Student Display of Confederate Symbols in Public Schools

by Suzanne M. Alford

Whether it is being removed from atop the South Carolina capitol or remaining a part of the state flag by the vote of Mississippi residents, the Confederate flag continues to be a controversial symbol.[1] For some it is a reminder of the bravery and honor of soldiers who sacrificed their lives for their homeland. For others it is a symbol of slavery, racism, and resistance to school integration.

The battle over this controversial symbol has moved into our nation's schools. Students who resist dress codes or other rules prohibiting the display of the flag or other Confederate symbols have handed school administrators a dilemma: while charged to foster an inclusive environment that facilitates learning, these officials are also bound to respect all students' First Amendment right to freedom of expression.

This paper explores the legal implications of a school board's decision to prohibit the display of Confederate symbols. It examines U.S. Supreme Court decisions on student dress and analyzes Confederate flag cases from several federal circuit courts. It concludes by addressing how this body of law applies to North Carolina schools and by offering guidelines to school administrators who are contemplating a ban on Confederate symbols.

The Display of Confederate Symbols in Public Schools

In the 1950s and 1960s many public officials throughout the South protested racial integration by flying the Confederate flag on public buildings, including schools.[2] Some schools displayed the flag at sporting events, and some administrators hung it in their offices to signal their opposition to integration.[3] In later decades, as racial tension and controversy surrounding the Confederate flag mounted, some school boards officially banned display of the Confederate symbol.[4]

Although the Confederate flag is now seldom officially displayed in schools, student use of the Confederate symbol on clothing, notebooks, and vehicles continues to concern administrators. Some students say they display Confederate symbols to express pride in their Southern heritage, while others display them to express their dislike of racial minorities. Many schools have therefore banned student displays of the Confederate flag in an effort to curb incidents of racial violence and harassment and promote a more friendly environment for all students.

Students in several states, including North Carolina, have been suspended for defying these bans and have subsequently challenged their punishment in federal courts. During the 2000–2001 school year, at least two incidents at North Carolina schools led to legal action. In Mecklenburg County, high school student Amanda Williams was suspended for displaying a Confederate flag in her truck window.[5] In Burke County, three students were suspended for repeatedly wearing T-shirts adorned with Confederate flags.[6] Williams and Toby Carver, one of the suspended Burke County students, have filed complaints against their school districts.

Both Carver and Williams are being represented by the Southern Legal Resource Center (SLRC), "a non-profit South Carolina Civil Rights Public Law firm that specializes in representing the victims of Southern heritage violations."[7] In

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The author is a student at Duke University School of Law. She served as a summer law clerk at the Institute of Government in 2001.

1. Chris Burritt, "S.C. Moves Rebel Flag: Banner's Removal from Atop the State Capitol Draws 1,500 in Protest," *Atlanta Journal and Constitution*, July 2, 2000, 1A; Emily Wagster, "Mississippi Votes to Keep Confederate Flag," *Chattanooga Times/Chattanooga Free Press*, April 18, 2001, A2.

2. "The Confederate flag, since the decision by the U.S. Supreme Court on May 17, 1954 in Brown v. Board of Education, has become a symbol of resistance to school integration and, to some, a symbol of white racism in general" (Smith v. St. Tammany Parish School Board, 316 F. Supp. 1174, 1176 [E.D. La. 1970], internal citation omitted).

3. "The principal of Covington High School displays a Confederate battle flag in his office next to the American flag and the Louisiana State flag" (*id.* at 1176).

4. *See, e.g., id.* at 1175.

5. "Attorney Files Complaint over School Ban of Confederate Flag," Associated Press State & Local Wire, May 25, 2001.

6. "Students Suspended for Wearing Rebel Flag Shirt," *Morning Star*, May 13, 2000, 5B.

7. Press Release, Southern Legal Resource Center, Maryville High Backs Down on Flag Ban (May 5, 1999) *at* http://www.cheta.net/slrc/pr463.htm (last visited March 16, 2002).

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addition to providing legal representation, the SLRC suggests that "the best advice an attorney can give to parents of a student wishing to express Southern pride in a school setting may well be to advise them to withdraw the student from public school and either switch to a private school or homeschool."[8] The SLRC advises students to use Confederate symbols "as a means of encouraging Southern solidarity and consciousness and not as a means of antagonizing Blacks or other sensitive liberal or minority groups."[9] It urges students to refrain from wearing inflammatory Confederate memorabilia that may be perceived as offensive and to opt instead for such tasteful and dignified items as lapel pins or scarves.

Organizations on the other side of the issue have expressed outrage at the continued display of the Confederate flag in public spaces. National Association for the Advancement of Colored People (NAACP) President Kweisi Mfume, protesting the flag's display above the South Carolina capitol, calls it the "representative of an era that epitomized everything that was wrong and inhumane in this country."[10] In its database of "hate" symbols, the Anti-Defamation League classifies the Confederate flag as a "general racist symbol." The database notes that "[a]lthough the flag is seen by some Southerners simply as a symbol of Southern pride, it is often used by racists to represent white domination of African-Americans."[11] While the NAACP and the Anti-Defamation League do not specifically address the controversial issue of students wearing Confederate symbols to school, their general statements about the flag show that the banner continues to be perceived by many as a symbol of racism and oppression.

The Law Governing Student Display of Confederate Symbols

School administrators considering a ban on student displays of Confederate symbols must be careful not to violate students' First Amendment rights to freedom of speech. The U.S. Constitution guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[12] While the amendment refers explicitly only to Congress, Supreme Court decisions have expanded its application to states and to public schools.[13]

Several cases brought by students challenging bans on Confederate symbols on First Amendment grounds have been tried in Federal Circuit Courts of Appeal. The Fourth Circuit, which hears federal cases originating in North Carolina, has not yet addressed such a case. Consequently, there is no binding precedent governing the manner in which North Carolina school districts may limit student displays of Confederate symbols. However, several U.S. Supreme Court decisions on cases from other federal circuits can provide guidance to North Carolina school administrators responding to student displays of Confederate symbols.

Supreme Court Case Law on Student Expression

The Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District* sets forth the most appropriate and commonly used test in student Confederate flag cases.[14] In *Tinker*, the Court held that an Iowa school district violated a student's constitutional right to freedom of speech by suspending him for wearing a black armband to protest United States involvement in Vietnam. The Court found that the student's armband was "closely akin to 'pure speech' . . . which is entitled to comprehensive protection under the First Amendment."[15]

The Court created a strict test to determine whether or not a school may prohibit student expression of a viewpoint. It held that in order to prohibit student expression of a viewpoint, school officials must be motivated "by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." Rather, they must show that "the students' activities would materially and substantially disrupt the work and discipline of the school" or "impinge upon the rights of other students."[16]

Seventeen years later, in *Bethel School District v. Fraser*, the Court distinguished between expression of viewpoint, which is protected under *Tinker*, and an unprotected "vulgar and offensive" manner of speech.[17] The Court held that a Washington state student's "plainly offensive" school assembly speech that used an explicit sexual metaphor was not entitled to First Amendment protection.[18] Finding it "a highly

8. Southern Legal Resource Center, *Advice on Southern Civil Rights for Parents and Activists*, available at http://www.cheta.net/slrc/advice1.htm (last visited March 16, 2002).

9. *Id.*

10. Press Release, National Association for the Advancement of Colored People, NAACP Challenges South Carolina Confederate Flag: Demands Removal of Symbol of Slavery From State Property (Jan. 12, 2001) *at* http://www.naacp.org/news/releases/confederateflag01/20/.shtml (last visited March 16, 2002).

11. *Hate on Display: A Visual Database of Extremist Symbols, Logos and Tattoos*, at http://www.adl.org/hate_symbols/racist_confederate_ flag.html (last visited March 16, 2002).

12. U.S. CONST. amend I.

13. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); and Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969).

14. *Tinker*, 393 U.S. 504 (1969).

15. *Id.* at 506.

16. *Id.* at 508, 513.

17. *Fraser*, 478 U.S. 675 (1986).

18. *Id.* at 684. The student's speech, which was given to nominate a classmate for a student government office, read in part: "'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is

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appropriate function of public school education to prohibit the use of *vulgar and offensive terms in public discourse*," the Court granted school boards the power to determine what "manner of speech" is appropriate within public schools.[19]

Although the Court did not specifically state that those who are offended by a speech determine whether or not it is offensive, in deciding that the sexual metaphor used was offensive it did take into consideration the age and maturity of the students who listened to Fraser's speech.[20] Accordingly, school boards may take into consideration students' responses to speech in determining whether a given speech is "offensive." *Fraser* thus gives schools broad powers to limit the manner in which a student expresses an opinion, while *Tinker* mandates that the opinion itself not be prohibited unless it materially disrupts the school's functioning or infringes on other students' rights.

Two years after *Fraser*, in *Hazelwood School District v. Kuhlmeier*, the Court addressed the issue of school-sponsored student speech, as opposed to the unsponsored student speech that occurs on school grounds.[21] In *Kuhlmeier*, a Missouri school principal refused to allow a journalism class to print articles on teenage pregnancy and divorce in the school newspaper because he found several passages in the articles objectionable.[22] The Court found that the principal did not violate the students' First Amendment rights because schools may limit "the style and content of student speech in *school-sponsored activities* so long as their actions are reasonably related to legitimate pedagogical concerns."[23]

While *Kuhlmeier* specifically addresses the issue of school-sponsored student speech, it also offers insight into a school's ability to limit unsponsored student speech. The Court held that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission.'"[24] This assertion appears to give a school broader powers to limit student speech than the standard asserted in *Tinker*, since it allows a school to prohibit speech that is inconsistent with its educational mission but is not a material disruption of school order.

Case Law on Student Display of Confederate Symbols

Even though there are no reported North Carolina cases in which students have challenged school bans on Confederate symbols, trends are discernible from case law in other federal jurisdictions. Cases involving student display of Confederate symbols are usually tried under the *Tinker* test, meaning that school officials may prohibit students from wearing the symbols only if they show that allowing their display would create a material disruption of the school's function or be an invasion of other students' rights. Despite this demanding test, schools often emerge victorious in legal challenges to their bans, particularly in schools with a history of racial violence or tension.

In the 1972 case of *Melton v. Young*, the Sixth Circuit applied the *Tinker* test of substantial disturbance and ruled in a school district's favor.[25] The Brainerd [Tenn.] High School had experienced several incidents of racial violence and disruption stemming from racial integration, two of which were so severe that the school was temporarily closed. Many of the disruptions resulted from the school's official use of the Confederate flag and the playing of "Dixie" as a pep song. The school board responded to the disruptions by adopting a policy under which Brainerd would no longer officially display the Confederate flag and would cease playing "Dixie" at school functions. Board policy also prohibited student displays of "provocative symbols on clothing" and ordered that "all displays of the [Confederate] Flag and Soldier" be removed from the school grounds and banned from any event in which the school participated.[26] Rod Melton, a student at Brainerd, wore a jacket to school with a Confederate flag patch on the sleeve, even though he was aware of the school's new policies. After refusing to remove the patch or cease wearing the jacket, Melton was suspended for wearing a "provocative symbol"; he subsequently sued, alleging that the district had violated his First Amendment rights.[27]

The court applied the *Tinker* test of substantial disruption and held that, considering the tense situation at Brainerd, the school was justified in suspending Melton. Because repeated disruptions and incidents of violence had earlier resulted from the school's official use of Confederate symbols, it was highly likely that Melton's display of the flag would create a material disruption.[28] That history of controversy surrounding the Confederate symbol was crucial to the court's analysis.

Twenty-eight years later, in 2000, the Tenth Circuit applied the *Tinker* test in a manner deferential to schools to reach a

a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.D.B. vice-president. . . ." *Fraser*, 478 U.S. at 687 (Justice Brennan, concurring).

19. *Id.* at 683 (emphasis added).

20. *Id.* ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.")

21. *Kuhlmeier*, 484 U.S. 260 (1988).

22. Id. at 263–64. The principal objected to the pregnancy article because he thought that anonymous students featured in it could be easily identified and because the subject matter was inappropriate for some of the school's younger students. He objected to the divorce article because it included negative comments about a student's father and the newspaper did not provide the father with an opportunity to respond.

23. *Id.* at 273 (emphasis added).

24. *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

25. *Melton*, 465 F.2d 1332 (6th Cir. 1972).

26. *Id.* at 1333–35

27. *Id.* at 1334.

28. *Id.* at 1335.

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similar result in *West v. Derby Unified School District*.[29] In *West*, a Kansas middle school student was punished for drawing a Confederate flag on a piece of paper in response to a dare during math class. The drawing violated a district policy on "Racial Harassment and Intimidation."[30] The district adopted the policy in response to incidents of racial violence at the local high school prompted by white students wearing Confederate flag shirts and black students wearing "X" shirts; during the same period, there were several incidents involving middle school students who drew Confederate flags on their arms and notebooks. The district's policy stated that

> [S]tudents should not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications, or *any item that denotes* Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, *Confederate flag*s or articles, Neo-Nazi or any other "hate" group.)[31]

West was suspended for three days for violating the policy, even though the district did not dispute the fact that he did not intend to harass or intimidate anyone with the drawing.

Applying the *Tinker* test, the court held that "based upon recent past events, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone."[32] The *West* decision is notable because there had been no recent incidents of racial violence at the middle school, much less any incidents of racial violence caused by the display of Confederate symbols. The court explained that "the fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one."[33]

The court's ruling that a student could be punished under *Tinker* in the absence of an intent to harass others was also an important part of the *West* decision. West argued that due process was violated when the school suspended him for violating a harassment policy, even though the district acknowledged that he did not intend to harass others. The court held, however, that under *Tinker* the district could suspend the student for disruptive speech without showing that he intended to harass others or disrupt the functioning of the school.[34] The court reasoned that an intent requirement for a suspension for disruptive speech would force school administrators to institute "trial-like procedures" to determine the student's intent and could overwhelm an administration trying to keep order in the school.[35] Therefore, the court held, if displaying a Confederate symbol could cause a substantial and material disruption of the school's functioning, it is irrelevant whether the student displays it to express pride in his heritage or to harass another person.

While some courts have interpreted *Tinker* as affording schools broad powers to prohibit student displays of Confederate symbols, the Sixth Circuit recently applied *Tinker* to hold in favor of a student. In *Castorina v. Madison County School Board*, two Kentucky students came to school wearing Hank Williams Jr. concert T-shirts with Confederate flags on the back.[36] School administrators informed the students that they were in violation of the school's dress code, which prohibits clothing "that is obscene, sexually suggestive, disrespectful, or which contains slogans, words or in any way depicts alcohol, drugs, tobacco or [has] any illegal, immoral or racist implication."[37] The students refused to turn the shirts inside out and subsequently were suspended.

The court applied the *Tinker* test to conclude that even if a school needs to prohibit "racially divisive symbols," it cannot enforce a "viewpoint-specific ban" that targets only Confederate symbols.[38] The court noted that in *Tinker* the school had prohibited black armbands worn to protest United States involvement in Vietnam but permitted students to wear other controversial political symbols, such as the Iron Cross. The *Tinker* Court found that prohibition of one particular controversial viewpoint but not others is unconstitutional unless it is necessary to prevent a substantial and material disruption.[39] Similarly, in *Castorina* the Sixth Circuit observed that the students wore the shirts to express a particular viewpoint—pride in their Southern heritage—and that the school discriminated against their viewpoint but not against others, as some students were allowed to wear clothing with an "X," a symbol in support of Malcolm X.[40]

The court also found that, as in *Tinker*, there was evidence that the students did not disrupt the school's functioning by wearing shirts decorated with the Confederate flag. The court therefore overturned the district court's issuance of summary judgment for the school district and remanded the case for trial, noting that if the lower court found that students at the school had been allowed to wear "X" shirts but not Confederate symbols, it "would be required to strike down the students' suspension as a violation of their rights of free speech as set forth in *Tinker*."[41]

29. *West*, 206 F.3d 1358 (10th Cir. 2000), *cert. denied*, 121 S. Ct. 71 (Oct. 2, 2000).
30. *Id.* at 1360.
31. *Id.* (emphasis added in court's opinion).
32. *Id.* at 1366.
33. *Id.*
34. *West*, 206 F3d. at 1363–64.
35. *Id.*
36. Castorina ex rel. Rewt, 246 F.3d 536 (6th Cir. 2001).
37. *Id.* at 538.
38. *Id.* at 544.
39. *Tinker*, 393 U.S. at 511.
40. *Castorina*, 246 F3d. at 541–42.
41. *Id.* at 544. A court renders a finding of *summary judgment* when it concludes that defendant and plaintiff agree on the facts of the case and that

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The courts in *Melton*, *West*, and *Castorina* all relied on the *Tinker* test of substantial disruption to determine whether a school had infringed on a student's right to freedom of speech. As evidenced by *Melton* and, especially, *West*, the *Tinker* test can be applied in a manner that is very deferential to schools.

While most courts use the *Tinker* test, at least one federal court has applied *Fraser*'s "vulgar and offensive" test instead. In *Denno v. School Board of Volusia County, Florida*, the Court of Appeals for the Eleventh Circuit used *Fraser*'s standard of "offensive" speech to uphold the suspension of a high school student for displaying a miniature Confederate flag.[42] The student, Wayne Denno, showed a miniature Confederate battle flag to a small group of friends while describing his hobby, reenacting Civil War battles. An assistant principal approached and ordered Denno to put away the flag. As Denno attempted to explain the historical importance of the flag, the assistant principal escorted him to the principal's office and suspended him on the way, asserting that the flag was offensive. The Eleventh Circuit upheld the student's suspension, finding that it could not "conclude that pre-existing law dictates or truly compels the conclusion that the *Tinker* standard should apply in the instant case to the exclusion of the *Fraser* standard."[43] Thus, the Eleventh Circuit condoned the administrator's use of the *Fraser* test of offensiveness, as opposed to the *Tinker* test, in evaluating student display of Confederate symbols.

Moreover, the Court held that "it would not be unreasonable for a school official to believe that such displays [of Confederate flags] have uncivil aspects akin to those referred to in *Fraser*, in that many people are offended when the Confederate flag is worn on a tee-shirt or otherwise displayed."[44] Therefore, in a case in which a student's display of a Confederate symbol does not cause disruption and so cannot be prohibited under the *Tinker* test, *Denno* allows schools in the Eleventh Circuit to turn to *Fraser* to ban Confederate symbols if they are deemed to be intrinsically offensive.

Banning Confederate Symbols in North Carolina Schools

Given the ever-present threat of litigation, school administrators and school boards considering whether to ban Confederate symbols from their schools need to consider several issues. Confederate symbol cases are likely governed by *Tinker*, which allows schools to prohibit students' symbolic speech if the speech would substantially disrupt the school's work or infringe upon the rights of other students.[45] Even though the *Tinker* test provides administrators with an appropriate basis for prohibiting Confederate symbols, the outcome under the *Tinker* test will vary according to the facts of each case. Indeed, *Tinker* raises the question of what exactly constitutes a material and substantial disruption of the "work and discipline of the school."

The Supreme Court offers some guidance in defining what constitutes the "work" of a school. In *Fraser*, the Court stated that schools must teach students how to interact in our complex republic: "'[Public education] must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.'"[46] The Court has further held that public school "is a principal instrument in awakening the child to cultural values."[47] Thus, a school's "work" includes teaching the civility and respect for others that good citizenship requires. A school could, therefore, argue that Confederate symbols, which could be perceived as racist or offensive, interfere with its "work" of teaching tolerance and civility and may justly be prohibited.

North Carolina statutes can also provide insight into what constitutes a school's "work." One state statute mandates that each local board of education "shall develop a local school administrative unit safe school plan designed to provide that every school in the local school administrative unit is safe, secure and orderly, *that there is a climate of respect in every school, and that appropriate personal conduct is a priority for all students and all public school personnel.*"[48]

It appears that under this statute the "work" of a school includes fostering an atmosphere in which students of all races are respected and feel welcome. Administrators could argue, therefore, using the *Tinker* test, that Confederate symbols substantially disrupt this atmosphere if students complain that the symbols threaten them or make them feel unwelcome. Schools could also utilize the dictum in the Supreme Court's *Kuhlmeier* decision, which stated that a "school need not tolerate student speech that is inconsistent with its 'basic educational mission,'" to argue that Confederate symbols are not consistent with their goal of fostering a "climate of respect."[49]

When applying the *Tinker* test of material disruption, administrators must also consider whether they plan to prohibit students from wearing Confederate symbols only in

only questions of law are in dispute. By overturning the lower court's summary judgment in *Castorina*, the Sixth Circuit orders the lower court to revisit the facts of the case.

42. *Denno*, 218 F.3d 1267 (11th Cir. 2000).

43. *Id.* at 1274.

44. *Id.*

45. *Tinker*, 393 U.S. at 513.

46. *Fraser*, 478 U.S. at 681, quoting Charles A. Beard and Mary R. Beard, *A New Basic History of the United States* (1968), 228.

47. Brown v. Board of Education of Topeka, 347 U.S. 483, 493 (1954).

48. N.C. GEN. STAT. § 115c-105.47 (a) (emphasis added).

49. *Kuhlmeier*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685).

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certain circumstances or at all times. To prohibit Confederate symbols on a case-by-case basis, administrators must have reason to believe that the symbol would cause a material disruption in each particular instance, whereas to enact an outright ban they must have reason to believe that such symbols would cause a material disruption in all circumstances. Thus, if the administrator can conceive of a circumstance in which a student display of a Confederate symbol would *not* be a material disruption (such as a picture of a Confederate flag on the cover of a report on the Civil War), a complete and total ban on such symbols is inappropriate.

If school officials wish to enact an outright ban on Confederate symbols but cannot justify it under *Tinker*, they may turn to *Fraser*, which apparently could justify such a prohibition by labeling the symbols as offensive per se.[50] However, administrators should note that, while this line of defense has been upheld in the Eleventh Circuit, a court with jurisdiction over North Carolina might reach a different conclusion. *Fraser*, as noted above, was intended to prohibit vulgar and patently offensive forms of speech but cannot be used to censor the content of students' speech. A Confederate flag, however, is not, strictly speaking, offensive *as a form of speech*; that is, a flag, in and of itself, is not offensive. (A school would certainly allow students to display other flags, such as the American or North Carolina flag.) It is the meaning, or symbolic content, of the Confederate flag that makes it offensive to some viewers. Thus, a ban on student display of Confederate symbols appears to be more appropriately justified by the *Tinker* test than by the *Fraser* test.

Moreover, the *Fraser* test, because it prohibits lewd or offensive speech regardless of whether it expresses a viewpoint, is a less appropriate basis for designing a policy banning controversial political symbols. In its *Fraser* decision, the Court explained that "unlike the sanction imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint."[51] Like the black armbands in *Tinker*, a Confederate flag is an inherently political symbol that voices a viewpoint. Therefore, while some may consider the message voiced by the Confederate flag to be offensive, it is *political* speech and thus falls beyond the scope of *Fraser*.

In addition to facing challenges to their bans of Confederate symbols on First Amendment grounds under *Tinker* and *Fraser*, school officials should be prepared to confront legal challenges based on civil rights arguments. Section 601 of Title VI of the Civil Rights Act of 1964 prohibits "discrimination on the grounds of race, color, or national origin" in "any program or activity receiving Federal financial assistance." A "local educational agency," or school board, falls under the statute's definition of a federally funded program.[52] Thus, North Carolina public schools that receive any amount of federal funding are statutorily prohibited from discriminating on the basis of national origin.

School administrators therefore need to be prepared to defend their prohibitions of Confederate symbols against civil rights claims that their policy discriminates against white southerners on the basis of national origin. The Supreme Court has held that the term *national origin* in the Civil Rights Act of 1964 can be roughly equated with *ancestry*. It noted that an earlier version of the bill included the term *ancestry* and that the "deletion of the word 'ancestry' from the final version was not intended as a material change, . . . suggesting that the terms 'national origin' and 'ancestry' were considered synonymous."[53] By equating *national origin* with *ancestry*, southern white students could argue that they are being discriminated against because of their ancestry if they are not allowed to display Confederate symbols, which could be considered expressions of their heritage. For several reasons, however, such an argument is likely to fail in court.

First, while the Supreme Court held that in the Civil Rights Act of 1964 "national origin" was synonymous with *ancestry*, it did so in the context of refuting the argument that "national origin" included a requirement of American citizenship. Moreover, the Court went on to define "national origin," stating that the term "on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came."[54] Thus, white southern students arguing discrimination based on their southern "national origin" could not rely on a regional definition of "national origin" (i.e., Southern American) but rather may have to show that their ancestors hailed from a different country, namely, the Confederate States of America. Since the United States Government has never considered the Confederacy a sovereign nation, it would be extremely difficult to persuade the Supreme Court to draw this conclusion.

Second, the legislative history of the Civil Rights Act of 1964 shows that the act was not intended to be used in this manner. Congress believed that such legislation was necessary because of continued discrimination against African Americans: "Today, more than 100 years after their formal emancipation, Negroes, who make up over 10 percent of our

50. As the court did in *Denno*, 218 F.3d at 1274.

51. *Fraser*, 478 U.S. at 685.

52. 42 U.S.C. §§ 2000d and 2000d-4a (1999). The U.S. Code defines "local educational agency" as "a public board of education or other public authority legally constituted within a State for either administrative control or discretion of, or to perform a service function for, public elementary or secondary schools in a city, county, township. School district, or other political subdivision of a State" (20 U.S.C. § 8801 [2000]).

53. Espinoza v. Farah Manufacturing Company, Inc., 414 U.S. 86, 89 (1973).

54. *Id.* at 88.

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population, are by virtue of one or another type of discrimination not accorded the rights, privileges, and opportunities which are considered to be, and must be, the birthright of all citizens."[55] Thus, legislative history shows that Congress intended the act to improve the civil rights of disadvantaged minorities who faced rampant discrimination, not white southerners who wished to display Confederate symbols.

Third, judicial interpretations of the act also show that its use has not been expanded to groups who have not traditionally faced discrimination, such as white southerners. The Supreme Court has noted that Title VI is "a statute intended to protect racial minorities."[56] Similarly, a district court refused to expand the definition of "national origin" under Title VI to include "Appalachians." The court held: "There is no indication that 'national origin' was intended to include Appalachians who do not possess a national origin distinguishable from that of other citizens of the United States."[57] White southern Americans, like Appalachian whites, share the same national origins as other white Americans born in the United States and, therefore, are not entitled to special protection under Title VI.

Fourth, even if a court were to accept white southern Americans as a group protected under Title VI because of their national origin, the southern white students would then have to show that the school enacted its ban with the intention of discriminating against them. The Supreme Court has held that Section 601 of Title VI "prohibits only intentional discrimination."[58] It is, therefore, insufficient for white southerners to show that a ban on Confederate symbols has a disparate impact on them; rather they must show that a school board intended to discriminate against them. School officials can easily refute such an allegation if they have a legitimate, nondiscriminatory reason for enacting the ban, such as student safety or fostering an inclusive learning environment.

Conclusion

Cases involving the student display of Confederate symbols may be decided on a variety of bases, including the *Tinker* test, the *Fraser* test, and Title VI of the Civil Rights Act of 1964. The *Tinker* test, however, is the most appropriate test for determining whether a school may prohibit such inherently political symbols. Under *Tinker*, a school may only prohibit students from displaying Confederate symbols if the symbols are likely to create a substantial or material disruption of the school's work and discipline or infringe upon the rights of other students.

School administrators faced with the increasingly complex goals of fostering inclusive and diverse learning environments may find that *Tinker* affords them broad powers to ban Confederate symbols. Such officials should, however, be cautious in exercising this power, not only for legal reasons but also because of policy considerations. The right of individuals to express unpopular ideas is fundamental to the United States, and the decision to prohibit a student from expressing his or her viewpoint through the display of Confederate symbols is necessarily in tension with this fundamental right. While administrators may rightfully wish to create an inclusive school atmosphere that values diversity, they should give serious consideration to whether prohibiting the display of Confederate symbols is the best way to achieve that goal. ■

55. House Report No. 914, USCCAN 2393.

56. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 590 (1983).

57. Bronson v. Board of Education of the City School District of Cincinnati, 550 F. Supp. 941, 959 (S.D. Ohio 1982).

58. Alexander v. Sandoval, 121 S. Ct. 1511, 1516 (2001).

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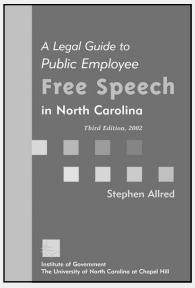

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Creationism and the Theory of Biological Evolution in the North Carolina Standard Course of Study

by Drew D. Dropkin

For almost a century, American religious leaders, scientists, and the public have been embroiled in heated debates over the teaching of evolutionary science in the public schools.[1] For one particular group of North Carolinians, this dispute can present a significant professional dilemma. Each year, some of the state's biology teachers must reconcile their personal convictions about the origins and development of life with the North Carolina science curriculum they teach.[2] To provide teachers and other school officials some insight into the legal principles underlying the treatment of this topic in the North Carolina curriculum, this article addresses two questions:

- Why does the North Carolina biology curriculum include the theory of biological evolution?
- Why doesn't the curriculum include the subject of creationism?

Before considering these central questions, it will be helpful to define the terms *evolution* and *creationism* as they are generally understood. *Webster's Revised Unabridged Dictionary* defines *creationism* as "the literal belief in the account of creation given in the Book of Genesis."[3] Judicial definitions of the word rarely diverge from this characterization. One federal district court has identified creationism as a "religious doctrine based on an interpretation of the Bible, which purports to explain the creation of the universe and human life." A U.S. Supreme Court justice has defined "the doctrine or theory of creation" as "holding that matter, the various forms of life, and the world were created by a transcendent God out of nothing."[4]

Among creationists, two schools of thought are most prominent. Young Earth creationists generally believe that the earth was created less than ten thousand years ago and reject Darwin's theory of natural selection and the evolution of species.[5] Old Earth creationists also reject evolution through natural selection, but they reconcile scientific evidence of an older earth with creationism by loosely interpreting the length of the creation week presented in the Bible. Despite these important differences, virtually all forms of creationism are characterized by reliance on a religious source (typically the Bible) and an explanation that posits a "creation out of nothing" (*creatio ex nihilo*).

Webster's definition of *evolution* in its biological sense is "[a] general name for the history of the steps by which any living organism has acquired the morphological and physiological characters which distinguish it; a gradual unfolding of successive phases of growth or development." United States

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The author is a recent graduate of the Duke University School of Law. He served as a summer law clerk at the Institute of Government in 2001.

1. The public debate about creationism and the theory of evolution began with Charles Darwin's *On The Origin of Species by Means of Natural Selection*, published in 1859. The controversy resurfaced in the 1920s when William Jennings Bryan led a Christian conservative crusade against the teaching of evolution in public schools. By 1930, twenty state legislatures had considered banning the teaching of evolution, but only three (Arkansas, Tennessee, and Mississippi) actually enacted such legislation. In 1925, high school science teacher John T. Scopes violated Tennessee's newly enacted Anti-Evolution Act of 1925 and, with the assistance of the American Civil Liberties Union, challenged the act's constitutionality. At the celebrated "Monkey Trial," Scopes was convicted and fined $100. The Tennessee Supreme Court subsequently reversed Scopes's conviction on technical grounds but never declared the Anti-Evolution Act unconstitutional. *See* Scopes v. State, 289 S.W. 363, 364 (Tenn. 1927).

The evolution/creationism dispute took on new life after the 1960s as funding for the sciences increased and the number of scientists multiplied tenfold in the post-Sputnik era. For an account of the continuing controversy over evolution and the influence of science, *see* Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* (New York, 1997); and Marjorie George, "And Then God Created Kansas? The Evolution/Creationism Debate in America's Public Schools," *University of Pennsylvania Law Review* 149 (2001): 843–72.

2. *See* State Board of Education/Department of Public Instruction, *North Carolina Standard Course of Study*, http://www.ncpublicschools.org/curriculum/ (last visited March 31, 2002).

3. All definitions are from *Webster's Revised Unabridged Dictionary* (1996) and can be accessed at http://www.dictionary.com/cgibin/dict.pl?term (last visited March 31, 2002).

4. Pfeifer v. City of West Allies, 91 F. Supp. 2d 1253, 1255 (E.D. Wis. 2000); Edwards v. Aguillard, 482 U.S. 578, 599 (1987).

5. Young Earth Creationists are most often associated with the work of the Institute of Creation Research based in Santee, California. For further information, *see* the Institute of Creation Research's Web site: Institute for Creation Research, http://www.icr.org.

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Supreme Court Justice Lewis F. Powell Jr. defined evolution as "the theory that the various types of animals and plants have their origin in other preexisting types, the distinguishable differences being due to modifications in successive generations."[6]

Many courts have struggled with the relationship between the theory of evolution and hypotheses about the origin of life itself. One federal decision attributes to evolutionary theory the theory that life sprang from inorganic matter, that is, "that all plant, animal, and human life 'have arisen from a single source which itself came from an inorganic form.'" Another federal court disagrees, holding that "the scientific community does not consider [the] origins of life a part of evolutionary theory. The theory of evolution *assumes* the existence of life and is directed to an explanation of how life evolved."[7]

As most scientists and courts have concluded, on balance, that evolutionary science does not necessarily incorporate a theory about the origins of life, we will assume for the purposes of this article that it does not. However, although evolutionary science does not incorporate a particular theory about the origin of life, some theories about the question are easily reconciled with evolutionary theory and can, together with the latter, offer a comprehensive explanation of the origin and subsequent development of life.[8] Other ideas about how life arose—Young Earth creationism, for instance—appear to be in direct conflict with the theory of evolution. This interplay among evolutionary theory, creationism, and various explanations of the origins of life has sparked heated debate about the teaching of evolutionary theory and creationism in public schools and provides an appropriate framework for examining the legal basis of North Carolina's biology curriculum.

Evolution in the North Carolina Science Curriculum

The North Carolina Standard Course of Study (NCSCS) prescribed for the state's public schools calls for students to receive instruction in the theory of biological evolution. Competency Goal 2 of the Science Curriculum for Biology states that "the learner will develop an understanding of the continuity of life and the changes in organisms over time."[9] North Carolina's Curriculum Support Resources program (NCCSR), which provides guidance for teachers in achieving the goals prescribed by the curriculum, advises teachers that 7 percent of the high school biology curriculum should be devoted to the study of biological evolution. It also details the specific biological concepts and processes related to evolution that teachers need to present and students need to learn to achieve the sixth objective of Competency Goal 2 (Objective 2.06). They include:

- The origins of life: including the concepts of biogenesis and abiogenesis,[10] the work of Louis Pasteur, and early hypotheses and experiments about the formation of earth's atmosphere;
- Patterns and similarities among different organisms as inferred from the fossil record: adaptive radiation,[11] vestigial organs, and biochemical similarities. (Patterns in embryology, homology, and analogy are omitted.[12])
- Variation: which provides material for natural selection; the roles of variation and reproductive and geographic isolation in speciation; current applications of (e.g., in pesticides, antibiotics).
- Natural Selection: Darwin's development of as the mechanism of evolution.

The NCCSR Web site suggests that teachers employ computer simulations to help students "[m]easure [and] graph variation in populations of organisms" and study simulations of "selection [and] reproduction over several generations."[13]

The inclusion in Competency Goal 2 of "the origins of life" as one of four components of the study of biological evolution

6. *Edwards*, 482 U.S. 578 at 599 (Justice Powell, concurring).

7. Crowley v. Smithsonian Inst., 636 F.2d 738, 739–40 (D.C. Cir. 1980) [quoting G. A. Kerkut, *Implications of Evolution* (New York, 1960), 157]; McLean v. Board of Education, 529 F. Supp. 1255, 1266 (E.D. Ark. 1982) (emphasis added).

8. For instance, theories that attempt to explain the sudden presence of life on earth by postulating that the first life-forms arose in a primordial soup or in bubbles or were carried to earth on meteorites can be seen as compatible with the theory of evolution.

9. *See* State Board of Education/Department of Public Instruction, *Science Curriculum — Biology,* Competency Goal 2. http://www.ncpublicschools.org/curriculum/science/biology.htm (last visited March 31, 2002).

10. *Biogenesis* is "[a] doctrine that the genesis or production of living organisms can take place only through the agency of living germs or parents." The term is also defined as "[l]ife development generally." *Abiogenesis* is defined as the "supposed origination of living organisms from lifeless matter; such genesis as does not involve the action of living parents; spontaneous generation" (*Webster's Revised Unabridged Dictionary*).

11. *Adaptive radiation* is "evolutionary diversification of a generalized ancestral form with production of a number of adaptively specialized forms" (*id.*).

12. *Embryology* is "[t]he science which relates to the formation and development of the embryo in animals and plants; a study of gradual development of the ovum until it reaches the adult stage." *Homology* is the "[c]orrespondence or relation in type of structure in contradistinction to similarity of function; as, the relation in structure between the leg and arm of a man; or that between the arm of a man, the fore leg of a horse, the wing of a bird, and the fin of a fish, all these organs being modifications of one type of structure." *Analogy*," in a biological context, means "[a] relation or correspondence in function, between organs or parts which are decidedly different."(All in *Webster's.*)

13. Competency Goal 2.

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is noteworthy, as is its listing as a distinct area of concentration in Objective 2.06. We can interpret the inclusion of this topic in the Course of Study for evolution in one of two ways: (1) as signaling that the study authors regard the "origins of life" as an integral component of the theory of biological evolution, contrary to common understanding; or (2) as an inadvertent association between the two areas of study that is not intended to convey any particular relationship. Regardless, the Course of Study clearly requires biology teachers to include study of the origins of life in their courses.

The study of the continuity of life does not, however, include the topic of creationism. Some teachers may be troubled by the prescribed study of biological evolution (including the origins of life) and the accompanying failure to require any instruction about creationism. Although the absence of this topic in the curriculum does not necessarily prohibit teachers from presenting it, those who wish to do so may be concerned about the legal consequences of introducing creationism into the classroom because of its inherently religious foundation. Their concerns are well founded, for the Constitution is not silent about the role of religion in the public schools.

Evolution, Creationism, and the Establishment Clause

Although school boards have wide discretion over their schools' curricula, they need to avoid running afoul of the Establishment Clause of the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion."[14] Although the express language of the clause only restricts the legislative power of *Congress*, the Supreme Court has extended this restriction to the states in general and to boards of education in particular.[15]

The fundamental principle of the Establishment Clause is generally embodied in the familiar concept of "separation of church and state." In more specific terms, the Establishment Clause instructs that "government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another."[16] In other words, the Establishment Clause seeks to prevent the government from becoming excessively involved in religion.

Historically, the courts have been extremely vigilant in monitoring public school compliance with the Establishment Clause.[17] Families entrusting the education of their children to the public school system need to feel that the schools will not be employed to promote religious views to impressionable young students whose attendance is involuntary.[18] The position of teachers in public schools is particularly important in this respect, the courts point out, because students are likely to emulate their teachers and view them as role models.[19] For this reason, teachers need to be aware of the way the courts determine whether a public school has become so involved with religion that its actions violate the Establishment Clause.

In the last thirty years, the U.S. Supreme Court has developed three different tests—the *Lemon* test, the endorsement test, and the coercion test—to evaluate government acts that allegedly violate the Establishment Clause. In 1971, in *Lemon v. Kurtzman*, the Court concluded that a government act is constitutional under the Establishment Clause if it

1. reflects a clearly secular purpose,
2. does not advance or inhibit religion as its primary effect, and
3. does not cause excessive government entanglement with religion.[20]

If the act fails any one of these three prongs of the *Lemon* test, it violates the Establishment Clause.[21]

More than ten years later, the Court adopted a new Establishment Clause test that focuses on whether a challenged governmental act endorses religious beliefs or practices. In *Lynch v. Donnelly*, one Supreme Court justice suggested that the second prong of the *Lemon* test—the evaluation of whether a government act "advances or inhibits religion"—should examine whether an action endorses a particular religious belief.[22] Five years later, in *County of Allegheny v. ACLU*, a majority of the Court adopted the endorsement approach. According to that decision, a policy endorses religion if

1. Government officials understand the act as an endorsement of religion, or
2. An observer would perceive the act as an endorsement of religious beliefs or practices.[23]

Although the *Allegheny* decision appears to replace the "advance or inhibit" inquiry of the *Lemon* test with the new

14. U.S. CONST. amend. I.

15. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Everson v. Board of Education, 330 U.S. 1, 15 (1947).

16. Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968).

17. *See, e.g.*, *Edwards*, 482 U.S. at 583–84.

18. *See*, *e.g.*, Grand Rapids School District v. Ball, 473 U.S. 373, 383 (1985); Meek v. Pittenger, 421 U.S. 349, 369 (1975).

19. *See*, *e.g.*, Bethel School District No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Wallace v. Jaffree, 472 U.S. 38, 81 (1985).

20. *Lemon*, 403 U.S. 602, 612–13 (1971).

21. *Id.*

22. *Lynch*, 465 U.S. 668, 687 (1984).

23. *Allegheny*, 492 U.S. 573, 595 (1989).

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"endorsement" inquiry, the Court has employed both formulations of the second prong in recent years.[24]

In 1992, the Court disregarded the *Lemon* test and adopted yet another test—the coercion test—to evaluate the constitutionality of a prayer delivered at a high school graduation. In *Lee v. Weisman*, the Court concluded that a school "may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that establishes a state religion or religious faith or tends to do so."[25] The Court applied the coercion test again in 2000 to evaluate the constitutionality of prayers before high school athletic events.[26]

Although it is unclear which test—the *Lemon* test, the endorsement test, the coercion test, or some combination of the three—a particular court will apply in an Establishment Clause case, school boards must consider all the tests when creating and changing their curriculum. A decision on a proposed course of study or proposed change in the curriculum may be unconstitutional if

- the decision is not enacted for a secular purpose,
- the primary or principal effect of the decision will be to advance or inhibit religion,
- the decision causes excessive government entanglement with religion,
- government officials understand the decision as an endorsement of particular religious beliefs or practices,
- an observer would perceive the decision as an endorsement of particular religious beliefs or practices, or
- the decision will require students to support religion or participate in a religious exercise.

Supreme Court Guidance

The United States Supreme Court has reviewed two cases that address the role of creationism and evolution in public schools. The first, *Epperson v. Arkansas*, was decided in 1968, before the Court developed any of the three Establishment Clause tests.[27] In it, the Court focused on the underlying rationale of the Establishment Clause. The second decision, *Edwards v. Aguillard*, reached the Supreme Court in 1987; in that case, the Court applied the *Lemon* test to evaluate the constitutionality of a Louisiana law.[28] Although the Supreme Court's treatment of the Establishment Clause has become more complex since these decisions were rendered, *Epperson* and *Edwards* still provide the legal framework for determining the role of evolution and creationism in the school science curriculum.

In 1968, in *Epperson v. Arkansas*, the U.S. Supreme Court invalidated a 1929 Arkansas law that prohibited teachers from discussing evolution in the classroom. The law made it unlawful for any teacher at a state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or "to adopt or use in any such institution a textbook that teaches" this theory.[29] In 1965, Susan Epperson, a tenth-grade biology teacher in Little Rock, received a new biology textbook adopted by the school administration; it contained a chapter on the theory of evolution. Aware of the old law and fearful that she would be dismissed and subject to criminal penalties if she used the textbook for classroom instruction, Epperson filed a lawsuit requesting the court to determine whether the Arkansas law was constitutional.[30]

The lowest Arkansas state court ruled that the law was unconstitutional;[31] the Arkansas Supreme Court reversed the ruling and reinstated the law. In its two-sentence opinion, that court held that the Arkansas law was a "valid exercise of the state's power to specify the curriculum in its public schools."[32]

The U.S. Supreme Court unanimously reversed the Arkansas Supreme Court's decision and invalidated the Arkansas law. Seven members of the court grounded their ruling in the requirements of the First Amendment's Establishment Clause.[33] The Court observed that the First Amendment restricts the power of a state to determine school curricula by mandating "governmental neutrality between religion and religion, and between religion and nonreligion. . . . There is and can be no doubt that 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."[34]

24. *Compare* Capitol Square Rev. and Advisory Board v. Pinette, 515 U.S. 753 (1995) (relying on the endorsement inquiry) *with* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (relying on the original articulation of the *Lemon* test).

25. *Lee*, 505 U.S. at 577–78 (1992).

26. Santa Fe Independent School District v. Doe, 530 U.S. 290, 301–02 (2000).

27. *Epperson*, 393 U.S. 97 (1968).

28. *Edwards*, 482 U.S. 578 (1987).

29. Initiated Act No. 1, Ark. Acts 1929.

30. *Epperson*, 393 U.S. at 100.

31. The Chancery Court of Arkansas held that the law violated Epperson's free speech rights under the First Amendment, noting that the law "tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach" (*id.*). Although the U.S. Supreme Court eventually agreed that the statute was unconstitutional, the Court did not endorse the view that the statute violated a teacher's free speech rights. It is clear that public school teachers relinquish their unadulterated right to free speech in the course of instruction.

32. *See* State v. Epperson, 416 S.W.2d 322, 322 (1967).

33. *Epperson*, 393 U.S. at 109. All nine members of the court voted to invalidate the law. Justices Black and Harlan voted to invalidate the statute on the grounds that it was too vague because it did not specify whether the law entirely prohibited the discussion of evolution or only prohibited the discussion of evolution as an established fact. The other seven justices ruled that the law was an unconstitutional establishment of religion.

34. *Id.* at 106.

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The Court subsequently determined that the Arkansas law did not reflect a neutral approach to the curriculum: "Arkansas' law 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. . . . It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."[35]

The Court based its decision on the fact that the Arkansas law was "an attempt to blot out a particular theory [evolution] because of its supposed conflict with the Biblical account, literally read."[36] In short, the Court held that the First Amendment mandates religious neutrality in the curriculum and that Arkansas's attempt to exclude the discussion of evolution from public schools was unconstitutional because it was motivated by a sectarian desire to avoid conflict with the biblical account of human origins.

The Court observed that the Arkansas law was not religiously neutral because it did not forbid discussion of all theories of human origins—that is, *both* the theory of evolution and creationism—from the school curriculum. In noting this fact, the Court seemed to indicate that it might uphold a law that removes discussion of human origins from the curriculum altogether or one that permits the discussion of both evolution and creationism.[37]

School administrators, teachers, and lawyers alike can draw three general principles from the *Epperson* decision:

1. Under the First Amendment, a school's curriculum must reflect governmental neutrality between religions, and between religion and nonreligion.
2. Although a school board has discretion when establishing the curriculum, it is unconstitutional for the curriculum to be tailored to the principles of a religious sect.
3. It might be constitutional for a school board to require a balanced treatment of creationism and the theory of evolution by either eliminating all study of human origins or by requiring the presentation of both evolution and creationism.

In 1987, the U. S. Supreme Court addressed the role of evolution in school curricula for a second time, in the process slightly modifying the three principles established in *Epperson*.[38] In *Edwards v. Aguillard*, the Court assessed the constitutionality of the Louisiana Balanced Treatment for Creation-Science and Evolution Science in Public School Instruction Act (the Creationism Act).[39] The act forbade public school teachers to teach the theory of evolution unless they also provided instruction in "creation science." In practical terms, the statute required balanced treatment of evolution and creation science; no school was required to teach evolution or creationism, but if either was taught, the other must also be taught.

Teachers, religious leaders,
and parents challenged the constitutionality of the Creationism Act in the federal district court for the Eastern District of Louisiana, which declared it unconstitutional. The district court, relying on the principles set forth in *Epperson*, reasoned that a prohibition against teaching evolution did not further secular objectives and that the balanced-treatment requirement compelled schools and teachers to tailor instruction to the principles of a religious sect or group.[40]

The Court of Appeals for the Fifth Circuit affirmed the district court's decision. Notably, the Fifth Circuit concluded that the Creationism Act was enacted for a religious purpose, even though Louisiana officials claimed that it was intended to protect academic freedom. The circuit court wrote: "Although the record here reflects self-serving statements made in the legislative hearings by the Act's sponsors and supporters, this testimonial avowal of secular purpose is not sufficient, in this case, to avoid conflict with the first amendment. . . . [T]his scheme of the statute, focusing on the religious *bête noire* of evolution, as it does, demonstrates the religious purpose of the statute."[41]

In a 7–2 decision, the U. S. Supreme Court, employing the *Lemon* test, declared the Louisiana act unconstitutional because it was intended to advance a particular religious belief.[42] Under the first prong of the *Lemon* test, Louisiana's Creationism Act could be constitutional only if it were enacted for a secular purpose, but the Court did not accept the legislature's stated purpose—that the act was intended to promote academic freedom—at face value: "While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham."[43] The Court subsequently determined that the promotion of academic freedom was a sham and that the genuine purpose of the act was the advancement of a religious belief.

35. *Id.* at 103, 108.

36. *Id.* at 109.

37. The Court observed that "Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory" (*id.*).

38. *Edwards,* 482 U.S. 578 (1987).

39. LA. REV. STAT. ANN. §§ 17:286.1–17:286.7 (West 1982).

40. Aguillard v. Treen, 634 F. Supp. 426, 426–27(E.D. La. 1985).

41. Aguillard v. Treen, 765 F.2d 1251, 1256 (5th Cir. 1985).

42. *Edwards*, 482 U.S. at 592–93. Justice Brennan delivered the opinion of the Court, joined by Justices Marshall, Blackmun, Powell, and Stevens, and joined in part by Justice O'Connor; Justice Powell concurred, joined by Justice O'Connor; Justice White concurred in the judgment.

43. *Id.* at 586–87.

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> [W]e need not be blind in this case to the legislature's preeminent religious purpose. . . . The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. . . . The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety. . . . Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment."[44]

The Supreme Court's decision in *Edwards* effectively modified the three general principles from *Epperson* as follows:

1. Under the First Amendment, a school's curriculum must reflect governmental neutrality between religions, and between religion and nonreligion.
2. Although a school board has discretion when establishing the curriculum, it is unconstitutional for the curriculum to be tailored to the principles of a religious sect. Courts will examine the genuine purpose of the curriculum change, even if the stated purpose of the change is secular.
3. It is not constitutional for a school board to require balanced treatment of creationism and the theory of evolution, either by eliminating all study of the origin of man or by requiring both evolution and creationism to be presented, if the modification is motivated by a religious purpose.

Recent Developments

Although these principles provide significant guidance to teachers, school administrators, and school board officials, the Supreme Court decisions in *Epperson* and *Edwards* do not address every possible approach to creationism and the theory of biological evolution in public school curricula. In the fifteen years since *Edwards*, several school boards have challenged the general understanding that creationism should not be presented in the science classroom. It is therefore worthwhile to consider the various arguments—both constitutional and practical—that have been raised in these attacks.

Creationism As Science

The most frequent challenge to the current understanding of the role of evolution and creationism in public schools contends that creationism is a genuine scientific theory and that, therefore, its introduction does not violate the strictures of the Establishment Clause. This challenge is most often grounded in the Supreme Court's decision in *Edwards*, in which the Court wrote: "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . In a similar way, teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of scientific instruction."[45]

In *Edwards*, the Court clearly stated that *scientific* theories about the origin of life—and scientific critiques of prevailing scientific theories—may be introduced in public schools. Most recent challenges to the exclusion of creationism have focused on the merits of creationist theory as a scientific theory, or as a scientific critique of the prevailing theory of evolution.

One of the most prominent examples of this "creationism as science" approach is the minority opinion filed by Justice Antonin Scalia (joined by Chief Justice William Rehnquist) in *Edwards*. The dissenters concluded that creationism is a legitimate scientific theory that could be presented in the classroom without violating the requirements of the Establishment Clause. They argued that "[t]he body of scientific evidence supporting creation science is as strong as that supporting evolution. In fact, it may be *stronger*. . . . Creation science is educationally valuable. Students exposed to it better understand the current state of scientific evidence about the origin of life. Those students even have a better understanding of evolution. Creation science can and should be presented to children *without any religious content*."[46]

The dissenting justices also concluded that there are only two possible explanations of the origin of life—evolution and creationism—and that, consequently, "any evidence that tends to disprove the theory of evolution necessarily tends to prove the theory of creation science, and vice versa."[47]

The dissenting opinion by Justice Scalia and Chief Justice Rehnquist, although insightful, should be viewed with caution. At the outset, one must remember that the opinion is a dissent; their conclusions did not garner the support of the majority of the Court. Furthermore, the dissent may be somewhat misleading. It is beyond debate that science instructors can introduce scientific critiques of the theory of evolution; in fact, the majority in *Edwards* specifically indicated that a school could compel its teachers to introduce such scientific critiques. However, because the dissenters believe that there are only two explanations for the origin of life, they categorize all evidence that may disprove evolution as "creation-science evidence" and contend that it can be presented in a religiously neutral manner. To a degree, the dissenters are quite correct: scientific

44. *Id.* at 585–86, 592, 593.

45. *Edwards*, 482 U.S. at 593–94.
46. *Id.* at 623 (Justice Scalia, dissenting) (emphasis added).
47. *Id.* at 622.

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evidence that tends to disprove the theory of evolution may be presented as long as it is presented in a religiously neutral manner. The dissent is disingenuous, however, in labeling this evidence "creation-science evidence." School administrators and school board members should be cautious in accepting the dissent's distinction between "creation-science evidence" (which according to the dissenters is religiously neutral scientific evidence that tends to disprove the theory of evolution) and creationism (which consists of an inherently religious foundation).

Despite the distinction drawn by Justice Scalia and Chief Justice Rehnquist in *Edwards*, most federal courts have rejected the "creationism as science" theory because creationism cannot satisfy the requirements of a scientific theory. The prevailing opinion in this regard is *McLean v. Arkansas Board of Education*, an extremely comprehensive opinion issued by a federal district court in 1982. In *McLean*, the district court was called upon to assess the validity of Arkansas's Balanced Treatment for Creation-Science and Evolution Science Act.[48] The court found the Balanced Treatment Act—which was substantially similar to the Louisiana act the U.S. Supreme Court invalidated five years later in *Edwards*—to be unconstitutional in that it violated the Establishment Clause.

The *McLean* court carefully contemplated the characteristics of a scientific theory and ultimately concluded that "creation science . . . is simply not science."[49] Assisted by several witnesses, the court identified five essential characteristics of science:

- It is guided by natural laws,
- It explains phenomena by reference to natural laws,
- It is testable against the empirical world,
- Its conclusions are tentative,
- It is falsifiable.[50]

The district court rigorously evaluated the fundamental principles of creationism under this five-part test. It concluded that creationism does not satisfy the first inquiry, because evidence for creation "out of nothing" by a supernatural force is not the product of an inquiry guided by natural laws. For substantially the same reason, creationism also fails to satisfy the second inquiry—supernatural creation and a worldwide flood cannot be explained with reference to natural laws. Furthermore, the court concluded, because the existence of God or a Creator cannot be established scientifically, supernatural creation is neither testable nor falsifiable.[51]

The *McLean* court's most telling observation may be its evaluation of the "scientific" methodology employed by creationists. Under the court's five-part test, one essential characteristic of a scientific theory is its tentativeness—it must always be subject to revision or abandonment. "A theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory." The court concluded that creationists generally do not collect and weigh scientific data to reach conclusions. On the contrary, they accept the biblical account of creation and attempt to find scientific support for it. The court concluded, therefore, that "while anybody is free to approach a scientific inquiry in any fashion they choose, they cannot properly describe the methodology used as scientific if they start with a conclusion and refuse to change it regardless of the evidence developed during the course of the investigation."[52]

In summary, the *McLean* court reached the matter-of-fact conclusion that creationism cannot be a mandatory component of a school's science curriculum because creationism is not a scientific theory.

Evolution As Religion

Other voices have challenged the current treatment of evolution and creationism by advancing the complementary argument: if creationism is not a scientific theory, evolution may be an inherently religious theory. This approach contends that evolution is a central tenet of a religion called "Secular Humanism." Because of its quintessentially religious nature, say the challengers, evolutionary theory and the presentation of evolution in the classroom violate the Establishment Clause.

Webster's defines *secular humanism* as "an outlook or philosophy that advocates human *rather than* religious values" (emphasis added). By definition, therefore, it appears that secular humanism may not qualify as a religion for purposes of the Establishment Clause. Yet federal courts have disagreed among themselves about its status for Establishment Clause purposes. In *Crowley v. Smithsonian Institution*, one court implied that secular humanism is a religion—one that advocates the theory of evolution, the right to divorce, the right to birth control, universal education, and a world community.[53] Other federal

48. *McLean*, 529 F. Supp. 1255 (E.D. Ark. 1982); ARK. STAT. ANN. § 80-1663 *et seq.* (1981 Supp.).

49. *McLean*, 529 F. Supp at 1267.

50. *Id.*

51. *Id.* at 1267–68. The *McLean* court relied heavily on creationist literature to support this conclusion. In a footnote, the court quoted from a book by the associate director of the Institute for Creation Research: "We do not know how God created, what processes He used, for God used processes which are not now operating anywhere in the natural universe. This is why we refer to divine creation as Special Creation. *We cannot discover by scientific investigation anything about the creative processes used by God*" (*id.* at 1267 n.25, quoting Duane T. Gish, *Evolution? The Fossils Say No!,* 3d ed. [San Diego, 1979], 42 [emphasis added]).

52. *Id.* at 1269.

53. *Crowley*, 636 F.2d 738 (D.C. Cir. 1980). Although the D.C. Court of Appeals did not discretely hold that secular humanism is a religion, the language employed in the court's opinion certainly supports the implication that the court viewed it as a religion. The court wrote: "The dispute about whether the evolution theory was based on scientific proof or on faith is immaterial to the question of whether the [challenged government exhibits] supported establishment of Secular Humanism as a religion. The fact that

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courts, including the Courts of Appeals for the First and Ninth Circuits, have held that secular humanism may be a religion.[54]

Only one federal appellate court—the Ninth Circuit—has evaluated an Establishment Clause challenge to the introduction of evolution premised on the assertion that evolution promotes secular humanism. In *Peloza v. Capistrano Unified School District*, a California high school biology teacher asserted that "evolutionism" is a belief system based on the assumption that life and the universe evolved randomly.[55] The teacher contended that evolution is not a scientific theory because it is based on events that occurred in the nonobservable and nonrecreatable past and are therefore not subject to scientific observation. The Ninth Circuit relied on two familiar rationales to reject Peloza's Establishment Clause claim. First, the court observed that the theory of evolution does not incorporate a viewpoint regarding the creation of the universe:

> "Evolution" and "evolutionism" define a biological concept: higher life forms evolve from lower ones. The concept has nothing to do with *how* the universe was created; it has nothing to do with whether or not there is a divine Creator (who did or did not create the universe or did or did not plan evolution as part of a divine scheme). . . . Only if we define "evolution" and "evolutionism" as does Peloza as a concept that embraces the belief that the universe came into existence without a Creator might he make out a claim. This we need not do.[56]

Second, the court concluded that secular humanism may not be a religion for the purposes of the Establishment Clause. It ruled that the common definition of *religion* and the case law addressing secular humanism support the conclusion that secular humanism is not a religion under the Establishment Clause.[57]

The Ninth Circuit's decision in *Peloza* appears to reflect the current understanding of evolution and secular humanism as it relates to the requirements of the Establishment Clause. As an ideology, secular humanism—by definition—rejects religious values and does not embrace a supernatural power. Because the philosophy lacks a religious component, courts have been extremely hesitant to characterize it as a *religion* as that term is defined pursuant to the Constitution's Establishment Clause. Even if secular humanism were a religion under the Establishment Clause, however, the presentation of evolution in the classroom would not necessarily be unconstitutional. As the *Crowley* court deftly noted, the introduction of a particular message is not unconstitutional just because the message coincides or harmonizes with one particular tenet of one religion.[58]

Disclaimers

As we have seen, recent legal attempts to reinstate creationism in public schools on the grounds that it is a scientific theory have failed—as have challenges to the teaching of evolution arguing that it is a fundamental tenet of the religion of secular humanism. In light of these developments, school boards, school administrators, and citizens have acknowledged that the basic landscape of the public school science curriculum is unlikely to undergo significant change: evolution will continue to be presented as a scientific theory, but creationism will not. In the context of this general understanding of the legal principles underlying the treatment of creationism and the theory of evolution, some schools and school boards have mounted more subtle attacks on the established approach.

A number of boards have required that teachers, as they begin the unit on biological evolution, present a disclaimer stating that evolution is an unproven scientific theory. One federal circuit, the Court of Appeals for the Fifth Circuit, has addressed the constitutionality of this mandatory "evolution is only a theory" disclaimer. In *Freiler v. Tangipahoa Parish Board of Education*, the court ruled that a mandatory disclaimer violated the Establishment Clause.[59]

In 1994, the Tangipahoa (La.) Parish School Board adopted a resolution requiring teachers to present the following disclaimer:

> 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.[60]

The plaintiffs, three parents of school-aged children in Tangipahoa Parish, challenged the constitutionality of this disclaimer in the federal district court for the Eastern District of Louisiana. The district court judge applied the three-part *Lemon* test to assess the constitutionality of the school board's resolution and concluded that the mandatory disclaimer violated the Establishment Clause. According to the court, the

appellants were able to identify one *religious group* that espoused evolution as one of its tenets is immaterial"(*id*. at 743, emphasis in original).

54. *See* Rhode Island Federation of Teachers v. Norberg, 630 F.2d 850, 854 (1st Cir. 1980); Grove v. Mead School District No. 354, 753 F.2d 1528, 1534 (9th Cir. 1985).

55. *Peloza*, 37 F.3d 517 (9th Cir. 1994).

56. *Id.* at 521.

57. *Id.*

58. *Crowley*, 636 F.2d at 742–43.

59. *Freiler*, 185 F.3d 337 (5th Cir. 1999).

60. Freiler v. Tangipahoa Parish Board of Education, 975 F. Supp. 819, 821 (E.D. La. 1997).

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parish's disclaimer failed the first prong of the *Lemon* test because it was not implemented for a secular purpose: "The manner and the contemporaneous proposal and adoption of the disclaimer, the discussions and comments at the School Board meeting during which it was passed, the testimony submitted at trial, and the historical context in which the subject arises, demonstrate by a preponderance of the evidence that religious concerns motivated the disclaimer."[61]

The district court did not evaluate the constitutionality of the disclaimer under the second or third prongs of the *Lemon* test because, once the disclaimer failed the first prong, the court was compelled to declare the resolution unconstitutional.[62]

The Tangipahoa Parish Board of Education appealed the district court's ruling, but the decision was ultimately affirmed by the Court of Appeals for the Fifth Circuit.[63] Surprisingly, however, the Fifth Circuit did not support the district court's conclusion that the disclaimer did not serve a legitimate secular purpose. On the contrary, the circuit court ruled, the dual objectives of the disclaimer—namely, disclaiming orthodoxy of belief and reducing student/parent offense—were permissible secular objectives that satisfied the first requirement of the *Lemon* test. Instead, the appeals court invalidated the parish's disclaimer under the second prong of the *Lemon* test, concluding that its effect was to protect and maintain a particular religious viewpoint.[64]

Although *Freiler* provides the clearest guidance regarding the constitutionality of an "evolution is only a theory" disclaimer, the Fifth Circuit's decision must be viewed with caution for two reasons. First, the decision has been widely criticized. After the three-judge panel issued the opinion in *Freiler*, several judges on the Fifth Circuit urged that the case be reheard *en banc* (meaning that *all* Fifth Circuit judges, not just a three-judge panel, would rehear the case).[65] Though the petition was denied, seven Fifth Circuit judges indicated that they questioned the three-judge panel's application of Establishment Clause principles.[66] And at least three U.S. Supreme Court justices had similar concerns; when the Court declined to review the Fifth Circuit's decision in *Freiler*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, issued an opinion asserting that the Fifth Circuit's decision may be erroneous and may reflect a deficiency in the manner in which the courts examine potential Establishment Clause violations.[67]

A second reason for viewing the Fifth Circuit's decision in *Freiler* with caution is that the court explicitly limited it to the particular circumstances and the particular disclaimer in effect in Tangipahoa Parish. The three-judge panel clarified the scope of its opinion as follows:

> [W]e emphasize that we do not decide that a state-mandated statement violates the Constitution simply because it disclaims any intent to communicate to students that the theory of evolution is the only accepted explanation of the origin of life, informs students of their right to follow their religious principles, and encourages students to evaluate all explanations of life's origins, including those taught outside the classroom. We decide only that under the facts and circumstances of this case, the statement of the Tangipahoa Parish School Board is not sufficiently neutral to prevent it from violating the Establishment Clause.[68]

The Fifth Circuit's ruling thus did not declare all mandatory disclaimers unconstitutional but only the disclaimer required in the Tangipahoa Parish schools.[69] Although this limitation of the *Freiler* decision must be duly acknowledged, the method of constitutional evaluation employed by the Fifth Circuit indicates how future courts are likely to assess the constitutionality of disclaimers conveying the message that evolution is an unproven theory.

61. *Id.* at 830.

62. Although the district court appeared to rule exclusively on the "purpose" prong of the *Lemon* test, the opinion can also be read as concluding that the parish's disclaimer constitutes an unconstitutional endorsement of religion (as enunciated in *Allegheny*). The court wrote: "In mandating this disclaimer, the School Board is endorsing religion by disclaiming the teaching of evolution in such a manner as to convey the message that evolution is a religious viewpoint that runs counter to the religious belief of the Biblical theory of Creation, or other religious views. An endorsement of religion is a violation of the Establishment Clause and thus must be invalidated" (*id.* at 830).

63. Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337 (5th Cir. 1999).

64. *Id.* at 346.

65. A member of the circuit court may request that the other members of the court be polled to determine if a particular case will be reheard *en banc*. Pursuant to Federal Rule of Appellate Procedure 35, a majority of the judges in active service must vote in favor of rehearing for the petition to be granted.

66. Freiler v. Tangipahoa Parish Board of Education, 201 F.3d 602 (5th Cir. 2000). Justice Barksdale dissented from the denial of rehearing *en banc*, joined by Justices Jolly, Higginbotham, Jones, Smith, Garza, and DeMoss.

67. Tangipahoa Parish Board of Education v. Freiler, 530 U.S. 1251 (2001). Justice Scalia dissented from the denial of certiorari, joined by Chief Justice Rehnquist and Justice Thomas. The dissenters expressed their desire to revisit the merits of the *Lemon* test in general. Their opinion continued: "Even assuming, however, that the Fifth Circuit correctly chose to apply the Lemon test, I believe the manner of its application [to be] so erroneous as independently to merit the granting of certiorari, if not summary reversal. Under the second prong of Lemon, the 'principal or primary effect [of a state action] must be one that neither advances nor inhibits religion.' Far from advancing religion, the 'principal or primary effect' of the disclaimer at issue here is merely to advance freedom of thought" (*id.* at 1253).

68. *Freiler*, 201 F.3d at 603.

69. The three Supreme Court justices who dissented from the denial of certiorari in *Freiler* also took issue with the Fifth Circuit's narrow decision: "Reference to unnamed 'facts and circumstances of this case' is not a substitute for judicial reasoning" (*Freiler*, 530 U.S. at 1254–55).

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The Theory of Intelligent Design

Another very controversial recent development in the school science curriculum is the introduction of the "theory of intelligent design." This theory is based on the general notion that the world and its creatures are too complex to have arisen through randomness and must therefore be the product of an "intelligent designer." It has received significant attention lately because of its incorporation into a science textbook entitled *Of Pandas and People: The Central Question of Biological Origins.*[70]

Of Pandas and People attempts to skirt the perilous constitutional line that forbids introducing religious doctrine into the classroom by scrupulously avoiding speculation about who the "intelligent designer" might be. Nonetheless, the book is easily reconciled with the creationist approach that identifies God as the intelligent designer. In fact, when asked whether he could think of any other "intelligent designer," a university professor who endorsed the book responded, "You could think of a time-traveler, or other strange things, but offhand, no."[71] The authors concede that species may undergo change over time but also accuse evolutionists of "subjective judgments" and "circular argument."[72]

The manner in which it presents the theory of intelligent design has sparked interest in *Of Pandas and People* and aroused heated debate in many communities. In Idaho, for instance, several communities have contemplated adopting the textbook in its public schools; and citizens in Louisville, Ohio, purchased fifty copies of the book and donated them to their school's science library.[73] These communities are not alone, and the debate surrounding this controversial textbook has reignited the creationism/evolution clash across the country.[74]

School adoptions of *Of Pandas and People* may constitute a violation of the Establishment Clause, although no court has yet addressed this precise issue. The American Civil Liberties Union (ACLU) has indicated that an adoption of the textbook could prompt it to initiate a legal challenge to its classroom use.[75] Some legal observers have already concluded that introducing the theory of intelligent design into public school biology courses would be unconstitutional.[76] Others, however, have argued that the theory is not religious and therefore does not violate the Establishment Clause; their implicit argument seems to be that the relationship between intelligent design theory and creationism is similar to that between evolution and secular humanism: although the theory of intelligent design harmonizes with religious doctrine, its introduction as a scientific theory does not, by itself, constitute presentation of a religious view.[77] Because compelling arguments can be made to challenge and defend the constitutionality of placing *Of Pandas and People* in the classroom, and because no court has addressed the constitutionality of doing so, school administrators and officials must heed the general guidance provided by the Supreme Court's Establishment Clause jurisprudence to assess the constitutionality of adopting the textbook.

Removing Evolution from State Curriculum Standards

Possibly the boldest challenge to the treatment of evolution and creationism is also the subtlest: some states have considered removing the study of evolution from state science curriculum standards. This decision effectively diminishes the importance of evolution relative to other biological concepts presented in biology class: evolution would no longer be a required concept, and the theory of biological evolution would not be included on statewide standardized tests. The removal of evolution from the curriculum would not, however, bar teachers from introducing evolution into their classrooms or make its presentation contingent on concurrent teaching of creationism. Such a removal can thus be distinguished both from the balanced-treatment requirement invalidated in *Edwards* and from the Arkansas statute the Court invalidated in *Epperson*. For these reasons, the constitutionality of removing evolution from a state's course of study is not clear, and no court has addressed the constitutional ramifications of doing so.

Most recently, the state of Kansas was embroiled in a heated controversy about just such a possible removal of evolution from the state science curriculum.[78] The state's experience may provide significant insight into the constitutionality and wisdom of eliminating the teaching of evolution. Initially, a committee of scientists, educators, and citizens drafted a set of science education standards based on standards proposed by the National Academy of Sciences; the proposed standards

70. Percival Davis and Dean H. Kenyon, *Of Pandas and People: The Central Question of Biological Origins*, 2d ed. (Dallas, 1993).

71. Todd Pruzan, "The Secret Creator," *N.Y. Times Magazine*, August 29, 1999.

72. *Id.*

73. Andrea Tortora, "Teachers Tiptoe around Evolution," *Cincinnati* (Ohio) *Enquirer*, Dec. 13, 1999, B1; and Pruzan, "Secret Creator."

74. For an account of the legal controversy about the book, *see* George, "And Then God Created Kansas?"; and Jay D. Wexler, "Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools," *Stanford Law Review* 49 (1997): 439–43.

75. Pruzan, "Secret Creator" (quoting the legal director of the Ohio branch of the ACLU).

76. George, "Of Pandas, People, and the First Amendment," 455–56.

77. David K. DeWold et al., "Teaching the Origins Controversy: Science, or Religion, or Speech?" *Utah Law Review* (2000): 39, 93–95.

78. *See* George, "And Then God Made Kansas?"

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included using evolution as a "unifying concept" linking cosmology, geology, physics, and biology. Evolution opponents were outraged by the standards, and the Kansas State Board of Education subsequently rejected them, delegating to one board member the task of writing a new set of standards. The newly promulgated standards: (1) referred to microevolution (adaptation) but not to macroevolution (change from one species to another); (2) no longer listed evolution as a "unifying concept"; (3) omitted many references to the earth's age; and (4) omitted references to the big-bang theory. Kansas school board members have indicated that the purpose of the new standards was to ensure that students are taught "good science."[79]

The constitutionality of the board's action is hard to ascertain, because, as noted above, no court has directly addressed the constitutionality of removing evolution from a state's curriculum standards. At least one legal commentator has expressed the opinion that Kansas's action is unconstitutional.[80] Although a fair argument could be made supporting the constitutionality of the decision, an equally fair argument could be made that removing evolution from the curriculum is unconstitutional.

Defenders of the Kansas decision could argue, for example, that the removal of evolution from the curriculum restores the governmental neutrality originally required by the Supreme Court in *Epperson*. Defenders could also identify a variety of secular purposes—for example, avoiding controversial issues or allocating precious class time to other "settled" biological principles—to justify removing evolution from the curriculum. They could also note that in *Epperson* the U.S. Supreme Court clearly indicated that it might be constitutional to remove all discussion of the origin of life—including both creationism and evolution—from the classroom. On this basis, defenders might argue, omitting evolution from the curriculum standards without prohibiting its introduction places evolution in a more favorable pedagogical position than the suggestion in *Epperson* that a school could remove from the public school classroom *all* discussion of the origins of life.

On the other side, opponents of the Kansas decision could argue that the action violates three different aspects of the Establishment Clause. First, under the first prong of the *Lemon* test, the school board's purpose of teaching "good science" could be characterized as a sham to conceal the board's genuine religious purpose. Second, its treatment of evolution could be viewed as an endorsement of religion or religious practices, although this contention is certainly less plausible than the challenge under the *Lemon* test. Most importantly, however, challengers could assert that the action of the Kansas State Board of Education violates one of the fundamental principles announced in *Epperson*: that the curriculum cannot be tailored to the principles of a religious sect.

Ultimately, we can only speculate how a court would have ruled on the constitutionality of Kansas's action, for in the end the state's board of education did not remove evolution from the state curriculum. Yet the constitutional conflict of such an action is readily apparent. On the one hand, removing the theory of evolution from state science standards may appear to preserve the government's neutrality between religion and nonreligion. On the other hand, the removal may be seen as an unconstitutional tailoring of the curriculum to the principles of a specific religious sect. From this perspective, the actions Kansas considered are difficult to reconcile with the two lasting principles announced by the Supreme Court in *Epperson*.

The Future of Creationism in the Classroom

Creationists have suffered countless setbacks in their attempts to introduce creationism into the science classroom. The Supreme Court has invalidated laws that prescribe balanced treatment for creationism and evolution, and other federal courts have concluded that creationism cannot be properly categorized as a scientific theory. And, although the development of the theory of intelligent design may provide creationists with a new hope of reinstating the topic into the biology curriculum, creationism's status in public school science classrooms remains tenuous at best.

Does this imply that the presentation of creationism is wholly forbidden in public schools? No. Courts have routinely acknowledged that religious beliefs—including belief in the divine origin of life—may be presented in classrooms in a constitutionally appropriate context. In a concurring opinion in *Edwards*, for instance, Justice Powell observed that as "religion permeates our history," it would be proper to present creationism to students in courses on comparative religions, history, ethics, or philosophy.[81]

Conclusion

The salient public debate surrounding the teaching of creationism and the theory of evolution in public schools has continued for almost a century. Although this contentious

79. *Id.* at 865–68.
80. *Id.* at 868–71.
81. *Edwards*, 482 U.S. at 607.

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discussion has not been conducted in North Carolina's courts, the controversy has not escaped our state's public schools. As noted earlier, the North Carolina Course of Study for the science curriculum prescribes the study of biological evolution and omits the study of creationism. It does, however, include a topic on the origins of life, which may cause concern to some school administrators, school officials, and teachers.

The legal decisions considered in this article provide significant insight into the legal principles that govern the treatment of creationism and the theory of evolution in the science classroom. The Supreme Court's decisions in *Epperson* and *Edwards*, in particular, offer fundamental principles that should guide the creation and modification of a school's curriculum. Subsequent decisions in the lower federal courts supplement these fundamental principles by extending them to related recent developments. Although the constitutionality of some of the latest challenges to the treatment of creationism and evolution remains untested in the federal courts, school boards can benefit from the significant guidance provided by earlier court opinions.

At the present time—and probably for the foreseeable future—the North Carolina Standard Course of Study includes the theory of evolution in its biology curriculum, because evolution is a scientific theory. Although the course of study at times fails to delineate adequately between the scientific theory of evolution and independent theories of the origin of life, it is clear that evolution is a proper subject for the public school science classroom. Creationism, on the other hand, is not included in the course of study, because it is not a scientific theory. North Carolina has adopted the following standard for its science curriculum, which aptly embodies this conclusion:

> Explanations of how the natural world changes based on myths, *personal beliefs*, *religious values*, mystical inspiration, superstition, or authority may be personally useful and socially relevant, but they are not scientific.[82] ■

82. 1995 National Science Education Standards, North Carolina Standard Course of Study (emphasis added).

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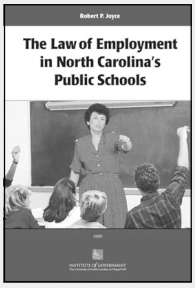

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Cases and Opinions That Directly Affect North Carolina

Purchase of liability insurance does not waive state's sovereign immunity; in cases where state does waive immunity, tort complaints must be brought before the Industrial Commission, not the state courts. Wood v. North Carolina State University, 147 N.C. App. 336, 556 S.E.2d 38 (2001).

Facts: Kathy Wood and Evalyn Gonzales (the plaintiffs) sued North Carolina State University (NCSU), alleging that they were harassed by an NCSU professor. NCSU argued that, as a state institution, it was protected from suit by sovereign immunity. The trial court ruled (1) that NCSU had waived sovereign immunity by purchasing liability insurance; (2) that an exception to sovereign immunity applied to a portion of the case; and (3) that NCSU was estopped from asserting the immunity defense. NCSU appealed the ruling.

Holding: The North Carolina Court of Appeals reversed the trial court on all counts, in the process making important distinctions between sovereign immunity as it applies to the state and sovereign immunity as it applies to cities and counties.

The state may not waive its immunity by purchasing liability insurance, although cities and counties may. The court began by stating that only the General Assembly may waive the state's immunity and found that it had done so in only one instance, with passage of the State Tort Claims Act, Chapter 143, Section 291 of the North Carolina General Statutes (hereinafter G.S.). That law waives immunity in suits arising from negligent acts committed by state employees in the course of their employment.

Editor's note: Waiver of immunity is different from consent to suit. While only the General Assembly can waive the state's immunity, the state may, by certain actions, consent to suit. Consent was not at issue in this case (but see the digest of Moore v. North Carolina Cooperative Extension Services*, below*).

Therefore, the state does not waive its immunity through the purchase of liability insurance, even though state statutes and case law provide that cities and counties may waive immunity in this way. For example, G.S. 115C-42 and 115C-47(25) provide that school boards may waive immunity, up to policy limits, by purchasing liability insurance. The purchase of liability insurance by the state does nothing more than provide for a source of recovery, other than the state treasury, in cases that arise under the Tort Claims Act.

The state may only be sued in the Industrial Commission for tort claims arising under the Tort Claims Act. To the extent that the state may be sued under the Tort Claims Act, the act requires that such suits be brought before the Industrial Commission, not in state courts. (Cities and counties that have waived immunity may be sued in state court.) Moreover, plaintiffs bringing suit in the Industrial Commission under the act can recover no more than $500,000 in damages; this limitation does not apply in state courts.

The plaintiffs argued that the provision of the Tort Claims Act allowing the state to purchase liability insurance to defend tort actions brought against its employees makes the state amenable to suit in state court. The appeals court, however, found that the plaintiffs had confused cases against the state, which may be brought only in the Industrial Commission and are subject to limitations on damages, and cases against state employees, which may be brought in state court without damage limitations. The provision the plaintiffs cited merely allows the state to purchase insurance to cover employee liability. The court found that the insurance policy held by NCSU, and at issue in this case, was designated for that purpose.

Common law exceptions to the doctrine of sovereign immunity do not apply to the state. The plaintiffs argued that quasi-estoppel, a legal doctrine based on fairness, prevented NCSU from asserting sovereign immunity. (The opinion did not elaborate on the factual basis for this claim.) The court summarily rejected this argument, noting that it called for the court to waive the state's immunity, which only the General Assembly is empowered to do.

Ingrid M. Johansen is a research fellow at the Institute of Government.

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The court also found that the ministerial duty exception to sovereign immunity did not apply to the state. That exception applies when a governmental entity exercises its powers and privileges for its own benefit, as opposed to the public benefit. This exception, said the court, applies only to counties or cities.

State residents have the right to challenge statutory election scheme for University Board of Governors. Davis v. State of North Carolina, 180 F. Supp. 2d 774 (E.D.N.C. 2001).

Facts: G.S. 116-6 provides that of the sixteen members of the Board of Governors of the University of North Carolina, at least two shall be women, two shall be members of a minority racial group, and two shall be members of the political party to which the largest minority of members of the General Assembly belongs. In the election for seats on the board, the four separate candidate slates of women, racial minorities, political minorities, and at-large do not compete against each other. Walter Davis and other North Carolina residents (the plaintiffs) brought suit against various state officials (the defendants), alleging that this scheme for electing board members violated the Fourteenth Amendment's guarantee of equal protection. [See "Changes Affecting Higher Education," *School Law Bulletin* 32 (Fall 2001): 18–25, which reports recent changes in the statute governing Board of Governors elections.]

The defendants asked the court to dismiss the claim, arguing that the plaintiffs lacked "standing" to bring suit. *Standing* is a legal doctrine requiring that, in order to bring a suit, a plaintiff show (1) that he or she suffered, or is about to suffer, an injury; (2) that there is a causal relationship between the injury and the challenged conduct; and (3) that there is a likelihood the injury will be redressed by a favorable decision. The defendants argued that the plaintiffs, never having been nominated to a slate or rejected for a seat on the board, had not suffered actual injury or discrimination under the election scheme.

Holding: The federal court for the Eastern District of North Carolina denied the defendants' motion to dismiss. In equal protection cases, the court noted, plaintiffs need only show that they were denied equal treatment because the government imposed a barrier to a benefit, not that they were ultimately denied the benefit itself. In other words, government conduct that prevents citizens from competing on an equal basis for governmental benefits is injurious. The gender, racial, and political classifications the plaintiffs complained about were in place well before the actual Board of Governors election; the nomination process itself is therefore different for each person, depending on his or her minority or nonminority status. Therefore the plaintiffs have standing.

School principal properly held liable for deliberate indifference to the risk that a teacher was molesting students; school board properly held not liable. Baynard v. Malone, 268 F.3d 228 (4th Cir. 2001).

Facts: Craig Lawson taught sixth grade at the Charles Barrett Elementary School in the Alexandria (Va.) school system. During fall 1990, Lawson began molesting one of his students, Jackson Baynard, on school grounds (before, during, and after school hours), as well as on camping trips and at his (Lawson's) home.

Earlier that year, a former student of Lawson's, Steven Leckie, had approached Catherine Malone, Lawson's principal, and informed her that Lawson had molested him fifteen years earlier when he was a sixth-grade student. He also told her that he was not interested in pressing charges against Lawson but warned her to make sure that Lawson was not spending time with students outside of class. Malone did not act on this information or report it to anyone. Nor did she record the name or any information about a woman who informed her during a school function that Lawson had sexually molested a student. Malone did talk to Lawson after the school librarian reported that she had surprised him in his classroom with Baynard sitting on his lap in a way that seemed inappropriate. Lawson convinced her that Baynard had initiated the contact and that he would admonish Baynard to behave more appropriately.

Malone took no further action until another teacher relayed to her a neighbor's contention that Lawson abused students. At that time, she communicated the Leckie accusation and the latest report (but not the lap-sitting incident) to Otto Beckhoff, the Alexandria City School Board's (ACSB) personnel director. Beckhoff instructed Malone to monitor Lawson's activities. Subsequently, Malone walked the halls several times a day, occasionally stopping in at Lawson's classroom. Although Baynard often stayed after school with Lawson, sometimes for as long as one and a half hours, and received rides home from him, Malone never reported seeing them together.

Immediately upon receiving Malone's report, Beckhoff informed Paul Masem, ACSB's superintendent, and began an investigation. He interviewed Leckie and his parents, the neighbor who had alleged abuse of students, and school officials in Lawson's former school district. On the basis of his investigation, he informed the police department of his concerns. Soon after, the police investigation was closed for lack of evidence and Lawson resigned. Lawson nonetheless continued to abuse Baynard for another nine years, until Baynard reported the abuse and Lawson was arrested and convicted.

In 1999 Baynard brought suit against Malone, Beckhoff, and Masem, charging that they should be held liable under Section 1983, Title 42 of the United States Code, because they were deliberately indifferent to the risk that Lawson would

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cause his students constitutionally recognizable injuries by molesting them. He also filed suit against ACSB, alleging that it had violated Title IX of the Education Amendments of 1972 by allowing Lawson to sexually harass him. A jury returned verdicts against ACSB, Beckhoff, and Masem for $700,000 and against Malone for $350,000. The federal district court reversed the verdict against Beckhoff, Masem, and ACSB, finding no reasonable basis for holding them liable. The court refused, however, to reverse the verdict against Malone. Baynard appealed the reversal of the first verdict, and Malone appealed the refusal to reverse the verdict against her.

Holding: The Fourth Circuit Court of Appeals affirmed the lower court's ruling on both verdicts.

With respect to the Malone verdict, the court stated that under Section 1983 state officials acting in supervisory capacities can be held liable for a constitutional injury (which Lawson's abuse of Baynard admittedly was) inflicted by a subordinate when three requirements are satisfied: (1) the supervisor had actual or constructive knowledge that the subordinate was engaged in conduct that posed an unreasonable risk of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the conduct; and
(3) there was a causal link between the supervisor's inaction and the injury suffered by the plaintiff. Based on the facts of this case, particularly Malone's "desultory efforts at 'monitoring'" Lawson, the court had no problem concluding that the jury's verdict against Malone was reasonable.

The court also had no difficulty in finding that ACSB officials Beckhoff and Masem could not be held liable under Section 1983's three-prong test. Immediately upon receiving Malone's report, Beckhoff had begun an investigation and, given that the principal had withheld information about the lap-sitting incident, acted appropriately. As Superintendent Masem could not have been expected to conduct the investigation himself, and since Beckhoff's investigation was adequate, he did not act improperly in failing to direct Beckhoff to take further action.

The court went on to address the Title IX claim against ACSB. Title IX prohibits sex discrimination, including sexual harassment and abuse, by educational institutions that receive federal funds. To be held liable under this statute, a school district official with authority to address the discrimination on the district's behalf (in this case, Principal Malone) must have actual knowledge of the discrimination and be deliberately indifferent to it. This standard differs from the standard set in Section 1983. Title IX requires *actual knowledge*, while Section 1983 requires only that a school official *should have known* of the discrimination. Although Malone arguably should have known of Lawson's potential for abuse, the facts do not show that she *did* know. Further, Malone herself did not have the authority to fire, transfer, or suspend Lawson. Therefore, ACSB could not be held liable under Title IX for her conduct.

Former employee's contract claim not barred by sovereign immunity. Moore v. North Carolina Cooperative Extension Services, 146 N.C. App. 89, 552 S.E.2d 662 (2001).

Facts: Everett Prosise, District Extension Director for North Carolina Cooperative Extension Service (NCCES), a branch of North Carolina State University, sent a letter to Sheppard Moore offering him the newly created position of area education extension agent. The letter stated that the position came with a salary of $39,000 and would be of three year's duration, with annual performance evaluations. Moore accepted the position and began his duties in August 1994; six months later he was terminated for an unsatisfactory performance rating.

Moore filed suit against the state of North Carolina, North Carolina State University (NCSU), and NCCES, among others, alleging that the letter from Prosise constituted an employment contract, which the defendants breached. Moore sought the salary and other benefits he would have earned during the remainder of his unexpired three-year term as area education extension agent. The defendants sought to have Moore's claim dismissed on the basis of sovereign immunity. The trial court denied the defendants' request, and they appealed.

Holding: The North Carolina Court of Appeals affirmed the trial court's refusal to dismiss Moore's complaint.

The state—and its agencies—cannot be sued unless it consents to suit or waives its sovereign immunity. Whenever the state, or its authorized agents, enters into a valid contract, it implicitly consents to suit in the event that it breaches the contract. Based on affidavits from Prosise and Larry Monteith, NCSU's chancellor, the court found that Prosise did have authority to offer Moore an appointment with NCCES. The court went on to find that the letter to Moore constituted an employment contract. Therefore, the defendants consented to suit.

Principal's search of nonstudent juveniles on school property was constitutional. In the Matter of D.D., 146 N.C. App. 309, 554 S.E.2d 346 (2001).

Facts: A substitute teacher told Principal Hicks of Hillside High School that she had overheard students talking about a group of girls who were planning to come on campus at the end of the day to fight with a Hillside student. Hicks wanted to stop any potential fight and had a duty to report the unauthorized presence of nonstudents on his campus. On the basis of

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the teacher's information and this rule, Hicks, Hillside's resource officer, and two other school security officers confronted four female students—only one of them a Hillside student—in the school's parking lot at the end of the day.

During the confrontation, the students used profane language and offered false information when asked who they were and where they attended school. One of the officers searched the purse of one of the students and found a box cutter. Hicks and the officers then brought the students into Hicks's office, where he requested that they empty their pockets. At this point, they discovered that one of the students, D.D., had a knife in her possession. Hicks decided to have her charged with juvenile delinquency.

The trial court denied D.D.'s motion to suppress the knife evidence as illegally obtained. She was found delinquent and placed on supervised probation for one year. D.D. appealed this ruling.

Holding: The North Carolina Court of Appeals affirmed the trial court's ruling, but not the reasoning used to reach it.

In the school context, the *T.L.O.* standard [*New Jersey v. T.L.O.*, 469 U.S. 325 (1985)] generally governs the legality of student searches. This standard provides that school administrators need not have a warrant or probable cause to search students but, rather, only need to show that the search was reasonable under all of the circumstances. Although the trial court had found the search constitutional, it ruled that *T.L.O.* did not apply in this case because D.D. was not a Hillside student. The court of appeals, however, determined that *T.L.O.* did apply to the facts of this case.

The court began by noting that no cases from other jurisdictions supported the trial court's refusal to apply *T.L.O.* to students who are not students at the school where the search was conducted. Indeed, it found that *T.L.O.*'s rationale—that warrantless searches by school officials are justified when necessary to maintain discipline, safety, and a sound educational environment—applies equally well to the facts of this case.

The court also found unpersuasive D.D.'s argument that *T.L.O.* should not apply here because law enforcement officers were involved in the search. Although the *T.L.O.* case did expressly limit its holding to cases in which the student search was conducted solely by school officials, that holding has been expanded to include cases in which law enforcement officers work *in conjunction with* school officials, either assisting in the search or conducting it themselves. However, when officers conduct the search themselves, they must be school resource officers employed by the school district and ultimately responsible to it (rather than local law enforcement officials). The rationale behind this extension of the *T.L.O.* rule is that such officers are serving the school's interest in maintaining discipline and a safe learning environment and are not seeking evidence of a crime.

In this case, the involvement of the officers (aside from the initial search of the other student's purse, which D.D. did not have standing to dispute) was purely supportive, and Hicks led the investigation. Allowing Hicks to utilize the officers in this manner is consistent with *T.L.O.*'s rationale.

Having found the *T.L.O.* standard applicable to this case, the court went on to conclude that Hicks's search of D.D. met its requirements. Hicks knew, based on his experience, that student fights often involve weapons, and he had an obligation to his own students and staff to prevent their use on school grounds. Therefore, the initial confrontation with the students was justified. When the students responded with profanity and lies, Hicks had reasonable grounds to believe that further investigation would reveal evidence of a crime or school rule violation. The students' reaction, in combination with the box cutter found by one of the officers, provided sufficient justification to bring the students into his office and ask them to empty their pockets. This search, therefore, was justified at its inception and was not unnecessarily intrusive.

Tenure denial was not race-based. Nemecek v. Board of Governors of the University of North Carolina, No. 2:98-CV-62-BO(2), ___ F. Supp. 2d ___ (E.D.N.C. Nov. 6, 2001).

Facts: Stephen Nemecek, a white male professor, did not receive tenure at Elizabeth City State University (ECSU), a historically black university. ECSU's Faculty Hearing Committee reviewed Nemecek's claim that the tenure denial was racially motivated but found no evidence to support it. Nemecek then filed several race discrimination claims against ECSU and its officials in federal court, including claims under Sections 1981 and 1983 of Title 42 of the United States Code and under Title VII of the Civil Rights Act of 1964. He also filed several other claims, which were dismissed in an earlier ruling. [See "Clearinghouse," *School Law Bulletin* 31 (Winter 2000): 31–32.]

ECSU moved to have Nemecek's claims dismissed before trial, arguing that he had no evidence on which a reasonable jury could return a verdict for him.

Holding: The federal court for the Eastern District of North Carolina agreed with ECSU and dismissed Nemecek's complaint.

The court first addressed Nemecek's claims under Sections 1981 and 1983, federal statutes that prohibit racial discrimination by state officials. ECSU argued that the earlier committee review of Nemecek's tenure denial barred a new review by the federal court (a concept called *issue preclusion*), and the court agreed. The U.S. Supreme Court has held that, in cases brought under Sections 1981 and 1983, when a state agency acting in a

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judicial capacity resolves disputed issues of fact that the parties have had adequate opportunity to present, federal courts must give the agency determinations preclusive effect. The North Carolina Court of Appeals has issued a similar ruling.

The facts before the court showed that ECSU's Faculty Hearing Committee is composed of impartial persons from the faculty member's department. Parties may be represented by legal counsel, may present testimonial and documentary evidence, and may examine and cross-examine witnesses. Transcripts of committee proceedings are available. Nemecek availed himself of all these features and thus received the benefit of a hearing that mimicked the essential procedural characteristics of a court hearing. Therefore the committee's ruling that racial discrimination did not motivate the decision to deny him tenure is entitled to preclusive effect.

The Supreme Court's holding on issue preclusion does not apply to claims brought under Title VII, so the court addressed Nemecek's Title VII claim on its merits. Before doing so, however, the court noted the great trepidation with which courts review professorial employment decisions under Title VII.

Nemecek met the initial requirements of a successful Title VII racial discrimination claim. First, he showed that he was a member of a protected class—a white male at a predominantly black university. Second, he showed that he suffered adverse employment action. Third, he produced evidence (favorable department progress reports, a list of research endeavors and publications, and student letters praising his teaching ability) to show, at least preliminarily, that he was qualified for tenure. Finally, he showed that he was denied tenure under circumstances giving rise to an inference of unlawful discrimination. To satisfy this requirement, Nemecek offered evidence of "coded" language used by department members during his tenure review that, he alleged, indicated racially discriminatory attitudes. He also presented a statistical analysis of ECSU employment practices that show favoritism to nonwhite and black faculty and evidence from a three-year-old administrative proceeding in which ECSU was found to have discriminated against a white faculty member.

Nemecek did not, however, show that ECSU's stated reasons for denying him tenure were a pretext for racial discrimination. ECSU cited Nemecek's poor teaching performance, inadequate research, and lack of departmental contributions. Nemecek proffered no new evidence of racial discrimination, relying only on the evidence he used to meet Title VII's initial requirements. And the "coded" language on which he relied (for example, that he was "not ready to give what it takes to enhance the chance of success these students are seeking") made no mention of race and was much more easily reconciled with ECSU's asserted reasons for the tenure denial than with the claim of discrimination. The court was disinclined to rely on the statistical analysis, given the subjectivity of the tenure-decision process. Finally, the evidence from the earlier discrimination case was not ultimately persuasive, because Nemecek failed to show that the same decision makers were involved in the two cases.

Student's death, caused by being struck by a car while she was walking to school, was not the result of negligence on the part of the school bus driver who failed to pick her up. Chapman v. Onslow County Board of Education, in the North Carolina Industrial Commission, I.C. No. TA-15681 (Oct. 16, 2001).

Facts: Letitia Cullom, a sixth-grade student at Southwest Middle School in the Onslow County (N.C.) school system, was killed by a car as she walked to school. Her mother, Mary Chapman, sued the board, alleging negligence because school bus driver Kathy Overton failed to stop at Cullom's bus stop. The deputy commissioner who heard Chapman's case found that Cullom's name had been taken off the list of students to be picked up in the morning because she was never at the stop, preferring instead to walk to school. The commissioner ruled that Cullom's preference for walking to school, not Overton's failure to stop at her bus stop, was the cause of her death. Further, the commissioner rejected Chapman's allegation that Overton was negligent in failing to report that children were walking to school along a dangerous road. He ruled that Overton was responsible only for the safety of the children on her bus. Chapman appealed.

Holding: The full Industrial Commission affirmed the deputy commissioner's ruling.

Court dismisses school board's claim concerning 45-day interim special education placement. Waters v. Cumberland County Board of Education, No. 5:00-CV-670-BR3, ___ F. Supp. 2d ___ (E.D.N.C. Nov. 13, 2001).

Facts: In April 2000 the Cumberland County Board of Education sought to place Weston Waters, a middle school student with disabilities, in a 45-day interim alternative placement after he threatened to kill a fellow student. In the expedited hearing provided for in the Individuals with Disabilities Education Act, the administrative law judge (ALJ) ruled that the board had failed to meet its burden of proving that allowing Weston to remain in his current placement was substantially likely to result in injury to himself or others. Nonetheless, the ALJ incorporated into the August 2000 order the alternative placement that the board and Weston's parents had agreed to in the meantime.

In October 2000 the board (for reasons not made clear in the opinion) appealed the ALJ's ruling. The hearing officer found that the board had met the burden of proof regarding

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Weston's dangerousness but concluded that as he was already in an alternative placement to which neither party objected, the issue was moot. The board appealed this ruling.

Holding: The federal court for the Eastern District of North Carolina affirmed the hearing officer's ruling. The 45-day interim placement that gave rise to this controversy has long since passed, said the court, and ruling on whether the board met the burden of proof necessary to justify that placement would afford relief to neither party.

Other Cases

Teacher's decision to have classroom speakers on the environmental benefits of industrial hemp was constitutionally protected speech. Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir. 2001).

Facts: Donna Cockrel, a tenured fifth-grade teacher at Simpsonville Elementary in the Shelby County (Ky.) school district, was allegedly terminated for insubordination, conduct unbecoming a teacher, inefficiency, incompetence, and neglect of duty. She believed she was terminated because of her decision to bring speakers on the environmental benefits of industrial hemp to her classroom. Hemp, an illegal substance in Kentucky, is a plant known in one form as marijuana; but in its industrial form hemp produces a valuable fiber used to make paper, textiles, and other products.

The Cable News Network (CNN) and Woody Harrelson (a celebrity best known for his role as "Woody" on the television show *Cheers*) participated in Cockrel's first presentation on hemp, with the consent of Simpsonville's principal, Harry Slate. Harrelson's visit received local and national media attention and evoked numerous letters from parents and educators concerned that teaching children about the benefits of industrial hemp sent a mixed message about drug use. Following receipt of these letters, school system superintendent Leon Mooneyhan asked the state education standards board to investigate revoking Cockrel's teaching certificate. When the board declined to revoke her certificate, Mooneyhan let Cockrel know that subsequent visits by Harrelson would not be in her best interests.

Harrelson did visit Cockrel's class again, on two separate occasions. After this second visit, and a third (both of which Slate authorized), the principal initiated an evaluation of Cockrel's teaching. She was the only tenured teacher at the school to be reviewed after only two years, instead of once every three years. During the next school year, after news that Harrelson would be visiting Cockrel's classroom yet again, the PTA adopted a position statement calling for her termination. Slate sent Mooneyhan an evaluation of Cockrel's performance supporting this position; it cited various instances of misconduct, including many that occurred before Harrelson's first visit but about which Cockrel had not been informed at the time. Mooneyhan terminated her employment.

Cockrel filed suit in the federal court for the Eastern District of Kentucky, arguing that she was terminated in retaliation for her decision to hold classroom discussions of the potential environmental benefits of industrial hemp. The district court determined that Cockrel's decision to invite speakers on industrial hemp did not constitute speech at all, and that, even if it did, it was not protected by the First Amendment of the U.S. Constitution. Therefore, it dismissed her complaint before trial. Cockrel appealed.

Holding: The Sixth Circuit Court of Appeals reversed the district court ruling.

Cockrel's decision to bring a speaker into class *is* speech, began the court. She need not have generated the speech herself for her action to constitute expressive conduct. Just as cable television operators and newspapers are considered to be engaged in protected speech, even though they merely present material produced by others, a teacher's selection of a speaker for an in-class presentation is speech. In addition, Cockrel's choice of hemp advocates shows that there was a specific message she wanted to convey to her students, which is clearly expressive conduct.

Even though Cockrel's conduct qualifies as speech, continued the court, it must still satisfy other criteria before it is entitled to constitutional protection. First, it must touch a matter of public concern. That the issue of industrial hemp is of public concern cannot be disputed, given the reaction it generated among Simpsonville parents and teachers. In concluding that her presentation touched a matter of public concern, the court specifically rejected the conclusion of the Fourth Circuit Court of Appeals (the federal court with jurisdiction over North Carolina) in *Boring v. Buncombe County Board of Education*, 136 F.3d 364. [See "Clearinghouse," *School Law Bulletin* 29 (Summer, 1998): 23–24.] In that decision, the court had held that a teacher, in choosing what to teach students, is not speaking as a citizen, but rather as an employee on matters of private interest.

Second, Cockrel's interest in speaking on industrial hemp must outweigh her employer's interest in the efficient operation of the school and a harmonious work environment. The court did find evidence that Cockrel's presentation had caused problems in both of these areas but found that the evidence was not entitled to much weight. Particularly disturbing, to the court's mind, was the fact that Slate had given prior approval to all three of the hemp presentations but later used their damaging effect on school harmony as a reason for Cockrel's discharge. The school cannot, said the court, blame Cockrel for the effects of a decision it had endorsed.

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The court concluded by finding strong evidence that retaliation for the industrial hemp presentations had motivated Cockrel's termination. Slate had initiated evaluations of Cockrel after Harrelson's second visit—evaluations of a kind to which no other tenured faculty were subject. Mooneyhan had sought to have her teaching certificate revoked on the basis of complaints from parents about the presentation. Slate had sent a negative evaluation of Cockrel's performance to Mooneyhan and had recommended her termination. Finally, the fact that Cockrel was never informed of, or disciplined for, any of the alleged misconduct for which she was terminated—and that allegedly took place before Harrelson arrived on the scene—also supports this conclusion.

Teacher's refusal to follow evolution curriculum was not constitutionally protected speech. LeVake v. Independent School District #656, 625 N.W.2d 502 (Mn. Ct. App. 2001).

Facts: Rodney LeVake was a math and science teacher in Independent School District #656 (Minn.). His contract provided that he could be assigned to teach any topic for which he had licensure. In 1997 he was assigned to teach tenth-grade biology. The required curriculum for the course included the subject of evolution and stated that at the end of the course students should understand that evolution involves natural selection and mutations. The curriculum did not provide for criticism of evolution or discussion of alternatives to it.

At the end of the 1997–98 school year, LeVake told Dave Johnson, the high school principal, that he could not teach evolution according to the prescribed curriculum and that he believed evolution was "impossible." Concerned that students could not gain an understanding of evolution from LeVake, Johnson reassigned him to teach ninth-grade natural science. LeVake sued the school district, arguing that the reassignment violated his rights to the free exercise of religion, free speech, and due process. The trial court granted the district judgment before trial, and LeVake appealed.

Holding: The Minnesota Court of Appeals affirmed the trial court's judgment for the district.

The First Amendment to the U.S. Constitution prohibits governmental laws and policies that burden the free exercise of religion. LeVake failed to allege that the district's evolution curriculum prevented him from practicing the religion of his choice or that the district itself required him to refrain from practicing his religion outside of his duties as a public school teacher. Apparently he believed that his reassignment constituted evidence of religious discrimination against him, but the court refused to equate the alleged religious discrimination with a free exercise violation.

The court next found that LeVake's refusal to teach the required evolution curriculum was not constitutionally protected speech. His desire to discuss criticisms of, and alternatives to, evolution took place in the context of his position as public school teacher. As in the Kentucky case discussed above, when a public employee asserts a free speech claim, the court must balance the interest of the employee in commenting on matters of public concern against the interest of the state, as an employer, in promoting the efficiency of the services it provides through its employees. LeVake's responsibility as a public school teacher to teach evolution in the manner prescribed by the curriculum, and the state's compelling interest in adherence to a curriculum suitable for young students, overrode his interest in teaching what he liked about evolution. Therefore LeVake's refusal to follow the curriculum was not protected speech.

LeVake's final claim, that the district deprived him of his rights to free exercise of religion and free speech without due process by failing to provide him with adequate notice of what types of speech were prohibited before reassigning him, also failed. LeVake had discussed the required curriculum with Johnson and the science department chair before he accepted the 1997 reassignment. His contract required him to faithfully perform the teaching prescribed by the school board, and he had sufficient notice, through the required curriculum, about what he was expected to teach. Nonetheless, he informed school officials that he could not teach the material. Therefore, the court ruled that no due process rights were implicated. ■

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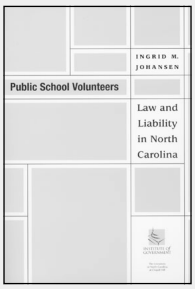

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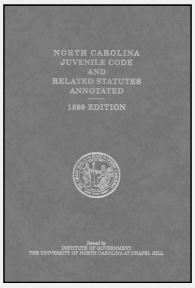

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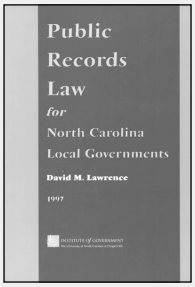

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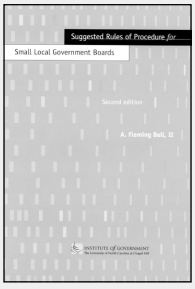

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