates from the college will be teaching religion instead of science in their biology classrooms. Richmond Times-Dispatch, May 19, 1982, at B3, col. 1.

13. *See infra* notes 64-65, 87-99 and accompanying text.

is seeking licensing to teach in public, not private, schools, and that the teacher, because of his training in creationism, intends to teach a biology course based on creation-science, with evolution taught, if at all, as a minor, invalid theory.[14]

II. Denial of Licensing and the Free Exercise Clause

A. *Free Exercise Balancing Test*

The free exercise clause of the first amendment prohibits the state[15] from passing laws regulating religious beliefs as such or from prohibiting the free exercise of any religion. The fundamental requirement of any free exercise claim is coercion by the state.[16] That is, the state must have used its power to force or to attempt to force the individual not to practice his religion as he chooses. Without some show of force or coercion, no free exercise violation can occur. This coercion must also result in a burden on the individual's practice of a bona fide religion[17] by inhibiting that practice or by requiring conduct contrary to the individual's religious convictions.[18] Generally, the coercion takes the form of forcing the individual to choose between his religious beliefs and some important governmental benefit.[19] However, not all coercive burdens imposed by the government violate the first amendment. The coercive burden must also outweigh the state's public interest in imposing that burden.[20] Should the state interest

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14. These assumptions comport with the original facts of the Liberty Baptist College situation before the objectives of the biology training program were altered in response to criticism by the Virginia State Board of Education. *See supra* note 12.

15. Cantwell v. Connecticut, 310 U.S. 296 (1940) (first amendment applied to the states through the fourteenth amendment).

16. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 423, 430 (1962).

17. "Bona fide" religion has been liberally construed by the courts and includes the freedom to practice no religion at all or to practice one not based on belief in a Supreme Being. *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (definition of religion expanded to include those not professing belief in Supreme Being and reaffirming protection of belief in no religion at all); People v. Pierson, 176 N.Y. 201, 211-12, 68 N.E. 243, 247 (1903) (Christian Catholic Church, which believed in divine healing, recognized as religion).

18. Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

19. *E.g.*,

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert v. Verner, 374 U.S. 398, 404 (1963).

20. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (state interest in compulsory school attendance outweighed by burden of potential destruction of Amish faith); Gillette v. United States, 401 U.S. 437 (1971) (government interest in military conscription outweighs religious convictions based on particular war); Sherbert v. Verner, 374 U.S. 398 (1963) (possibility of

be sufficiently compelling, the action does not violate the first amendment despite the coercive burden it places on the individual.[21] The result is a balancing process by which the court weighs the burden on the individual against the benefit to the state.

In a situation where a teacher trained in creationism is denied licensing by the state, any possible free exercise violation must therefore be analyzed by balancing the burden on the teacher against the interest of the state in denying licensing.

B. *State Interest in License Denial*

Although not absolute, the state does have a compelling interest in providing public education[22] and in disseminating knowledge developed by a responsible academic community.[23] In addition, the state has an interest in the efficiency and productive operation of its public schools.[24] Creationism has frequently been characterized as unscientific and, as such, is not generally accepted by the academic world as a scientific theory of the earth's origins, but rather a religious belief founded in faith.[25] Teaching creationism would open the door to arguments that other non-traditional theories of man's origin must also be taught, and the ensuing disruption

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fraudulent unemployment claims insufficient state interest to deny unemployment compensation to individual discharged because of refusal for religious reasons to work on Saturday).

21. *See, e.g.*, Thomas v. Review Bd. of Indus. Employment Sec. Div., 450 U.S. 707, 718-19 (1981) (state interest in preventing unemployment is insufficiently compelling to justify free exercise burden); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961) (interest in maintaining uniform day of rest); Prince v. Massachusetts, 321 U.S. 158 (1944) (interest in enforcing child labor laws); Biklen v. Board of Educ., 333 F. Supp. 902, 908-09 (N.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 951 (1972) (state interest in loyalty oath outweighs teacher's free exercise rights); People v. Pierson, 176 N.Y. 201, 68 N.E. 243 (1903) (interest in protecting lives and health of children outweighs parent's belief in divine healing).

22. Wisconsin v. Yoder, 406 U.S. 205 (1972); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).

23. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Epperson v. Arkansas, 393 U.S. 97, 105, 107 (1968); Citizens for Parental Rights v. San Mateo County Bd. of Educ., 51 Cal. App. 3d 1, 18-20, 124 Cal. Rptr. 68, 81-83 (1975), *appeal dismissed*, 425 U.S. 908, *reh'g denied*, 425 U.S. 1000 (1976).

24. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810-11 (2d Cir. 1971) (policy prohibiting distribution of potentially disruptive material on school grounds does not violate free expression); Guzick v. Drebus, 431 F.2d 594, 597-98 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971) (prohibition on wearing button soliciting participation in anti-war demonstration does not deny right of free speech); *see also* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (state interest in possible disruption of school caused by students wearing black anti-war armbands insufficient to outweigh burden on freedom of expression).

25. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982); Lines, *Scientific Creationism in the Classroom: A Constitutional Dilemma*, 28 LOY. L. REV. 35, 53 (1982) ("To be constitutional, a nonevolutionary theory must be subjected to the same critical inquiry that any scientific theory should receive."). *But see* Bird, *supra* note 7, at 167-70.

of the educational process would jeopardize the efficiency and effectiveness of the public education system.[26] In addition, teaching such theories might well violate the establishment clause of the first amendment. For example, in *Daniels v. Waters*,[27] the Sixth Circuit held a Tennessee statute to violate the establishment clause because it required all textbooks expressing an opinion on the origin of man to devote "commensurate attention to, and an equal amount of emphasis on" the Biblical account of creation as well as other non-evolutionary theories.[28] By denying licensing to teachers trained primarily in creationism, the state is protecting its interest in providing an education in generally accepted scientific theories rather than religious dogma. In this way, the state restricts itself to teaching secular matters and avoids the potential disruptions which would occur if the state were required to teach all theories of origin whether founded in science or religious belief.[29]

Such a disruption would be justified only if the burden on free exercise is substantial enough to outweigh it. Although he does not consider the burden on teachers, at least one author feels that the burden on students is never substantial enough merely because evolution and not creationism is taught. Because students are not pressured to abandon their creationist beliefs, no coercion exists even though they may learn that the academic community does not regard their beliefs as science.[30] Whether the state's interest in providing a sound education outweighs the free exercise burden on the teacher has not yet been decided. Before making this decision, a court would also have to examine the extent to which the license denial actually burdens the teacher.

C. *Previous Burdens on Free Exercise Rights*

Previous burdens which have been held to outweigh the state's interest have been quite substantial. In *Wisconsin v. Yoder*,[31] an exemption for compulsory school attendance beyond the eighth grade was granted to an Amish family because attendance would have made training their children in their faith impossible.[32] The Supreme Court found this interference with their free exercise of religious belief to be a burden substantial enough to outweigh the state's interest in compulsory education, especially since the Amish community would continue to provide an education

26. Wright v. Houston Indep. School Dist., 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) (action to enjoin teaching of evolution denied).

27. 515 F.2d 485 (6th Cir. 1975).

28. *Id.* at 487.

29. Wright v. Houston Indep. School Dist., 486 F.2d 137.

30. Lines, *supra* note 25, at 53; *see also* Note, *Evolution, Creationism and the Religion Clauses*, 46 ALB. L. REV. 897, 910-11 (1982).

31. 406 U.S. 205 (1972).

32. *Id.* at 219.

in the form of vocational training in their agricultural community.[33] The Court recognized that the situation in *Yoder* was unusual and that this burden was not likely to occur often; it stated that the substantiality of the claimed burden was "one that probably few other religious groups or sects could make."[34] Similarly in *West Virginia State Board of Education v. Barnette*,[35] a substantial burden was found to exist in requiring a student to salute the flag and recite the pledge of allegiance under threat of expulsion where the student, a Jehovah's Witness, considered such conduct to be contrary to writings in Exodus.[36] State interest in coercing "national unity" was insufficiently compelling to overcome that burden.[37] Although *Barnette* discusses many unacceptable burdens in terms of all first amendment freedoms, including free exercise, the decision is primarily grounded in the free speech clause. However, Justices Black and Douglas concurred on free exercise grounds as well.[38]

On the other hand, the coercive burden on free exercise where students were voluntarily released from school during the school day to attend religious instruction elsewhere did not constitute a sufficient burden to make the "release time" program unconstitutional.[39] Likewise, the burden on students taught only the theory of evolution and not creationism was held not to state a claim upon which relief could be granted in *Wright v. Houston Independent School District*.[40] A federal court decided that the proposed solutions were more onerous on the school district than was the burden on free exercise.[41] In *Wright*, the articulated state interests were quite similar to those in the teacher licensing question, although the burdened parties were students, not teachers.

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33. *Id.* at 223-26. The Court recognized, "[N]ot only do the Amish accept the necessity for formal schooling through the eighth grade level, but continue to provide what has been characterized by the undisputed testimony of expert educators as an 'ideal vocational education . . . .'" *Id.* at 224.

34. *Id.* at 236.

35. 319 U.S. 624 (1943).

36. "Thou shalt not make unto thee any graven image . . . thou shalt not bow down thyself to them, nor serve them . . . ." *Exodus* 20:4-5. Because the defendants considered the flag to be an "image," they refused to salute it. 319 U.S. at 629.

37. 319 U.S. at 639-41. Although the Court felt that national unity was an admirable goal, the burden on first amendment freedoms was an impermissible method of achieving it in the absence of "grave and immediate danger." *Id.* at 639.

38. *Id.* at 643-44 (Black & Douglas, JJ., concurring).

39. Zorach v. Clauson, 343 U.S. 306, 311 (1952). *Zorach* was decided on both free exercise and establishment grounds and held that no coercion within the meaning of either first amendment religion clause existed.

40. 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

41. 366 F. Supp. at 1211. The proposed solutions were either the exclusion of the students from study of evolution or the presentation of all theories of the origin of life.

D. *Burden on Teachers Resulting From License Denial*

The teacher who is denied a license is burdened to the extent that he is denied the opportunity to teach in the public schools. This burden is coercive because it forces the teacher to choose between the benefit of public employment and the practice of his religious beliefs.[42] Should this burden on the individual outweigh the state's interest in not allowing creationism to be taught,[43] denial of licensing would violate the free exercise clause. However, it is possible that little burden on free exercise actually exists.

Early free exercise cases differentiated between the freedom to believe and the freedom to act, declaring the former to be absolute but the latter restricted.[44] Denial of licensing does not hinder the teacher's freedom to believe in creationism but only his freedom to act on that belief (i.e., to teach in the public schools). Unless the denial of a license proscribes conduct in which the teacher is otherwise entitled to engage (i.e., public employment as a teacher), no burden on the teacher results from the license denial.[45]

It has been held that the state has broad discretion in choosing the curriculum of its schools, as long as its choice does not violate the Constitution.[46] The state also has the right to establish qualifications for its teaching positions within constitutional limits.[47] On the other hand, a teacher does not appear to have a constitutional right to public employment which is denied merely because the state does not hire him to teach.[48] However, the state cannot refuse to hire an individual for a constitutionally impermissible reason.[49] Therefore, it could not refuse to em-

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42. McDaniel v. Paty, 435 U.S. 617 (1978) (statute denying ministers or priests the right to serve as delegates to state constitutional convention is coercive because of forced choice between religion and public rights).

43. *See supra* notes 22-30 and accompanying text.

44. Cantwell v. Connecticut, 310 U.S. 296 (1940); Reynolds v. United States, 98 U.S. 145 (1878).

45. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

46. Epperson v. Arkansas, 393 U.S. 97, 107 (1968).

47. Freeman v. Gould, 405 F.2d 1153, 1158 (8th Cir. 1969).

48. "[T]o refuse . . . to engage the professional services of any person is in no sense a denial of the constitutional right of that person to follow his chosen profession." Seattle High School Chapter No. 200, Am. Fed'n of Teachers v. Sharples, 159 Wash. 424, ____, 239 P. 994, 996 (1930). *But cf.* Meyer v. Nebraska, 262 U.S. 390 (1923) (no state shall deprive a person of liberty without due process of law; "liberty" includes right of individual to engage in any of the common occupations of life). However, *Meyer* also implies such deprivation will be allowed if it bears some "reasonable relation" to an acceptable state purpose. Furthermore, the act which the Court struck down would have deprived the teacher of employment in any school, public or private, and not simply of government employment.

49. Elrod v. Burns, 427 U.S. 347 (1976) (interest in government efficiency insufficient to support patronage dismissal practice); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (political association alone is insufficient ground for denying public employment); Hysong v.

ploy a teacher merely because he was trained in creationism. However, it does appear that as long as the state may constitutionally exclude creationism from its curriculum,[50] as apparently it can,[51] and as long as the teacher is not otherwise qualified to teach additional subjects such as evolution, the teacher has no right to expect himself to be eligible for the benefit of public employment as a teacher. Because he is not otherwise qualified for this employment, denial of a license does not create a free exercise burden, but merely carries out the legitimate policy of the state not to teach creationism and to hire only teachers who are qualified in the curriculum lawfully chosen by the state.

Another possible burden on the teacher is that forcing a teacher with creationism beliefs to teach only evolution in order to obtain public school employment undermines the religious beliefs of that teacher. Although that may indeed be the result, the courts have not been swayed by similar arguments in analogous situations. For instance, in *Epperson v. Arkansas*[52] the Supreme Court stated that "the state has no legitimate interest in protecting any or all religions from views distasteful to them."[53] Likewise, in *Crowley v. Smithsonian Institution*,[54] a federal district court refused to hold that proposed museum exhibits on evolution violated the free exercise clause by forcing plaintiffs to choose between their right to attend the museum and their right to exercise their religious beliefs. The court did not find the burden imposed on plaintiffs substantial enough to outweigh the compelling state interest in "diffusing [scientific] knowledge among men."[55] The court also denied any state responsibility to protect individuals from information incompatible with their religious beliefs.

Even if some burden on the teacher's free exercise does exist, it does not appear to be sufficient to outweigh the state's interest in light of the foregoing, and thus would not be an unconstitutional burden. In addition, if creationism is determined to be impermissibly religious under the establishment clause, the court would probably consider both the burden on students' free exercise rights resulting from the licensing and the pos-

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School Dist. of Gallitzin Borough, 164 Pa. 629, 30 A. 482 (1894) (interest in avoiding sectarian instruction in public school is insufficient basis for forbidding nuns employed as public school teachers from wearing habits and insignia of religious order).

50. A complete discussion of this issue is beyond the scope of this comment. *See* Lines, *supra* note 25; Treiman, *Religion in the Public Schools*, 9 N. Ky. L. Rev. 229 (1982).

51. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).

52. 393 U.S. 97 (1968).

53. 393 U.S. at 107 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)).

54. 462 F. Supp. 725 (D.D.C. 1978), *aff'd*, 636 F.2d 738 (D.C. Cir. 1980). In *Crowley*, plaintiffs unsuccessfully argued that a Smithsonian exhibit on evolution violated their free exercise rights by forcing them "either to violate their religious beliefs by entering the Museum or forsake their right of access to public property," 462 F. Supp. at 727, because the exhibit presented evolution as "the only credible theory of the origin of life . . . ," *id.* at 725.

55. *Id.* at 727.

sible violation of the establishment clause itself which may result from the licensing.

III. Denial of Licensing and the Free Speech Clause

A. *Development of the Free Speech Test*

The denial of licensing to a teacher trained in creation-science also raises the issue of possible violation of the freedom of speech clause. Although the courts have traditionally been sympathetic to state efforts to control the content of the public school curriculum and to screen out ideas considered undesirable, there is evidence of a shift in judicial attitude toward encouraging student exposure to a broad variety of viewpoints and ideas.[56] For example, in *Mailloux v. Kiley*,[57] the dismissal of a teacher for using a teaching method which was relevant but lacked the preponderant support of the educational community was held to violate " 'vital First Amendment rights,' "[58] where the teacher had not first been given notice that his method was proscribed. The court said, "We do not confine academic freedom to conventional teachers or to those who can get a majority vote from their colleagues."[59]

However, freedom of speech has never been absolute, and the public school teacher's right to this freedom inside the classroom is subject to closer scrutiny than his right outside it.[60] For instance, lower courts have held that in-class freedom of speech does not extend to teaching material unrelated to approved subject matter[61] or to language which is patently offensive by community standards.[62] However, they have upheld the right of a teacher to use a teaching method which is not necessary to instruct the class fully on a subject, but which is related to that subject and is arguably a proper method.[63] The closest the Supreme Court has come to discussing the teacher's free speech rights within the public school classroom occurred in *Epperson v. Arkansas*.[64] In *Epperson*, the Court de-

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56. Note, *Free Speech Rights of Public School Teachers: A Proposed Balancing Test*, 30 Clev. St. L. Rev. 673, 679-80 (1981).

57. 323 F. Supp. 1387 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971).

58. 323 F. Supp. at 1392 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967)).

59. 323 F. Supp. at 1391.

60. Clark v. Holmes, 474 F.2d 928, 931 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973) (academic freedom is not "a license for uncontrolled expression at variance with established curricular contents . . . .").

61. Ahern v. Board of Educ., 329 F. Supp. 1391 (D. Neb. 1971), *aff'd*, 456 F.2d 399 (8th Cir. 1972).

62. Brubaker v. Board of Educ., 502 F.2d 973 (7th Cir. 1974).

63. Mailloux v. Kiley, 323 F. Supp. 1387, 1391 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971) (slang word for sexual intercourse written on blackboard by teacher to illustrate discussion of taboo words).

64. 393 U.S. 97 (1968).

clared an anti-evolution statute unconstitutional and allowed the plaintiff to include material on evolution in her biology class. However, the case was decided on freedom of religion grounds, and although it presented the Court with a clear opportunity to discuss free speech within the classroom, the Court expressly declined to do so.[65]

In determining whether the state is entitled to suppress freedom of expression, the courts have applied the test used by the Supreme Court in *Tinker v. Des Moines Independent Community School District*.[66] In *Tinker*, a prohibition on students wearing black armbands to school in disapproval of the Vietnam hostilities was declared an unconstitutional burden on free expression of opinion because it was not "necessary to avoid material and substantial interference with schoolwork or discipline . . . ."[67] In *Widmar v. Vincent*,[68] when a student religious group was denied use of college facilities generally available for residential student use, the test for an acceptable burden was one that "is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end."[69] The Court noted, however, that college students "are less impressionable than younger students"[70]; the logical inference is that a stricter standard might be imposed with minors. Even so, it can be inferred that the Court is using a two-prong test to determine when free speech rights may be suppressed, because avoiding *Tinker's* "substantial interference with schoolwork" test can be characterized as a compelling state interest.[71] The test seems to require both a compelling state interest and the least restrictive means available to advance that interest.

B. *Application of the Free Speech Test*

1. Compelling State Interest

To apply this test to the teacher licensing situation, it must be determined whether denial of a teacher's license is the least restrictive means to achieve a compelling state interest. The first step in the inquiry is to determine if the state has a compelling interest that is served by the denial of licensing. As discussed earlier, the state does have an interest in

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65. *Id.* at 104-05.

66. 393 U.S. 503 (1969).

67. *Id.* at 511.

68. 454 U.S. 263 (1981), *aff'g* Chess v. Widmar, 635 F.2d 1310 (8th Cir. 1980).

69. *Id.* at 270. *See also* Healy v. James, 408 U.S. 169, 184 (1972) (denial of recognition of student group was invalid under first amendment where college failed to show appropriateness of the action).

70. 454 U.S. 263, 274 n.14. *See also* Chess v. Widmar, 635 F.2d 1310, 1319 (8th Cir. 1980) (holding that the higher degree of supervision required by high school students poses a greater risk of government entanglement in religion than where college students are concerned).

71. *See supra* notes 60-61 and accompanying text.

maintainng the educational integrity of its school system as well as in protecting the system from the substantial disruption and interference that could result from adjusting curricula to the demands of numerous religious and other self-interest groups.[72] However, it is not sufficient merely that the state have a legitimate interest, but it "must be paramount, one of vital importance, and the burden is on the government to show [it] . . . ."[73] In *Elrod v. Burns*,[74] the argument that patronage dismissals were necessary to promote the efficiency and effectiveness of a government agency was not a sufficiently compelling state interest to overcome the burden on the individual's first amendment rights.

2. Least Restrictive Means

Not only must the state's interest be sufficiently compelling, but the method selected to further that interest must be narrowed to the least restrictive means available.[75] Thus, the license denial must be the least restrictive means available to advance the state's interest in protecting the public schools. Where the license is denied to a teacher of creationism who is not otherwise qualified to teach evolution, it may well be the least restrictive means to prevent unauthorized and possibly unconstitutional material from entering the biology curriculum. However, when the license is denied to one who is also qualified to teach evolution and other traditional materials, the least restrictive means may be not a license denial, but perhaps a state-approved lesson plan and monitoring of the material being taught.

Although the state has a right to set conditions for employment, these conditions may not be constitutionally impermissible.[76] In addition, the state has a right to determine, within constitutional limits, the subjects to be taught in its schools.[77] Thus, the state may have the right to require a teacher to be trained in evolutionary theory and to teach only evolutionary theory, but it may not have the right to refuse to hire a teacher merely because he is trained in creationism as well, even though the state fears he will attempt to indoctrinate students in his belief.[78] Because there are less restrictive means of advancing the admittedly compelling interest, such a burden on the teacher's free speech rights may not be allowed.

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72. *See supra* notes 22-30 and accompanying text.
73. Elrod v. Burns, 427 U.S. 347, 362 (1976).
74. 427 U.S. 347.
75. Widmar v. Vincent, 454 U.S. at 270.
76. *See supra* note 49 and accompanying text.
77. *See supra* note 50 and accompanying text.
78. Whether the licensed biology teacher has a right to introduce creation-science into his biology course is beyond the scope of this comment. *See generally* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982); Lines, *supra* note 25; Treiman, *supra* note 50.

IV. Licensing Creationism-Trained Teachers and the Establishment Clause

A. *Development of the Establishment Clause Test*

The first amendment has long been held to proscribe any religious activity by the state.[79] Indeed, it has been said that the establishment clause "was intended to erect a wall of separation between Church and State."[80] In *Everson v. Board of Education*,[81] the Court held the amendment to mean that the state must be entirely neutral in matters of religion, that it could neither show favoritism toward religions nor handicap them. In *Zorach v. Clauson*,[82] the Court said "so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal."[83]

Over the years, the Court has consistently broadened its interpretation of the establishment clause[84] through such holdings as the unconstitutionality of using public school buildings after hours for religious instruction of students[85] and of reciting a non-denominational prayer in school each day.[86] The cases with the most similarity to the teacher licensing situation are those in which the courts have invalidated certain laws respecting the curriculum offered by the public schools. The first laws challenged were the "monkey laws" or anti-evolution statutes proscribing teaching of evolutionary theory. In 1968, the Supreme Court finally held these laws unconstitutional in *Epperson v. Arkansas*,[87] on grounds that the intent of the legislature had been to eliminate evolutionary theory from the curriculum because of objections by fundamentalist Christians. Although *Epperson* does not expressly exclude creationism from the curriculum, its logical extension forbids the state to adjust its science courses for reasons supportive of religious beliefs.[88] The *Epperson* court applied

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79. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

80. 8 T. Jefferson, The Writings of Thomas Jefferson 113 (H. Washington ed. 1853) ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State."). *See also Everson*, 330 U.S. at 15-16.

81. *Everson*, 330 U.S. at 18.

82. 343 U.S. 306 (1952).

83. *Id.* at 312. However, *Zorach* also stands for the fact that some state "accommodation" of religion is not only permissible but also necessary in order for free exercise of belief to exist. *Id.*

84. "[Because] it forbade all laws *respecting an establishment of religion* . . . . [t]his Court has given the Amendment a 'broad interpretation . . . .'" McGowan v. Maryland, 366 U.S. 420, 421-22 (1960).

85. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

86. Engel v. Vitale, 370 U.S. 421 (1962).

87. 393 U.S. 97 (1968).

88. "[T]he First Amendment does not permit the state to require that teaching . . . be

the test for establishment clause constitutionality, part of which was first articulated in *School District of Abington Township v. Schempp*:[89] "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[90] To this, *Lemon v. Kurtzman*[91] added the requirement that the state action must avoid excessive government entanglement with religion.[92]

B. *Application of the Establishment Clause Test*

Recently, in *McLean v. Arkansas Board of Education*,[93] a district court applied the three-prong test to invalidate an Arkansas law requiring "balanced treatment" in the public school curriculum for creationism and evolution. The court found that the law requiring teaching of creationism violated all three prongs of the Supreme Court's test. Because the court found that creationism lacked the "essential characteristics of science,"[94] and was inspired by a literal reading of the Book of Genesis, it decided that creationism was not science, but religion masquerading as science.[95] When the state presented no legitimate educational purpose for the balanced treatment act, the court found that the act failed the first prong of the test by its lack of a clearly secular legislative purpose.[96] That the primary and, indeed, the only effect of the act was to advance religion was the logical conclusion once the court found that "creation-science has no scientific merit or educational value as science . . . ."[97] The court also found the excessive-entanglement prong violated by the pervasive presence of religious concepts in creation-science texts and by the resulting need to screen texts and monitor classroom discussion for impermissible religious instruction.[98]

It would thus appear that any establishment clause challenge to a state

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tailored to the principles or prohibitions of any religious sect or dogma." *Id.* at 106.

89. 374 U.S. 203 (1963).

90. *Id.* at 222.

91. 403 U.S. 602 (1970).

92. *Id.* at 612-13.

93. McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982).

94. *Id.* at 1267. The court said the following are the essential characteristics of science: (1) it is guided by natural law; (2) it has to be explained by reference to natural law; (3) it is testable against the empirical world; (4) its conclusions are tentative, rather than the final word; and (5) it is falsifiable.

95. A case invalidating a similar statute in Louisiana was argued on first amendment grounds but decided on state constitutional grounds by a federal district court. Aguillard v. Louisiana Dep't of Educ., No. CA 81-4787 (E.D. La. filed Dec. 3, 1981). The case is currently being appealed. *Compare* ARK. STAT. ANN. §§ 80-1663 to -1670 (Cum. Supp. 1983) *with* LA. REV. STAT. ANN. §§ 17:286.1-.7 (West Cum. Supp. 1983).

96. *McLean*, 529 F. Supp. at 1264.

97. *Id.* at 1272.

98. *Id.*

decision to license teachers trained in creationism would have to pass this three-prong test. Whether or not it could do so would depend on the specific factual situation. It seems clear that if creationism is considered a religious belief rather than a scientific theory, then the permissibility of licensing is unlikely. Even if a valid secular purpose for the licensing could be shown, the primary effect would be to infuse religious concepts into the biology curriculum should the teachers actually discuss creationism in their classes. Were the state to license the teachers and then attempt to regulate the extent to which creationism enters the standard biology course, or to monitor biology courses to ensure that no creationism is taught, the result would be an excessive governmental entanglement with religion under the *McLean v. Arkansas Board of Education* reasoning.[99]

However, should creation-science proponents succeed in designing a course based on creationism that could be accepted by the courts as science and not as religious dogma, the state licensing of teachers to teach such a course could no longer be argued to establish a religion, and the establishment clause would no longer be a barrier to licensing.

V. Denial of Licensing and the Establishment Clause

A. *Establishment Clause Ban on Religious Preferences*

The establishment clause has long been held not only to prohibit government action preferring one religion over another or all religions over none, but also to proscribe conduct preferring no religion to religion.[100] Thus in *Everson v. Board of Education*,[101] the Court held that the first amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers . . . ."[102] Even in his dissent, Justice Jackson agreed that the public schools were "organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion."[103] Proponents of creation-science argue that teaching of evolutionary theory and not creationism amounts to the state establishing the religion of Secular Humanism.[104] To analyze the accuracy of this allegation in the context of teacher

99. For an argument that the court misapplied the excessive entanglement test, see Lines, *supra* note 25, at 50-51.

100. Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Torcaso v. Watkins, 367 U.S. 488, 492-93 (1961); McGowan v. Maryland, 366 U.S. 420, 442-43 (1960); Illinois *ex rel* McCollum v. Board of Educ., 333 U.S. 203, 210-11 (1948); Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

101. 330 U.S. 1 (1947).

102. *Id.* at 18.

103. *Id.* at 23-24 (Jackson, J., dissenting).

104. Treiman, *supra* note 50, at 233.

licensing, we must first examine whether the denial of licenses in creationism that results in the teaching of only evolutionary theory is equivalent to preferring the religion of Secular Humanism to creationism. If it is, we must then examine whether this licensing preference passes or fails the three-prong establishment clause test.

B. *Evolutionary Theory as Secular Humanism*

The question of whether evolutionary theory is equivalent to Secular Humanism was considered in *Crowley v. Smithsonian Institution.*[105] In *Crowley*, the plaintiffs alleged that the museum's exhibitions on the theory of evolution violated the religious neutrality required by the first amendment. In holding there was no violation, the court found that evolutionary theory cannot be equated with Secular Humanism simply because the religious philosophy of Secular Humanism espouses evolution as one of its many tenets.[106] The court's rationale was prompted by *McGowan v. Maryland,*[107] where the Supreme Court stated, "[T]he 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."[108] Because evolutionary theory happens to be a part of the Secular Humanism doctrine,[109] it is unlikely that teaching evolution or, by extension, denial of a license to teach creationism, will be construed by the courts as establishing Secular Humanism in violation of the first amendment. Indeed, that the teaching of evolution is valid under the first amendment would seem to have been settled by default in *Epperson* and subsequent cases.[110]

However, even if evolution is considered to have some religious characteristics,[111] it does not automatically follow that denial of a teacher's li-

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105. 636 F.2d 738 (D.C. Cir. 1980). *See also supra* notes 54-55 and accompanying text.

106. 636 F.2d at 742-43. Secular Humanism also advocates such causes as the right to divorce, birth control, universal education, and a world community, none of which is considered a part of the theory of evolution. *Id.* at 740 n.3.

107. 366 U.S. 420 (1960).

108. *Id.* at 442. In addition, the Court has expressed concern over constitutional issues such as censorship and excessive entanglement when the states, and not the court, decide what is or is not religious. *See, e.g.,* Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981); United States v. Ballard, 322 U.S. 78, 87-88 (1944).

109. *See supra* note 106 and accompanying text.

110. *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolution statute violates first amendment); McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255 (E.D. Ark. 1982); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd,* 486 F.2d 137 (5th Cir. 1973), *cert. denied,* 417 U.S. 969 (1974).

111. Some creationists claim that evolution is a " 'non-observable . . . phenomenon which can neither be proven nor verified by the scientific method . . . .' " and thus is not true science but a " 'faith position' " and, therefore, itself a religion. Crowley v. Smithsonian Inst., 636 F.2d 738, 742 (D.C. Cir. 1980) (quoting testimony of witnesses). But, for arguments that neither evolution nor creation-science should be considered a religion, see Bird,

cense in creationism establishes evolution as a religion.

C. *Application of the Establishment Clause Test*

Assuming that license denial means that only evolution will be taught in the public schools, it is still necessary to apply the three-prong test to determine if a violation of the establishment clause exists. To apply the test requires factual analysis based on the specific situation as it arises, but a general line of inquiry can be established. For instance, it will be necessary to determine the purpose of the license denial in order to decide whether that purpose is clearly secular. Superficially at least, this must be so because the purpose of such a denial would probably be to prevent teaching of creationism in the public schools. This premise, in turn, will initiate an analysis of whether creationism is religion or science. If it is science, it is difficult to see how denial of a license in a secular subject could establish still another subject as a religion or even be relevant to its establishment in any way. If it is religion, as the *McLean* court determined it was, then the purpose and primary effect of the license denial still appear valid because denial would be maintaining the "wall of separation" between religion and the public schools.

The argument that licensing teachers to teach the religion of creationism is necessary to offset or neutralize the teaching of the "religion" of evolution fails because the appropriate remedy would be to stop licensing teachers in evolution, and not to license someone to teach additional constitutionally impermissible material.[112] Neither is it likely that the license denial would violate the excessive-entanglements prong because the action seems to be designed to prevent any state entanglement with religion in the public schools by obviating the need for monitoring classroom instruction or textbooks for religious content.[113] Thus, it seems unlikely that a court will consider the denial of licensing to teachers trained in creationism to be the establishment of a religion.

VI. Conclusion

It seems clear that any denial of licensing to biology teachers trained in creationism would have to pass the free-exercise balancing test as well as

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supra note 8, at 170.

112. The *McLean* court stated that

> Assuming for the purposes of argument, however, that evolution is a religion or religious tenet, the remedy is to stop the teaching of evolution; not establish another religion in opposition to it. Yet it is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment Clause . . . .

McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1274 (E.D. Ark. 1982).

113. *See supra* notes 98-99 and accompanying text.

the free-speech test requiring use of the least restrictive means to advance a compelling state interest in order to be constitutional under the first amendment. In addition, the denial could not be considered to establish Secular Humanism as a religion or to prefer no religion to religion in general. From the foregoing analysis, it appears unlikely that the burden on a teacher's free exercise of religion would be considered sufficient to outweigh the state's interest in denying licensing as long as creationism is considered religious doctrine by the courts. Neither are the courts likely to equate teaching of evolution with establishing Secular Humanism as a religion or preferring non-religion to religion and, therefore, denial of licensing seems safe from establishment clause challenge. The area in which licensing denial is most likely to be held unconstitutional is that of free speech because of the "least restrictive alternative" requirement. Even this possibility is unlikely as long as creation-science is considered impermissibly religious by the courts. However, if denial of licensing to the teachers is unconstitutional, licensing may be equally unconstitutional. As the three-prong test is now applied, and as long as creationism is held to contain religious concepts rather than pure scientific theory, licensing is almost certain to violate the establishment clause.[114]

In the end, the key to the constitutionality of the licensing questions is inextricably entangled in the constitutionality of creation-science itself in the public school curriculum. The answers depend in large measure on whether the courts decide that creation-science infuses religious dogma into biology classes or whether creationism, like evolution, is simply another scientific theory of life's origins.

Benjamin W. Emerson

114. The Liberty Baptist College licensing controversy in Virginia was temporarily defused before it could reach the courts by the granting of a one-year provisional licensing approval after the college agreed to stop teaching creationism as a biology course and to stop counting it toward the required hours for a biology education major. Richmond News Leader, Dec. 10, 1982, at 19, col. 1. However, it is submitted that the proposed monitoring by the state of college biology classes to ensure absence of religious dogma violates the excessive entanglement prong of the establishment clause test as applied by the *McLean* court.