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## SURVIVAL OF THE FITTEST: AN EXAMINATION OF THE LOUISIANA SCIENCE EDUCATION ACT

ROBERT E. MORELLI<sup>†</sup>

### INTRODUCTION

The beauty of the theory of evolution is its simplicity. The idea that organisms can change gradually over time so as to become better adapted to their environment is incredibly intuitive—successful individuals will survive, while the unsuccessful ones will eventually disappear. Successful changes will also accrue over time, so that the organisms of the present have generations of successful adaptations in their past, leading them to be highly specialized, complex, and well adapted to their environments.

The idea should not seem wholly foreign to citizens of capitalistic countries, let alone Americans.<sup>1</sup> Take, for example, the world of business. A successful company has likely become successful by gradually changing its approach and building on the successes of other companies, while unsuccessful companies eventually go bankrupt. This example reflects the ideas of social Darwinism, proposed in the late nineteenth-century to justify certain economic theories.<sup>2</sup> While, admittedly, this is not a

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<sup>1</sup> Yet, even so, America ranks second to last out of thirty-two countries listed in a survey measuring the population's acceptance of evolutionary theory. See Jon D. Miller et al., *Public Acceptance of Evolution*, 313 *SCIENCE* 765, 765 (2006). In a more recent survey, thirty-nine percent of Americans expressed that they "[b]elieve[d] in evolution," twenty-five percent said that they did not, and thirty-six percent expressed no opinion. Frank Newport, *On Darwin's Birthday, Only 4 in 10 Believe in Evolution*, GALLUP, Feb. 11, 2009, <http://www.gallup.com/poll/114544/Darwin-Birthday-Believe-Evolution.aspx>.

<sup>2</sup> Joel M. Ngugi, *Forgetting Lochner in the Journey from Plan to Market: The Framing Effect of the Market Rhetoric in Market-Oriented Reforms*, 56 *BUFF. L. REV.* 1, 85–86 (2008); John H. Walsh, *Can Regulation Protect "Suckers" and "Fools" from Themselves? Reflections on the Rhetoric of Investors and Investor Protection Under the Federal Securities Laws*, 8 *J. BUS. & SEC. L.* 188, 204–05 (2008). Social

wholly accurate or appropriate analogy to biological evolutionary theory, it is sufficient to show how the concepts behind evolution could apply in the societal context. Viewed in this manner, evolution can be used to explain the development of ideas and solutions to problems: The ideas or solutions that work are used and refined to become better, while those that do not are thrown by the wayside—essentially, survival of the fittest.

No better, or more ironic, example of this can be thought of than the gradual progression of efforts to discredit evolution and keep it out of the public school classroom. Beginning with the *Scopes* Monkey Trial in 1925, where a teacher was convicted of a criminal offense for simply acknowledging evolution in the classroom,<sup>3</sup> the opponents of evolutionary theory have repeatedly changed tactics in their attempts to battle evolution.<sup>4</sup>

Beginning with the outright prohibition of evolution—which gained some headway following the *Scopes* Monkey Trial, but was eventually abandoned after a successful Establishment Clause challenge in *Epperson v. Arkansas*<sup>5</sup>—the opponents of evolution next passed legislation that required teachers to devote equal time to evolution and creation science.<sup>6</sup> When that

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Darwinism, however, has many flaws. Since the 1930s, it has been in decline in American universities, and in its extreme form, is frequently acknowledged as having contributed to the eugenics movement both in the United States and abroad. Herbert Hovenkamp, *Evolutionary Models in Jurisprudence*, 64 TEX. L. REV. 645, 674 (1985); ThinkQuest.org, Social Darwinism, <http://library.thinkquest.org/C004367/eh4.shtml> (last visited Aug. 27, 2010).

<sup>3</sup> See *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

<sup>4</sup> Almost invariably, the opponents of evolutionary theory will be the supporters of some version of Biblical creationism—whether it is outright Biblical creationism, see *infra* Part I.B, or a more watered-down, pseudo-scientific theory such as Intelligent Design, see *infra* Part I.C. Of note, however, is that the Roman Catholic Church is not among the organizations opposed to the theory of evolution—so long as one respects the idea of divine causality, the Church feels that evolution is consistent with its theological doctrine. See POPE JOHN PAUL II, MESSAGE TO THE PONTIFICAL ACADEMY OF SCIENCES: ON *EVOLUTION MAGISTERIUM IS CONCERNED WITH QUESTION OF EVOLUTION FOR IT INVOLVES CONCEPTION OF MAN* ¶¶ 3–4 (1996), available at <http://www.ewtn.com/library/PAPALDOC/JP961022.HTM>; INT'L THEOLOGICAL COMM'N, *Communion and Stewardship: Human Persons Created in the Image of God* ¶¶ 62–70 (2004), available at [http://www.vatican.va/roman\\_curial\\_congregations/cfaith/cti\\_documents/rc\\_con\\_cfaith\\_doc\\_20040723\\_communion-stewardship\\_en.html](http://www.vatican.va/roman_curial_congregations/cfaith/cti_documents/rc_con_cfaith_doc_20040723_communion-stewardship_en.html).

<sup>5</sup> 393 U.S. 97 (1968).

<sup>6</sup> See ARK. CODE ANN. § 80-1663 (West 1981), *invalidated* by *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1274 (E.D. Ark. 1982); LA. REV. STAT. ANN. §§ 17:286.1–7 (1981), *invalidated* by *Edwards v. Aguillard*, 482 U.S. 578 (1987). Creation science was proposed as an alternative to the theory of evolution, and was defined as “the

approach was also found unconstitutional in both *McLean v. Arkansas Board of Education*<sup>7</sup> and *Edwards v. Aguillard*,<sup>8</sup> the creationists adapted again, by attempting to disclaim the theory of evolution prior to teaching it. This approach met with no more success than the previous attempts, however, and was found unconstitutional twice, first by *Freiler v. Tangipahoa Parish Board of Education*,<sup>9</sup> and then by *Selman v. Cobb County School District*.<sup>10</sup> The next approach again attempted to disclaim evolution, recommending that students consider an alternative theory, the “secular” alternative of Intelligent Design.<sup>11</sup> Not surprisingly, the court in *Kitzmiller v. Dover Area School District*<sup>12</sup> found this to be unconstitutional as well, concluding that Intelligent Design lacked any scientific merit.<sup>13</sup>

Nevertheless, despite the repeated failures, the opponents of evolutionary theory continue to try to find an acceptable way to insert their beliefs into the public school system. The most recent attempt is the most creative and ingenious yet: Rather than mandating the teaching of creation science, proposing alternatives to evolution, or disclaiming the theory of evolution, certain legislators and groups have begun to push for a requirement that public schools help students analyze, critique, and objectively review evolution.<sup>14</sup> Leading the way with this

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scientific evidences for creation and inferences from those scientific evidences.” LA. REV. STAT. ANN. § 17:286.3(2) (1981), *declared unconstitutional by Edwards v. Aguillard*, 482 U.S. 578 (1987). Specifically, creation science supports the inferences that indicate a sudden creation of life from nothing, a separate ancestry for man and apes, and “[a] relatively recent inception of the earth and living kinds.” *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1264 (E.D. Ark. 1982).

<sup>7</sup> 529 F. Supp. 1255, *aff’d*, 723 F.2d 45 (8th Cir. 1983).

<sup>8</sup> 482 U.S. 578 (1987).

<sup>9</sup> 185 F.3d 337 (5th Cir. 1999).

<sup>10</sup> 449 F.3d 1320 (11th Cir. 2006).

<sup>11</sup> Intelligent design is described as “a scientific theory which holds that certain features of the universe and living things are best explained by an intelligent cause, and are not the result of an undirected, chance-based process such as Darwinian evolution.” INTELLIGENT DESIGN & EVOLUTION AWARENESS CTR., INTELLIGENT DESIGN THEORY IN A NUTSHELL 1 (2004), <http://www.ideacenter.org/stuff/contentmgr/files/393410a2d36e9b96329c2faff7e2a4df/miscdocs/intelligentdesigntheoryinanutshell.pdf>.

<sup>12</sup> 400 F. Supp. 2d 707 (M.D. Pa. 2005).

<sup>13</sup> *Id.* at 735–37.

<sup>14</sup> See *infra* Part II. Alternatively, there has also been a push by legislators and proponents of creationism to introduce “Academic Freedom Bills,” which provide “rights and protection for teachers concerning scientific presentations on views regarding . . . evolution.” Academic Freedom Petition.com, Model Academic Freedom

measure is the State of Louisiana, which very recently enacted the controversial Louisiana Science Education Act ("LSEA").<sup>15</sup>

Simply put, the LSEA eschews all mention of religious theories of creation in favor of "promot[ing] critical thinking . . . logical analysis, and open and objective discussion of . . . evolution."<sup>16</sup> Permitting teachers to use supplemental materials to "help students understand, analyze, critique, and review scientific theories in an objective manner,"<sup>17</sup> the Act allows school boards to attack—or critique, if you will—the theory of evolution.<sup>18</sup> Notwithstanding the LSEA's disclaimer that the Act is not to be "construed to promote any religious doctrine,"<sup>19</sup> it is likely to do just that.

This Note asserts that the Louisiana Science Education Act is likely to be found unconstitutional under the Establishment Clause of the United States Constitution. Part I will examine the progression and development of the failed creationist challenges to evolution, as well as provide the relevant framework used by the courts to evaluate Establishment Clause challenges to public school curricula. Part II will set out the social context and history of the LSEA itself. Part III will then proceed to examine the LSEA and its background under the framework established in Part I to show that it is unconstitutional.

## I. THE HISTORY OF CHALLENGES TO EVOLUTION IN THE PUBLIC SCHOOL SCIENCE CURRICULA

### A. *The Origins of the Creationist Challenges to Evolutionary Theory*

The first major challenge to the theory of evolution in the public school setting occurred in 1925, with *Scopes v. State*.<sup>20</sup> *Scopes* involved a challenge to a Tennessee law that prohibited teaching "any theory that denies the story of the divine creation of man as taught in the Bible," making any violation a criminal

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Statute on Evolution, <http://academicfreedompetition.com/freedom.php> (last visited Aug. 27, 2010); see *infra* text accompanying notes 171–75.

<sup>15</sup> LA. REV. STAT. ANN. § 17:285.1 (2009).

<sup>16</sup> *Id.* § 17:285.1(B)(1).

<sup>17</sup> *Id.* § 17:285.1(C).

<sup>18</sup> See *infra* Part II.

<sup>19</sup> See § 17:285.1(D); *infra* Part III.

<sup>20</sup> 289 S.W. 363 (Tenn. 1927).

offense.<sup>21</sup> The defendant was a teacher employed in the Tennessee public school system, who, upon urging by the American Civil Liberties Union, presented the theory of evolution to his students.<sup>22</sup> In the ensuing criminal prosecution, Scopes was found guilty, and the trial judge imposed the maximum fine of \$100.<sup>23</sup>

On appeal, the Supreme Court of Tennessee reversed the judgment on a procedural error, concluding that the trial judge improperly imposed the fine of \$100, when a fine of more than \$50 must be imposed by a jury.<sup>24</sup> The court took note of the opposition to the anti-evolution statute and the contentions that it violated both the state and federal constitutions.<sup>25</sup> The court, however, justified the statute in the face of the Establishment Clause challenge by determining that the prohibition against teaching evolution did not give preference to “any religious establishment or mode of worship”<sup>26</sup> and noted that the statute did not require the teaching of anything; it only forbade the teaching of evolution, as “nothing contrary to that theory is required to be taught.”<sup>27</sup> Following its determination, the court recommended that the “bizarre case” against Scopes, who was no

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<sup>21</sup> *Id.* at 363 n.1.

<sup>22</sup> See Jana R. McCreary, *This Is the Trap the Courts Built: Dealing with the Entanglement of Religion and the Origin of Life in American Public Schools*, 37 SW. U. L. REV. 1, 35 (2008).

<sup>23</sup> See *Scopes*, 289 S.W. at 363. Scopes was represented by Clarence Darrow, pro bono, against a prosecution led by William Jennings Bryan in a trial that became a spectator event, being broadcast live on the radio and watched by hundreds. See McCreary, *supra* note 22, at 35–36. Eventually, the trial was adapted into a successful Broadway play, *Inherit the Wind*, and then later adapted again into a motion picture of the same name. See David Ray Papke, *The Impact of Popular Culture on American Perceptions of the Courts*, 82 IND. L.J. 1225, 1226 n.8 (2007).

<sup>24</sup> See *Scopes*, 289 S.W. at 367.

<sup>25</sup> See *id.* at 364. The first challenge was that the Act violated Article I, Section 8 of the Tennessee Constitution and Section 1 of the Fourteenth Amendment to the U.S. Constitution—the Due Process Clause. See *id.* Second, the court noted the challenge to the statute under Article XI, Section 12 and Article I, Section 3 of the Tennessee Constitution—the educational and religious clauses, respectively. See *id.* at 366. Lastly, the court noted the challenge to the statute under the First Amendment—the Establishment Clause. See *id.*

<sup>26</sup> *Id.* at 367. The court also noted that “members of the same churches quite generally disagree” as to belief or disbelief in the theory of evolution, and used this to bolster its argument that evolutionary theory does not give preference to any one religious establishment. *Id.*

<sup>27</sup> *Id.*

longer a public school teacher, be dropped in the interest of the "peace and dignity of the state."<sup>28</sup>

Where *Scopes* failed, however, *Epperson v. Arkansas*<sup>29</sup> succeeded. Shortly after Tennessee's validation of its anti-evolution statute, Arkansas passed its own, based mainly on the Tennessee law.<sup>30</sup> Enacted in 1928, the Arkansas statute remained good law for forty years, until the Supreme Court found it unconstitutional.<sup>31</sup>

Similar to the statute in *Scopes*, the Arkansas law prohibited the teaching of evolutionary theory, making any violation a misdemeanor offense,<sup>32</sup> and again, the law was challenged by a public school teacher.<sup>33</sup> The Court, observing the similarity between the statutes, determined that even though the Arkansas law omitted "the Divine Creation of man as taught in the Bible," the motivation was still quite the same as that behind the Tennessee statute.<sup>34</sup>

In comparison to the Supreme Court of Tennessee, the Supreme Court viewed the effect of the law differently and rested its holding on the law's conflict with the Establishment Clause.<sup>35</sup> Where the *Scopes* Court found that the law did not give preference to any particular religious organization, the Supreme Court stated that "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."<sup>36</sup> The Court then declared that government "must be neutral in matters of religious theory, doctrine, and practice,"<sup>37</sup> as the First Amendment prohibits "adopt[ing] programs or practices in . . . public schools . . . which 'aid or oppose' any

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<sup>28</sup> *Id.*

<sup>29</sup> 393 U.S. 97 (1968).

<sup>30</sup> *See id.* at 98. The Tennessee law at issue in *Scopes* was repealed in 1967, shortly before the Supreme Court decided *Epperson*. *See id.* at 102 n.8.

<sup>31</sup> *See id.* at 109.

<sup>32</sup> *See id.* at 98–99.

<sup>33</sup> *See id.*

<sup>34</sup> *Id.* at 108–09 (internal quotations omitted). The Court also noted that the State of Arkansas expressly mentioned that the statute was passed with the holding of the *Scopes* case in mind. *See id.* at 109 n.18. Interestingly, the Court suggested that the media event around the *Scopes* trial may have persuaded Arkansas to "adopt less explicit language," perhaps in an attempt to escape public attention. *Id.* at 109.

<sup>35</sup> *See id.* at 103.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 103–04.

religion . . . forbid[ding] alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma.”<sup>38</sup> The Court then inquired into the purpose and primary effect of the statute,<sup>39</sup> and found that there was “no doubt” that the law was enacted to prevent teachers from discussing a belief contrary to that held by some who regarded the Book of Genesis as the “exclusive source of doctrine as to the origin of man.”<sup>40</sup> Recognizing the “fundamentalist sectarian conviction” that spurred the enactment of the law—illustrated using examples of advertisements made to promote its enactment—the Court concluded that the Act could not be seen as religiously neutral, and found it contrary to the mandate of the First Amendment.<sup>41</sup>

Concurring in the result, Justice Stewart made an important observation regarding the potential effect of the Arkansas law. Drawing an analogy to teaching foreign languages, he stated that while a state is entirely free to determine its own curriculum, no state is “constitutionally free to [criminally] punish a teacher for letting his students know that other languages are also spoken in the world.”<sup>42</sup> Though Justice Stewart’s concurrence bemoaned the failure of the Court to find the Arkansas statute void for vagueness, his observation that it would be unconstitutional to “forbid a teacher to mention Darwin’s theory at all”<sup>43</sup> would eventually help to shape one facet of the approach that creationists now rely upon.

*B. Natural Selection Catches up with Creation Science: The Introduction of the Lemon Test, and Its Results on Creationist Legislation*

In 1971, three years after deciding *Epperson*, the Supreme Court gathered together its Establishment Clause case law and adopted a three-part test to be used in future Establishment Clause challenges.<sup>44</sup> In *Lemon v. Kurtzman*,<sup>45</sup> the Court dealt

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<sup>38</sup> *Id.* at 106–07.

<sup>39</sup> *See id.* at 107.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 108–09. The advertisements compared the support of evolution to the support of atheism, and suggested that teaching evolution would be “subversive of Christianity.” *Id.* at 108 n.16.

<sup>42</sup> *Id.* at 115–16 (Stewart, J., concurring).

<sup>43</sup> *Id.* at 116 (internal quotations omitted).

<sup>44</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).



with the constitutionality of state financial support of parochial elementary and secondary schools.<sup>46</sup> Pennsylvania and Rhode Island had adopted legislation where each state would reimburse or supplement the salaries of teachers in religiously affiliated schools.<sup>47</sup> In examining the statutes, the Court established a three-part test to determine whether the states had violated the First Amendment, stating that “first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>48</sup> If the challenged action or legislation is found to violate any of the three prongs, it is unconstitutional.<sup>49</sup>

In *Lemon*, the Court found the third prong to be the deciding factor for both statutes.<sup>50</sup> The Court explained that “to determine whether the government entanglement with religion is excessive, it must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”<sup>51</sup> With respect to the Rhode Island legislation, the Court found that despite restrictions on the aid given to the parochial schools, “A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected” and that the “contacts will involve excessive and enduring entanglement between state and church.”<sup>52</sup> To illustrate, the Court noted that “[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.”<sup>53</sup> Likewise, in regards to the Pennsylvania legislation, the Court reiterated that the “very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give

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<sup>45</sup> 403 U.S. 602.

<sup>46</sup> *Id.* at 606–07.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 612–13 (internal citations omitted).

<sup>49</sup> *See id.*

<sup>50</sup> *See id.* at 614.

<sup>51</sup> *Id.* at 615.

<sup>52</sup> *Id.* at 619.

<sup>53</sup> *Id.*

rise to entanglements between church and state” and that the Pennsylvania statute created the same kind of relationship as the Rhode Island statute did.<sup>54</sup>

Even though *Lemon* did not concern a challenge to a school's science curriculum, the courts would have the opportunity to consider this aspect of the Establishment Clause using the *Lemon* test soon enough. Following *Epperson*, it did not take long for the opponents of evolutionary theory—perhaps taking a cue from evolutionary theory itself—to find a new method to marginalize the teaching of evolution. Rather than seeking to prohibit the teaching of evolution altogether, the creationists instead attempted to require equal treatment in the classroom for creation science and evolutionary theory and were successful in passing legislation in both Arkansas and Louisiana during the 1980s.<sup>55</sup> Not surprisingly, both laws were challenged, and both were found unconstitutional. The Arkansas law was struck down shortly after its enactment in 1982 by the Eastern District of Arkansas in *McLean v. Arkansas Board of Education*,<sup>56</sup> and the Louisiana law was found unconstitutional by the Supreme Court in *Edwards v. Aguillard*.<sup>57</sup>

The court in *McLean* summarized the essential mandate of the Arkansas Balanced Treatment Act, stating that it required “[p]ublic schools within th[e] State [to] give balanced treatment to creation-science and to evolution-science.”<sup>58</sup> The court noted the Fundamentalists' effort in passing anti-evolution laws and observed that the proponents of the “scientific creationist” or

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<sup>54</sup> *Id.* at 620–21. Additionally, the Court acknowledged a “broader base of entanglement” that stems from the “devisive [sic] political potential” of this sort of state program. *Id.* at 622. Recognizing that having the population of a state or community divide on the issue of government aid to parochial schools “would tend to confuse and obscure other issues of great urgency,” the Court strongly cautioned against the “hazards of religion’s intruding into the political arena” leading to an intensification of “[p]olitical fragmentation and divisiveness [along] religious lines.” *Id.* at 622–23. This aspect of excessive entanglement, however, has never been independently used to find a statute invalid. See *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O’Connor, J., concurring).

<sup>55</sup> See ARK. CODE ANN. § 80-1663 (West 1981), *invalidated by* *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1274 (E.D. Ark. 1982); LA. REV. STAT. ANN. §§ 17:286.1–7 (1981), *invalidated by* *Edwards v. Aguillard*, 482 U.S. 578 (1987). This legislation actually took the form of a “model act” that was submitted to many states by the same groups. See *McLean*, 529 F. Supp. at 1261.

<sup>56</sup> 529 F. Supp. at 1274.

<sup>57</sup> 482 U.S. at 596.

<sup>58</sup> *McLean*, 529 F. Supp. at 1256.

“creation science” movements were often members of Fundamentalist organizations that promoted the idea that the Book of Genesis was supported by scientific data.<sup>59</sup> Then, the court examined the circumstances surrounding the passage of the Act, noting the strong religious convictions of the supporters of the legislation,<sup>60</sup> as well as the myriad of statements that were made concerning the need for religious figures to remain “behind the scenes” of the movement.<sup>61</sup> The court also took note of the manner in which the bill was treated in the Arkansas state legislature: having been introduced by a self-described Fundamentalist who had not consulted with any scientists, educators, or attorneys concerning the wisdom of the legislation and passed after a “perfunctory” fifteen-minute hearing.<sup>62</sup>

The court then relied on the “unusual circumstances” surrounding the passage of the law to justify an inquiry into the stated legislative purpose of the statute.<sup>63</sup> From this inquiry, the court quickly determined that the stated purpose of the Act has no basis in fact and that it was “simply and purely an effort to introduce the Biblical version of creation into the public school curricula”; and as such, *the Act* had the specific purpose of advancing religion in violation of the first prong of the *Lemon* test.<sup>64</sup> The court then made extensive observations as to whether

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<sup>59</sup> *See id.* at 1258–59. The court examined some of the Fundamentalist organizations in depth, mentioning that one in particular required applicants for membership to subscribe to a belief in the literal truth of the Book of Genesis, including a belief that the creation of man was a direct act by God. *Id.* at 1260 n.7.

<sup>60</sup> The court stated that the efforts of the legislation’s drafter were motivated by his “desire to see the Biblical version of creation taught in the public schools” and that there was no evidence that the other major proponents were motivated by anything other than their religious convictions. *Id.* at 1263.

<sup>61</sup> *See id.* at 1262. The drafter of the legislation recognized that the law would eventually face a constitutional challenge, explicitly stating that the association of creation science with religion in the public opinion could adversely affect the decisions of the higher courts that would eventually determine the constitutionality of the law and that the association of ministers with the promotion of the bill would surely be a point of contention in the adversarial process. *See id.* at 1261–62.

<sup>62</sup> *Id.* at 1262–63. Not surprisingly, the court found the sponsor’s acts motivated solely by his religious beliefs. *See id.* at 1263. Interestingly enough, however, the court mentioned that the bill’s sponsor felt the legislation did not violate the First Amendment because it “did not favor one denomination over another,” regardless of the fact that he was sponsoring the teaching of a religious belief. *Id.* at 1263 n.14.

<sup>63</sup> *Id.* at 1264.

<sup>64</sup> *Id.*

creation science was, in fact, science.<sup>65</sup> After determining that it was not, the court concluded that creation science's lack of "scientific merit or educational value as science" was significant in determining whether it would withstand the second prong of the *Lemon* test.<sup>66</sup> Stating that the second prong only affects statutes with the primary affect of advancing religion, the court explained that a statute which has a secondary purpose that advances religion is not necessarily unconstitutional.<sup>67</sup> Since creation science is not science, however, and is without educational value, the primary, and only real effect of the Act was to promote religion, in violation of the second prong of *Lemon*.<sup>68</sup>

The court, however, did not stop there. While mentioning that the Act was self-contradictory—in that it forbade instruction in any religious doctrine or references to religious writings, yet required teachers to essentially teach Biblical creationism—the court observed that state entanglement with religion was inevitable.<sup>69</sup> Finding that "[t]he need to monitor classroom discussion in order to uphold the Act's prohibition against religious instruction will necessarily involve administrators in questions concerning religion,"<sup>70</sup> the court concluded that involvements of this sort create the kind of "excessive and prohibited entanglement with religion" that *Lemon* forbade.<sup>71</sup>

In *Edwards*, the Supreme Court made many of the very same observations that were made in *McLean*, though without going into as much specific detail. Beginning its analysis with the first prong of the *Lemon* test, the Court stated that while it is "normally deferential to a State's articulation of a secular

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<sup>65</sup> *See id.* at 1267–72. The court determined that "the essential characteristics of science are: (1) It is guided by natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against the empirical world; (4) Its conclusions are tentative . . . ; and (5) It is falsifiable." *Id.* at 1267. Examining creation science under these standards, the court found that since creation science relies upon supernatural intervention, it is not guided by natural law, explanatory by reference to natural law, testable, or falsifiable. *See id.*

<sup>66</sup> *Id.* at 1272.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Despite finding those conclusions to be "dispositive of the case," the court addressed four remaining issues—including a novel argument that evolutionary theory is, in effect, a religion—before granting an injunction permanently prohibiting enforcement of the Act. *Id.* at 1272–74.

purpose, it is required that the statement of such purpose be sincere and not a sham.<sup>72</sup> The Court explained that “the statute’s words, enlightened by their context and the contemporaneous legislative history,”<sup>73</sup> in addition to the “historical context of the statute, [as well as] the specific sequence of events leading to passage of the statute,”<sup>74</sup> can control the determination of legislative purpose.

According to the Act, its purpose was to “protect[] academic freedom.”<sup>75</sup> Pointing to the testimony given by the bill’s sponsor, however, the Court determined that his subjective intent was to “narrow the science curriculum,” in direct contradiction to the Act’s stated purpose.<sup>76</sup> The Court found that the Act served to restrict academic freedom, as teachers were no longer free to teach the theory of evolution without also presenting creation science, even if they found that the creation science curriculum resulted in ineffective science education.<sup>77</sup> Finally, the Court noted that the Act “d[id] not grant teachers a flexibility that they did not already possess” with regards to the presentation of scientific theories regarding the origins of life—as “no law prohibited Louisiana public school teachers from teaching any scientific theory”<sup>78</sup>—and that no other areas of Louisiana’s public school curriculum required balanced treatment of opposing opinions.<sup>79</sup> In concluding that the Act totally failed to achieve its intended goal, the Court stated that it instead “ha[d] the distinctly different purpose of discrediting ‘evolution by counterbalancing its teaching at every turn with the teaching of creationism.’”<sup>80</sup>

Determining that it “need not be blind . . . to the legislature’s preeminent religious purpose in enacting this statute,”<sup>81</sup> the Court took note of the historical tensions between specific

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<sup>72</sup> *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

<sup>73</sup> *Id.* at 594.

<sup>74</sup> *Id.* at 595.

<sup>75</sup> LA. REV. STAT. ANN. § 17:286.2 (1981), *invalidated by Edwards*, 482 U.S. 578.

<sup>76</sup> *Edwards*, 482 U.S. at 587.

<sup>77</sup> *See id.* at 586 n.6.

<sup>78</sup> *Id.* at 587.

<sup>79</sup> *See id.* at 588 n.7.

<sup>80</sup> *Id.* at 589 (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985)).

<sup>81</sup> *Id.* at 590.

religious denominations and the teaching of evolution.<sup>82</sup> The Court observed that the legislature “sought to alter the science curriculum to reflect endorsement of a religious view”<sup>83</sup> to provide that view with a “persuasive advantage,”<sup>84</sup> in clear violation of the purpose prong of *Lemon*, and therefore, the First Amendment.<sup>85</sup>

Notwithstanding its repeated exhortations that the Act served to advance a religious doctrine, the Court suggested that a legislature may be constitutionally permitted to present “a variety of scientific theories” other than evolutionary theory.<sup>86</sup> Clarifying, the Court stated that “scientific critiques of prevailing scientific theories” could be validly taught only with the “clear secular intent of enhancing the effectiveness of science instruction.”<sup>87</sup>

C. *Descent with Modification—The Shift from Teaching Creation Science to “Encouraging Critical Thinking”*

Seizing upon the suggestions in *Edwards* and *Epperson*, the opponents of evolutionary theory strategically modified their assault on evolution in an attempt to comply with the permissible secular goal of “enhancing the effectiveness of science instruction.”<sup>88</sup> A trio of cases have recently come before the federal courts regarding the constitutionality of mandating a disclaimer of evolutionary theory in science classes, in an attempt to explain to students that there are “alternatives” to the theory of evolution—namely, creationism. The first of these cases was *Freiler v. Tangipahoa Parish Board of Education*,<sup>89</sup> followed by *Selman v. Cobb County School District*,<sup>90</sup> and most recently, *Kitzmiller v. Dover Area School District*.<sup>91</sup>

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<sup>82</sup> See *id.* at 590–91. The Court recognized that the “same historic and contemporaneous antagonisms” that were present in *Epperson* also affected the enactment of the Louisiana Act. *Id.* at 591.

<sup>83</sup> *Id.* at 593.

<sup>84</sup> *Id.* at 592.

<sup>85</sup> *Id.* at 593.

<sup>86</sup> *Id.* at 594.

<sup>87</sup> *Id.* at 593–94.

<sup>88</sup> *Id.* at 594.

<sup>89</sup> 185 F.3d 337 (5th Cir. 1999).

<sup>90</sup> 449 F.3d 1320 (11th Cir. 2006).

<sup>91</sup> 400 F. Supp. 2d 707 (M.D. Pa. 2005).

In addition to applying the *Lemon* test, these cases applied a different test as well—the more recently developed endorsement test. This test originated from Justice O'Connor's concurrence in *Lynch v. Donnelly*,<sup>92</sup> and originally was described as a “gloss on *Lemon* that encompassed both the purpose and effect prongs”<sup>93</sup> but is now seen by the Supreme Court as a wholly distinct test.<sup>94</sup> The endorsement test asks whether the government is endorsing religion through the challenged action in “convey[ing] a message that religion or a particular religious belief is *avored* or *preferred*”<sup>95</sup> and examines that message from the viewpoint of a “reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.”<sup>96</sup> Additionally, the observer is deemed able to “‘glean other relevant facts’ from the face of the policy in light of its context.”<sup>97</sup>

In *Freiler*, the Fifth Circuit addressed a challenge to a Louisiana school board resolution that required teachers in public schools to read students a disclaimer, which made clear that the school's presentation of evolution in the curriculum was “not intended to influence or dissuade the Biblical version of

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<sup>92</sup> 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). Since its inception, the endorsement test has been applied in numerous other cases, notably *County of Allegheny v. ACLU*, 492 U.S. 573, 574 (1989), where it was first adopted by a majority of the Court. Its increase in popularity could possibly be linked to strong criticism of the *Lemon* test, as certain Justices have been particularly vociferous, likening the *Lemon* test to a “ghoul in a late-night horror movie . . . [that] stalks our Establishment Clause jurisprudence.” *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). Nevertheless, despite Justice Scalia's disdain for *Lemon*, it was used as recently as 2005 in *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 845 (2005), and remains good law.

<sup>93</sup> *Kitzmiller*, 400 F. Supp. 2d at 714. *Kitzmiller* described the test as being “most closely associated with *Lemon*'s ‘effect’ prong, rather than its ‘purpose’ prong.” *Id.* at 713.

<sup>94</sup> *Cnty. of Allegheny*, 492 U.S. at 620–21.

<sup>95</sup> *Id.* at 593 (citation omitted).

<sup>96</sup> *Kitzmiller*, 400 F. Supp. 2d at 714–15 (explaining that the “objective observer [is] ‘presumed to be familiar with the history of the government's actions and competent to learn what history has to show.’” (citing *McCreary Cnty.*, 545 U.S. at 866)).

<sup>97</sup> *Id.* at 715 (citing *Modrovich v. Allegheny Cnty.*, 385 F.3d 397, 407 (3d Cir. 2004)). The court found further support for this statement in Justice O'Connor's concurrence in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779–81 (1995) (O'Connor, J., concurring), where she explains that the reasonable observer must be more knowledgeable than a casual passerby.

Creation.”<sup>98</sup> The statement further explained that students were free to form their own beliefs as to the origins of life and urged them to “exercise critical thinking and . . . closely examine each alternative” in the formation of their opinions.<sup>99</sup> Examining the history of the resolution, the court noted that it was enacted following an earlier rejected proposal that encouraged the teaching of creation science within the school district,<sup>100</sup> and that the discussion leading to the enactment of the resolution was focused mainly on the conflict between evolution and the Biblical theory of creation.<sup>101</sup>

In the context of the first prong of *Lemon*, the court examined whether the stated purpose of the statute was a sham, explaining that so long as just one proffered purpose is both secular and not a sham, the resolution will withstand the scrutiny of *Lemon*'s purpose inquiry.<sup>102</sup> After discussing the three purposes given in defense of the statute,<sup>103</sup> the court concluded that two of them were both sufficiently secular and sincere to withstand *Lemon*'s purpose inquiry.<sup>104</sup>

Moving to *Lemon*'s second prong—the requirement of a secular effect—the Fifth Circuit likened the inquiry to that of the endorsement test, asking whether the action at issue “conveys a

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<sup>98</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999). The court applied the endorsement test, in addition to the *Lemon* test, due to the confusion in the Establishment Clause jurisprudence and its own desire to be “both complete and judicious in [its] decision-making.” *Id.* at 343.

<sup>99</sup> *Id.* at 341.

<sup>100</sup> *Id.* The district court provided a more thorough examination of the events leading to the rejection of the creation science proposal and the “compromise” served by the disclaimer resolution that was ultimately adopted. See *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819, 821–22 (E.D. La. 1997).

<sup>101</sup> *Freiler*, 185 F.3d at 341–42.

<sup>102</sup> *Id.* at 344. The Fifth Circuit stated that “a sincere secular purpose for the contested state action must exist; even if that secular purpose is but one in a sea of religious purposes.” *Id.* (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

<sup>103</sup> The district court claimed that the disclaimer served “(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution.” *Id.*

<sup>104</sup> *Id.* at 345. The court noted, however, that the first purpose offered was, indeed, a sham. *Id.* The court stated that upon hearing that they are free to retain their own beliefs, children “hear that evolution as taught in the classroom need not affect what they already know,” which is directly contrary to critical thinking, which requires students to “approach new concepts with an open mind and a willingness to alter and shift existing viewpoints.” *Id.*



message of endorsement or disapproval.”<sup>105</sup> The court cautioned that while the “government practice may not aid one religion, aid all religions, or favor one religion over another,” the benefit to religion must be more than “indirect, remote, or incidental” before it would be considered an endorsement of religion.<sup>106</sup> The court then examined the primary effect of the disclaimer based on the message it conveyed to its intended audience—the students—and found that encouraging critical thinking, when combined with a reminder to students that they could retain their own views on Biblical creationism, urged students to consider religious theories as alternatives to evolution.<sup>107</sup> Concluding that this juxtaposition “implies School Board approval of religious principles,” the court found the endorsement to be more than indirect, remote, or incidental, and as such, that it violated both the second prong of *Lemon* and the endorsement test.<sup>108</sup>

In *Selman*, the Eleventh Circuit dealt with an issue very similar to that addressed in *Freiler*. There, instead of reading a disclaimer to students prior to teaching evolution, the disclaimer was placed on science textbooks in the form of a sticker, which stated that “Evolution is a theory, not a fact . . . [and it] should be approached with an open mind, studied carefully, and critically considered.”<sup>109</sup> The Eleventh Circuit observed that the district court, in its application of the *Lemon* test, had combined the second and third prongs, resulting in the district court finding that “any action with a forbidden religious effect also constituted excessive entanglement”<sup>110</sup> and concluding that the sticker violated not only the *Lemon* test but the endorsement test as well.<sup>111</sup> The Eleventh Circuit determined that this conclusion

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<sup>105</sup> *Id.* at 346 (quoting *Doe v. Santa Fe Indep. Sch. Dist.*, 186 F.3d 806, 817 (5th Cir. 1999)).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 346–47. The court also noted that the disclaimer failed to encourage students to consider religion in the context of other classes, such as western history, where it would also be relevant. *Id.* at 347.

<sup>108</sup> *Id.* at 348.

<sup>109</sup> *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320, 1324 (11th Cir. 2006).

<sup>110</sup> *Id.* at 1328.

<sup>111</sup> *See Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1312 (N.D. Ga. 2005). The district court also determined that the endorsement test, instead of standing as a distinct test, *see supra* text accompanying note 94, had been incorporated by the Supreme Court into its *Lemon* analysis. *Selman*, 390 F. Supp. 2d at 1312. With regard to the *Lemon* test, the court found that the sticker survived the

was due to the manner in which the lower court viewed the sequence of events leading up to the adoption of the sticker<sup>112</sup> and expressed concern with the court's reasoning, observing that there were troubling gaps in the record.<sup>113</sup> Stating that when dealing with the Establishment Clause, "factual context is everything," the Eleventh Circuit chose not to decide the case on an incomplete record and remanded it back to the district court,<sup>114</sup> where it was settled with the defendants agreeing "never to use a similar sticker or to undermine the teaching of evolution in science classes."<sup>115</sup>

Finally, and most recently, the court in *Kitzmiller* invalidated another local school district policy that required a statement to be read to students prior to the evolution section of their biology class.<sup>116</sup> There, while searching for a new biology textbook, the school board came across the textbook *Of Pandas and People*, which espoused an alternative to evolutionary theory—that of Intelligent Design ("ID").<sup>117</sup> Following a series of events that culminated in sixty copies of the book being donated to the school district,<sup>118</sup> the school board passed a resolution stating that students "will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design."<sup>119</sup> The board then required science teachers to read a statement to their students explaining that evolution "is a theory . . . not a fact[, and g]aps in [evolutionary] Theory exist for which there is no evidence."<sup>120</sup> The statement then informed students that information on the

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first prong because it "fosters critical thinking" and "reduces offense to students and parents whose beliefs may conflict with the teaching of evolution." *Id.* at 1305. As to the second and third prongs of *Lemon*, the court found that the sticker sent a message to the opponents of evolution, stating that they are "favored members of the political community," while telling the supporters of evolution that they are "political outsiders." *Id.* at 1306. The court further concluded that the message, as sent to "impressionable public school students," is likely to be viewed as a "union of church and state." *Id.*

<sup>112</sup> *Selman*, 449 F.3d at 1329–30.

<sup>113</sup> *Id.* at 1330, 1338.

<sup>114</sup> *Id.* at 1338.

<sup>115</sup> *Georgia: Board Yields on Evolution Stickers*, N.Y. TIMES, Dec. 20, 2006, at A24.

<sup>116</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005).

<sup>117</sup> *Id.* at 753–54.

<sup>118</sup> *Id.* at 755–56.

<sup>119</sup> *Id.* at 708.

<sup>120</sup> *Id.*

theory of ID was available and encouraged them to “keep an open mind.”<sup>121</sup>

In a “lengthy and exhaustive opinion,”<sup>122</sup> the court thoroughly addressed all aspects of the school board’s decision to require the statement. Following a “‘belt and suspenders’ approach” due to the “evolving caselaw” on the Establishment Clause, the court applied both the *Lemon* and endorsement tests in reaching its decision, similar to the approach taken in *Freiler*.<sup>123</sup>

Beginning with the endorsement test, the court considered the message of the disclaimer from the perspective of both its intended audience—high school students—and the community at large.<sup>124</sup> The court found that the religious nature of ID was “readily apparent” to both adults and children.<sup>125</sup> In concluding that ID was a religious doctrine, the court closely examined the history of the movement,<sup>126</sup> as well as the motivations of those who supported it. In particular, the court singled out the Discovery Institute (“DI”) of Seattle, Washington, as the major institutional sponsor of the ID movement and found clear evidence that the movement’s objectives were religious in nature.<sup>127</sup> Relying on the “Wedge Document,” an internal publication for members of the Discovery Institute, the court

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<sup>121</sup> *Id.* at 709.

<sup>122</sup> Peter Irons, *Disaster in Dover: The Trials (and Tribulations) of Intelligent Design*, 68 MONT. L. REV. 59, 60 (2007).

<sup>123</sup> *Kitzmiller*, 400 F. Supp. 2d at 714 n.4.

<sup>124</sup> *Id.* at 715, 729.

<sup>125</sup> *Id.* at 718. The court also noted that at the time the school board was considering the adoption of the ID textbook, it was aware that ID was a form of creationism, *id.* at 755, and that despite the admissions of several board members that they lacked the background in science to evaluate ID, they approved the book without consulting with any scientific organization for advice regarding their decision, *id.* at 758–59.

<sup>126</sup> The court observed that the concept of an “intelligent designer” was linked to an argument made by St. Thomas Aquinas, as early as the thirteenth century, who stated that “[w]herever complex design exists, there must have been a designer; nature is complex; therefore nature must have had an intelligent designer.” *Id.* at 718.

<sup>127</sup> *See id.* at 737. For a more thorough and detailed examination of the institutional history and background of the Discovery Institute, along with the gradual development of the Intelligent Design theory, see BARBARA FORREST, CTR. FOR INQUIRY, UNDERSTANDING THE INTELLIGENT DESIGN CREATIONIST MOVEMENT: ITS TRUE NATURE AND GOALS (2007) [hereinafter FORREST, UNDERSTANDING THE ID MOVEMENT], available at <http://www.centerforinquiry.net/uploads/attachments/intelligent-design.pdf>.

explained that through ID, the Discovery Institute sought “to replace science as currently practiced with ‘theistic and Christian science[,]’ . . . ‘replac[ing] materialistic explanations with the theistic understanding that nature and human beings are created by God.’ ”<sup>128</sup> The court then discussed the testimony of Dr. Barbara Forrest, who introduced evidence that illustrated the recurring creationist theme of casting doubt on evolutionary theory by using seemingly legitimate methods.<sup>129</sup> Forrest explained that creationists had previously attempted to present alternative theories alongside evolution in order to highlight its “strengths and weaknesses,” as well as to inform students of a “supposed ‘controversy’ [over evolutionary theory] in the scientific community.”<sup>130</sup>

The court next found that the “objective student”<sup>131</sup> would see the disclaimer as “a strong official endorsement of religion.”<sup>132</sup> The court relied on testimony that interpreted the message the disclaimer sent to high school students—essentially, a message that stated, “evolution, unlike anything else that they are learning, is ‘just a theory . . . suggest[ing] . . . that [it] is only a highly questionable opinion or a hunch’ . . . and creates misconceptions in students . . . by misrepresenting the scientific status of evolution and by telling students that they should regard it as singularly unreliable, or on shaky ground.”<sup>133</sup>

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<sup>128</sup> *Kitzmiller*, 400 F. Supp. 2d at 720.

<sup>129</sup> *See id.* at 722.

<sup>130</sup> *Id.* In addition to her testimony in the case, Forrest’s paper highlights five of the most popular euphemisms for the promotion of creationist beliefs: (1) teaching the controversy; (2) teaching the full range of scientific views; (3) critical analysis and critical thinking; (4) the strengths and weaknesses of or evidence for and against evolution; and (5) academic freedom. FORREST, UNDERSTANDING THE ID MOVEMENT, *supra* note 127, at 20–22. Forrest’s paper discusses the origins of the terms and identifies how creationists associate each with the promotion of creationism. *Id.*

<sup>131</sup> Clarifying, the court explained that the objective student is “not a specific, actual student, or even an amalgam of actual students, but is instead hypothetical,” imbued with “detailed historical and background knowledge” yet evaluates the challenged conduct “with the level of intellectual sophistication [of] a child of the relevant age.” *Kitzmiller*, 400 F. Supp. 2d at 723.

<sup>132</sup> *Id.* at 724.

<sup>133</sup> *Id.* at 725 (first alteration in original). The court later reinforced its finding, stating that “the objective student is presumed to know that encouraging the teaching of evolution as a theory rather than as a fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations.” *Id.* at 728.

Then, comparing the treatment given to the religious alternative of ID, and the encouragement given to students to “keep an open mind,” the court found the disclaimer to convey “a strong message of religious endorsement.”<sup>134</sup>

The court then proceeded to determine the scientific merits of Intelligent Design, found them to be completely lacking<sup>135</sup> and concluded that ID is an “interesting theological argument, but . . . not science.”<sup>136</sup> Though there are some who would argue that the court’s determination that ID is not science was inappropriate and unnecessary,<sup>137</sup> it is hard to imagine how the case could have been decided adequately and completely absent this determination, particularly given its strong effect on the

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<sup>134</sup> *Id.* at 726. The court also mentioned that the objective student would be aware of the “massive community debate” the disclaimer caused and of the personal agenda used by the school board in adopting its policy. *Id.* at 728. Examining the message from the perspective of the community at large, the court also found that “the entire community has consistently and unwaveringly understood the controversy to concern whether a religious view should be taught as science in the . . . public school system,” finding that letters to the editor and editorials in local newspapers were “probative of the community’s collective social judgment that the challenged conduct advances religion.” *Id.* at 732–33.

<sup>135</sup> *Id.* at 735. The court determined that “(1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument . . . central to ID[] employs the same flawed and illogical contrived dualism that doomed creation science in the 1980’s; and (3) ID’s negative attacks on evolution have been refuted by the scientific community,” while noting that ID’s lack of acceptance in the scientific community also helped to establish that it is not science. *Id.* Towards the end of the discussion as to whether ID qualifies as science, the court noted the shift in approach taken by the supporters of ID to avoid scientific scrutiny of ID by arguing that the “controversy, but not ID itself, should be taught in science class.” *Id.* at 745. The court, however, recognized the strategy for what it is and described it as “disingenuous,” at best, and “at worst a canard.” *Id.*

<sup>136</sup> *Id.* at 745–46. Interestingly, it appears that some in the Roman Catholic Church would dispute the court’s characterization of ID as a theological argument, as the director of a Vatican-supported conference on evolution recently remarked that ID is “not a scientific perspective, nor a theological or philosophical one,” following his decision not to invite the supporters of both ID and creationism to partake in the conference. See Nicole Winfield, *Rome Meeting Snubs Intelligent Design, Creationism*, SEATTLE TIMES, Mar. 5, 2009, available at [http://seattletimes.nwsourc.com/html/nationworld/2008806143\\_apeuvaticanevolution.html](http://seattletimes.nwsourc.com/html/nationworld/2008806143_apeuvaticanevolution.html). Nevertheless, an article in the Vatican newspaper shortly after the decision was made described it as “correct” because “ID does not belong to science, and the claim that it should be taught as a scientific theory together with the Darwinian explanation is unjustifiable.” Fiorenzo Facchini, *Evolution and Creation*, L’OSSERVATORE ROMANO (English ed.), Jan. 17, 2006, at 10.

<sup>137</sup> See David K. DeWolf et al., *Intelligent Design Will Survive* *Kitzmiller v. Dover*, 68 MONT. L. REV. 7, 24–42 (2007).

*Lemon* test.<sup>138</sup> With regard to the first prong of the *Lemon* inquiry, the court explicitly stated that all of the secular purposes offered by the school board were shams and merely secondary to their religious objective.<sup>139</sup> In looking at the second prong of the *Lemon* test, the court made reference to its earlier findings under the endorsement test and concluded that “since ID is not science, the conclusion is inescapable that the only real effect of the ID policy is the advancement of religion,” in violation of the Establishment Clause.<sup>140</sup> Ruling in favor of the plaintiffs, Judge Jones called the decision to include ID in the public school curriculum “breathtaking inanity.”<sup>141</sup>

Intelligent Design, however, has not decided to die quietly. There are individuals who continue to assert that it is a valid theory, and argue that it will survive the massive blow dealt to it in *Kitzmiller*—and to an extent, it has.<sup>142</sup> Similarly, the Discovery Institute, the major sponsor of ID, has hedged its bets, and rather than relying solely on a resurgence of interest in ID, has decided to include a new approach in its repertoire—the Academic Freedom laws.<sup>143</sup> Working in conjunction with a newly released movie starring actor Ben Stein, *Expelled: No Intelligence Allowed*, the Discovery Institute is attempting to portray the supporters of evolution—cleverly labeled as “big science” or

<sup>138</sup> *Kitzmiller*, 400 F. Supp. 2d at 764. The same approach was taken by the court in *McLean*. See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1267–72 (E.D. Ark. 1982).

<sup>139</sup> *Kitzmiller*, 400 F. Supp. 2d at 763. The court did not find a single secular purpose for the resolution, which is difficult to imagine in light of the Supreme Court’s statement in *Wallace v. Jaffree*. See *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999).

<sup>140</sup> *Kitzmiller*, 400 F. Supp. 2d at 764; cf. *McLean*, 529 F. Supp. at 1272.

<sup>141</sup> *Kitzmiller*, 400 F. Supp. 2d at 765. Following the decision, the members of the school board who implemented the ID policy were voted out of the board, and the new board decided not to appeal the decision. Jill Lawrence, “*Intelligent Design*” Backers Lose in Pennsylvania, USA TODAY, Nov. 9, 2005, at 4A. The new school board, however, voted to pay the legal fees of the plaintiffs, an amount totaling over one million dollars. Christina Kauffman, *Dover Gets a Million-Dollar Bill*, YORK DISPATCH, Feb. 22, 2006, available at [http://yorkdispatch.inyork.com/searchresults/ci\\_3535139](http://yorkdispatch.inyork.com/searchresults/ci_3535139).

<sup>142</sup> See generally DeWolf et al., *supra* note 137, at 54–57.

<sup>143</sup> See H.B. 923, 2008 Leg., Reg. Sess. (Al. 2008); H.B. 1483, 110th Gen. Assemb., Reg. Sess. (Fl. 2008); S.B. 2692, 110th Gen. Assemb., Reg. Sess. (Fl. 2008); H.B. 2554, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S.B. 1386, 117th Gen. Assemb., 2d Reg. Sess. (S.C. 2007). See generally Academic Freedom Petition.com, Model Academic Freedom Statute on Evolution, <http://academicfreedompetition.com/freedom.php> (last visited Aug. 27, 2010).

Darwinists—as the persecutors of new scientific ideas.<sup>144</sup> It is from this history that the LSEA has evolved, with the opponents of evolution learning from their mistakes and attempting to correct the shortcomings of their unsuccessful approaches, all in a continued attempt to discredit evolutionary theory and promote a religious alternative.

## II. THE LSEA: ITS LEGISLATIVE BACKGROUND AND SOCIAL CONTEXT

Louisiana is no stranger to controversial legislation concerning the theory of evolution. The most recent Supreme Court case on the subject, *Edwards v. Aguillard*,<sup>145</sup> challenged a Louisiana law. Similarly, the decision in *Freiler v. Tangipahoa Parish Board of Education*<sup>146</sup> invalidated a Louisiana school board resolution. Like many other states in the South, Louisiana has historically been affected by the “‘fundamentalist’ religious fervor” that has led to the suppression of theories that “den[y] the divine creation of man.”<sup>147</sup> It should come as no surprise that organizations seeking proving grounds for new legislation concerning evolution or creationism would turn first to the states where the legislation is most likely to be supported by the public and enacted into law. Louisiana, among other states,<sup>148</sup> is a prudent choice and provides an excellent starting point to begin the latest assault on evolution.

On its face, the LSEA is deceptively secular. It neither prohibits the teaching of evolution, nor mandates teaching an alternative; nor does it require a disclaimer to be given to students. Instead, it allows the state Board of Elementary and Secondary Education, upon request of a local school board, to assist educators in “creat[ing] and foster[ing] an environment

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<sup>144</sup> EXPELLED: NO INTELLIGENCE ALLOWED (Premise Media 2008). *Expelled* unabashedly supports ID, portraying its supporters and researchers as the victims of the “reigning orthodoxy.” See Martin Cothran, *Shaking up the Darwinian Establishment*, KENTUCKY CITIZEN, May/June, 2008, [http://www.kentuckyfamily.org/index.php?option=com\\_content&task=view&id=130&Itemid=240](http://www.kentuckyfamily.org/index.php?option=com_content&task=view&id=130&Itemid=240); WorldNet Daily.com, Ben Stein To Battle Darwin in Major Film (Sept. 28, 2007), <http://www.wnd.com/?pageId=43722>.

<sup>145</sup> 482 U.S. 578 (1987).

<sup>146</sup> 185 F.3d 337 (5th Cir. 1999).

<sup>147</sup> *Edwards*, 482 U.S. at 590 (citing *Epperson v. Arkansas*, 393 U.S. 97, 98, 109 (1968)).

<sup>148</sup> See *infra* notes 176 and 180–81 and accompanying text.

within public . . . schools that promotes critical thinking skills, logical analysis, and open and objective discussion of scientific theories being studied including, but not limited to, evolution, the origins of life, global warming, and human cloning.”<sup>149</sup> The LSEA explains that support and guidance should be given to teachers to “help students understand, analyze, critique, and objectively review”<sup>150</sup> the scientific theories mentioned above and allows teachers to use “supplemental textbooks and other instructional materials” after the material presented in the standard textbook is discussed.<sup>151</sup> The LSEA then proceeds to disclaim any religious purpose, stating that it “shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion.”<sup>152</sup>

The actual history of the LSEA, and the events leading to its adoption, however, contradict the secular façade that is presented at first glance. The substantive portion of the LSEA had its beginnings in a local school board resolution from Louisiana’s Ouachita Parish, adopted in late 2006.<sup>153</sup> This school board policy, in turn, took its substance from a “Proposed Science Resolution Policy” formerly posted on the website of a Louisiana Family Forum (“LFF”) member, and former Baton Rouge City Court Judge Darrell White.<sup>154</sup> Judge White’s policy took note of

<sup>149</sup> LA. REV. STAT. ANN. § 17:285.1(B)(1) (2009).

<sup>150</sup> *Id.* § 17:285.1(B)(2).

<sup>151</sup> *Id.* § 17:285.1(C).

<sup>152</sup> *Id.* § 17:285.1(D).

<sup>153</sup> Ouachita Sch. Dist., Ouachita Parish Science Curriculum Policy (Nov. 29, 2006), *available at* [http://www.opsb.net/downloads/forms/Ouachita\\_Parish\\_Science\\_Curriculum\\_Policy.pdf](http://www.opsb.net/downloads/forms/Ouachita_Parish_Science_Curriculum_Policy.pdf). This curriculum policy, like the LSEA, seeks to encourage students to “understand, analyze, critique, and review in an objective manner the scientific strengths and weaknesses of existing scientific theories,” while mentioning the teaching of biological evolution, the chemical origins of life, global warming, and human cloning as controversial subjects. *Id.*

<sup>154</sup> Prior to this Note’s publication, Judge White removed his personal website from the Internet, <http://www.judgewhite.com>; <http://retiredjudges.org/>. As a result, Judge White’s proposed policy is no longer available on his website, but is currently on file with the author. Proposed School Board Policy: Science Education, <http://www.judgewhite.com/docs/proposedresolution.pdf> (last visited Aug. 10, 2009) (on file with author). Much more of the history of the LSEA—including the connections between Judge White’s policy and what ultimately became the LSEA—are discussed in an article written by Dr. Barbara Forrest for the *Talk to Action* website. Barbara Forrest, *The Discovery Institute, the LA Family Forum, and the LA Science Education Act*, TALK TO ACTION, June 26, 2008 [hereinafter Forrest, *The Discovery Institute*], <http://www.talk2action.org/story/2008/6/26/18920/8497>. Forrest



the Supreme Court's decision in *Edwards* and applied the Court's reasoning to conclude that helping students to "review, analyze, and critique the scientific strengths and weaknesses of existing scientific theories" serves to achieve the goals set out by certain Louisiana Science Content Standards, while passing Constitutional muster.<sup>155</sup> In comparing the LSEA, the Ouachita Parish Resolution, and Judge White's proposed resolution, it is apparent that the significant language remained virtually unchanged throughout the Act's various legislative inceptions.

Upon closer examination, it became clear that Judge White made no secret of his religious motivations. He devoted an entire section of his website to "origins science," which then linked to (1) articles on Intelligent Design; (2) an article and images depicting evolution as responsible for euthanasia, homosexuality, racism, and abortion, while labeling Christianity as the solution;<sup>156</sup> and (3) an article written by the Judge himself, which criticizes Judge Jones and Judge Cooper—of *Kitzmiller* and the *Selman* district court, respectively—for "exchang[ing] the glory of God for the fairy tale of evol[ution]."<sup>157</sup> Judge White's website also linked to the LFF, "an organization committed to defending

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is no stranger to Establishment Clause litigation and creationist challenges to evolution—she was a key witness in the *Kitzmiller* case, see *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 722 (M.D. Pa. 2005); FORREST, UNDERSTANDING THE ID MOVEMENT, *supra* note 127, at 20–22, and as a professor at Southeastern Louisiana University, a major opponent of the LSEA, she went so far as to testify in the hearings against the enactment of the legislation. Nat'l Ctr. for Sci. Educ., Louisiana's Latest Creationist Bill Moves to House Floor (May 27, 2008), <http://ncse.com/news/2008/05/louisianas-latest-creationism-bill-moves-to-house-floor-00152>.

<sup>155</sup> Proposed School Board Policy: Science Education, *supra* note 154. Specifically, White's proposed resolution seized upon the Courts suggestion that "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 secular education." *Id.* (internal quotation marks omitted).

<sup>156</sup> WALT BROWN, IN THE BEGINNING: COMPELLING EVIDENCE FOR CREATION AND THE FLOOD 289–90 (8th ed. 2008). As Judge White's website is no longer accessible, I have provided alternative sources for the articles and images that the site linked to: Ken Ham, Building up the Arsenal, <http://www.answersingenesis.org/articles/au/building-up-arsenal> (last visited Aug. 27, 2010); BROWN, *supra* note 156 (available through Amazon.com's "Look Inside" or at <http://www.creation-science.com/onlinebook/>).

<sup>157</sup> Judge Darrell White, A Tale of Two Flies (Feb. 21, 2006), <http://www.answersingenesis.org/docs2006/0221flies.asp>. Interestingly, Judge Jones predicted just this sort of treatment following his decision in *Kitzmiller*. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005).

faith, freedom and the traditional family”<sup>158</sup> in Louisiana, of which he is a founding member.<sup>159</sup> The LFF, perhaps following Judge White’s lead, also has no reservations in showing its religious orientation, describing its mission as “persuasively present[ing] biblical principles in the centers of influence.”<sup>160</sup>

The LFF and Judge White, however, were not the only major supporters of the legislation that was to eventually become the LSEA. A closer examination reveals that the Act draws some of its language, specifically the disclaimer of religious purpose, from a Model Academic Freedom Bill distributed by the Discovery Institute, of *Kitzmiller* fame.<sup>161</sup> Not surprisingly, the connections to the Discovery Institute run deeper still. Casey Luskin, one of the Discovery Institute’s employees and staunchest defenders of Intelligent Design,<sup>162</sup> testified in front of the Louisiana House Education Committee in favor of the bill, while a Discovery Institute senior fellow and legal advisor took credit for helping to draft it in accordance with the Discovery Institute’s Model Academic Freedom Act.<sup>163</sup>

Unlike Judge White or the LFF, however, the Discovery Institute is much more subtle when it comes to revealing its true motivations. Nevertheless, it has already been recognized as a religiously motivated organization.<sup>164</sup> Notwithstanding the court’s determination in *Kitzmiller*, the Discovery Institute describes itself as having a point of view that includes “a belief in God-given reason and the permanency of human nature,”<sup>165</sup> while

<sup>158</sup> Louisiana Family Forum, About LFF, <http://www.lafamilyforum.org/about-lff> (last visited Aug. 27, 2010).

<sup>159</sup> Family Research Council, Louisiana Family Forum, <http://www.frc.org/get.cfm?incl=fpc/FPC&id=146670> (last visited Aug. 27, 2010).

<sup>160</sup> Louisiana Family Forum, *supra* note 158.

<sup>161</sup> See Forrest, *The Discovery Institute*, *supra* note 154; see also LA. REV. STAT. ANN. § 17:285.1(D) (2009); Academic Freedom Petition, *supra* note 143; *Kitzmiller*, 400 F. Supp. 2d at 720, 737. A close examination of the Academic Freedom website reveals that all questions regarding the bill should be directed to Casey Luskin of the DI. See Academic Freedom Petition, *supra* note 143.

<sup>162</sup> See generally DeWolf et al., *supra* note 137, at 55–57.

<sup>163</sup> Press Release, La. Coal. for Sci., (1) New York Times Editorial and Major Scientific Societies Call for Jindal’s Veto of SB 733; (2) Escalating Discovery Institute Involvement in Promoting SB 733 (June 22, 2008), [http://lasciencecoalition.org/docs/Release\\_LFCS\\_NYT\\_Jindal\\_6.22.08.pdf](http://lasciencecoalition.org/docs/Release_LFCS_NYT_Jindal_6.22.08.pdf).

<sup>164</sup> See *Kitzmiller*, 400 F. Supp. 2d at 720, 737.

<sup>165</sup> Discovery Inst., About Discovery, <http://www.discovery.org/aboutFunctions.php> (last visited Aug. 27, 2010).

their Center for Science and Culture espouses the goal of challenging neo-Darwinian theory and supporting ID.<sup>166</sup>

Thus, with the Discovery Institute having helped the LFF prepare the LSEA, the LFF asked Senator Ben Nevers to introduce the Act to the legislature on its behalf.<sup>167</sup> The LFF's choice of Senator Nevers was one of born out of shared ideologies, as Nevers has a history of endorsing creationist legislation. In 2003, he sponsored legislation that "encouraged school systems to 'refrain from purchasing textbooks that do not present a balanced view of the various theories relative to the origin of life but rather refer to one theory as proven fact,'"<sup>168</sup> which immediately brings to mind the Balanced Treatment Act found unconstitutional in *Edwards*.<sup>169</sup> While promoting the LSEA, Nevers admitted that the LFF's goals in supporting the bill were to have the "scientific data related to creationism . . . discussed when dealing with Darwin's theory" and mentioned that he personally supported teaching students the "weaknesses and strengths in both scientific arguments."<sup>170</sup> Recognizing potential harm in his statements, Nevers quickly retreated and clarified that the bill would not protect teaching creationism.<sup>171</sup> Nevertheless, the statements remain as a testament to his true motivations.

Louisiana is not the only state where legislation of this sort has appeared. Similar bills were unsuccessfully introduced during the past few years in Florida, Alabama, Missouri, Michigan, and South Carolina, all based in some way on the DI's Model Academic Freedom Statute.<sup>172</sup> While campaigning in favor

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<sup>166</sup> Discovery Inst., About the Center for Science and Culture, <http://www.discovery.org/csc/aboutCSC.php> (last visited Aug. 27, 2010).

<sup>167</sup> Sylvia Schon, *Bill Allows Teaching Creationism as Science*, HAMMOND DAILY STAR (La.), Apr. 6, 2008, available at [http://www.hammondstar.com/articles/2008/04/06/top\\_stories/9327.txt](http://www.hammondstar.com/articles/2008/04/06/top_stories/9327.txt).

<sup>168</sup> Forrest, *The Discovery Institute*, *supra* note 154.

<sup>169</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 589 (1987) (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985)).

<sup>170</sup> Schon, *supra* note 167 (quoting Senator Ben Nevers).

<sup>171</sup> Gene Mills, *Not About Teaching Creationism*, HAMMOND DAILY STAR (La.), Apr. 11, 2008, available at <http://www.hammondstar.com/articles/2008/04/11/opinion/letters/9760.txt>.

<sup>172</sup> See H.B. 923, 2008 Leg., Reg. Sess. (Al. 2008); H.B. 1483, 110th Gen. Assemb., Reg. Sess. (Fl. 2008); S.B. 2692, 110th Gen. Assemb., Reg. Sess. (Fl. 2008); H.B. 2554, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S.B. 1386, 117th Gen. Assemb., 2d Reg. Sess. (S.C. 2007); see also La. Coal. for Sci., *Out of the Mouths of Creationists: "The LA Science Education Act Promotes Critical Thinking"* (Wink

of an Academic Freedom Bill proposed in Florida,<sup>173</sup> the Discovery Institutes's employee Casey Luskin admitted to the press that ID—with its readily apparent religious nature<sup>174</sup>—could “more easily” be brought into classrooms in conjunction with an academic freedom statute.<sup>175</sup> Even so, the Florida bill came almost to the threshold of passing the state legislature, only failing because the two houses could not reach a compromise by the end of the legislative session.<sup>176</sup>

Predictably, the public in Louisiana and across the nation reacted strongly to the proposal of the LSEA. Numerous groups petitioned the Louisiana legislature to request its members to vote against the bill due to its perceived creationist motivation and even more wrote to Governor Bobby Jindal to request that he veto the bill for the same reasons<sup>177</sup>—including his former

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Wink, Nudge Nudge) (July 13, 2008), <http://lasciencecoalition.org/2008/07/13/creationists-wink-nudge/> [hereinafter Wink Wink, Nudge Nudge].

<sup>173</sup> Florida's Academic Freedom Statute was similar to the LSEA in many respects—however, it ultimately sought to protect the rights of students and teachers to present and hold views relating to evolution that differed from what was presented in the curriculum. See S.B. 2692, 110th Gen. Assemb., Reg. Sess. (Fl. 2008). Florida's bill nevertheless incorporated a section that gave teachers the “affirmative right and freedom to objectively present scientific information relevant to the full range of scientific views regarding biological and chemical evolution,” *id.* § 1(4), quite similar to the LSEA's language that promotes “open and objective discussion of scientific theories being studied including . . . evolution.” LA. REV. STAT. ANN. § 17:285.1(B)(1) (2009).

<sup>174</sup> See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 718 (M.D. Pa. 2005).

<sup>175</sup> Wink Wink, Nudge Nudge, *supra* note 172.

<sup>176</sup> Am. Inst. of Biological Scis., *Anti-Evolution Legislation Dies* (May 9, 2008), [www.aibs.org/publicpolicy/evolution\\_state\\_news.html#4903](http://www.aibs.org/publicpolicy/evolution_state_news.html#4903). For a comprehensive, state-by-state report on questionable actions and legislation, see generally Am. Inst. of Biological Scis., *AIBS State News on Teaching Evolution*, [http://www.aibs.org/public-policy/evolution\\_state\\_news.html](http://www.aibs.org/public-policy/evolution_state_news.html) (last visited Aug. 27, 2010).

<sup>177</sup> Editorial, *Louisiana's Latest Assault on Darwin*, N.Y. TIMES, June 21, 2008, at A18; Letter from Todd Carter, President, Nat'l Ass'n of Biology Teachers, to La. House of Representatives (June 10, 2008), *available at* [http://www.nabt.org/websites/institution/File/docs/LA\\_pressrelease.pdf](http://www.nabt.org/websites/institution/File/docs/LA_pressrelease.pdf); Letter from La. Coal. for Sci. to Hon. Bobby Jindal, Governor of La. (June 16, 2008), *available at* <http://lasciencecoalition.org/2008/06/17/jindal-veto-sb-733/>; Letter from Dena S. Sher, State Legislative Counsel, Ams. United for Separation of Church & State, to Representatives of the La. Legislature (May 28, 2008), *available at* [http://lasciencecoalition.org/docs/AU\\_Oppose\\_SB\\_733\\_5.28.08.pdf](http://lasciencecoalition.org/docs/AU_Oppose_SB_733_5.28.08.pdf); John Derbyshire, *Governor Jindal, Veto This Bill!* (June 20, 2008), <http://www.nationalreview.com/corner/164801/governor-jindal-veto-bill/john-derbyshire>.

genetics professor at Brown University.<sup>178</sup> The Act provoked a great outcry from many well-respected scientific organizations, as well—including the publishers of the widely known journal *Science*—which warned against the LSEA's potential to “insert religious or unscientific views into science classrooms.”<sup>179</sup> Despite the vocal opposition, however, the LSEA passed the Louisiana Senate unanimously, received only three dissenting votes in the House—to the widespread celebration of its supporters<sup>180</sup>—and was signed into law by the governor during the last week of June 2008.<sup>181</sup>

### III. THE APPLICATION OF THE *LEMON* AND ENDORSEMENT TESTS TO THE LSEA

#### A. *The Endorsement Test*

Many supporters of the LSEA feel that the statute is constitutional and would survive a First Amendment challenge.<sup>182</sup> Much of this sentiment, however, relates to the statute as written, without considering the statute's actual effect. Even though the *Lemon* test governs Establishment Clause

<sup>178</sup> Press Release, La. Coal. for Sci., Louisiana Coalition for Science Calls on Governor Jindal to Veto SB 733 (June 16, 2008), [http://lasciencecoalition.org/docs/Release\\_Jindal\\_Veto\\_6.16.08.pdf](http://lasciencecoalition.org/docs/Release_Jindal_Veto_6.16.08.pdf). Notably, Jindal graduated from Brown University with honors in biology. Office of the Governor Bobby Jindal, The Governor, <http://www.gov.state.la.us/index.cfm?md=pagebuilder&tmp=home&navID=38&cpID=1&catID=0> (last visited Aug. 27, 2010).

<sup>179</sup> Letter from Alan I. Leshner, Chief Exec. Officer & Exec. Publisher of SCIENCE, to Bobby Jindal, Governor of La. (June 20, 2008), available at [http://lasciencecoalition.org/docs/AAAS\\_Jindal\\_veto\\_6.20.08.pdf](http://lasciencecoalition.org/docs/AAAS_Jindal_veto_6.20.08.pdf); see also Letter from Am. Inst. of Biological Scis. et al., to Bobby Jindal, Governor of La. (June 13, 2008), available at [http://www.aibs.org/position-statements/20080620\\_joint\\_statement.html](http://www.aibs.org/position-statements/20080620_joint_statement.html).

<sup>180</sup> Amanda Geftter, *Evolution, Global Warming and Cloning: Up for Grabs in Louisiana*, NEW SCIENTIST, July 12, 2008, at 8–10; Discovery Inst., Louisiana House Passes Academic Freedom Bill on Evolution and Other Science Issues (June 11, 2008), <http://www.discovery.org/a/5711>; Anika Smith, Louisiana State Legislature Passes Landmark Act That Encourages Critical Analysis of Evolution (June 17, 2008), <http://www.evolutionnews.org/>.

<sup>181</sup> Bill Barrow, *Science Law Could Set Tone for Jindal*, TIMES-PICAYUNE (New Orleans), June 27, 2008, at 1.

<sup>182</sup> Will Sentel, *Lawyers Debate Fate of La. Evolution Law*, THE ADVOCATE (Baton Rouge), July 15, 2008, at 10A. Interestingly, the lawyer who feels most strongly that the law is constitutional is none other than Judge Darrell White. *Id.*; see *supra* text accompanying notes 154–56.

jurisprudence,<sup>183</sup> it is more helpful in this situation to begin an analysis of the LSEA with the endorsement test.

The endorsement test asks whether the government endorses religion by conveying a message that religion is “‘favored, preferred, or promoted over other beliefs.’”<sup>184</sup> To determine this, the test asks whether a reasonable observer, aware of the history of the community and broader context in which the challenged policy arose, would perceive the challenged action as being a government endorsement of religion.<sup>185</sup>

The reasonable observer, then, would have knowledge of Louisiana’s recurring antagonism towards evolutionary theory—remembering the challenged policies in *Edwards* and *Freiler*.<sup>186</sup> Competent to learn what history has to show, the observer would remember the ultimate outcome of these challenges and understand the implications of introducing religion into science classrooms. Aware of the gradual development of creationist anti-evolution legislation, the observer would recognize the controversy that exists over evolutionary theory and the origins of life. Conscious of the trend to encourage “critical thinking” with regards to evolution, the observer would notice similarities in the LSEA to earlier policies that also encouraged critical thinking in conjunction with evolution—the school board resolution in *Freiler*, the sticker in *Selman*, the disclaimer in *Kitzmiller*—all found to be unconstitutional.<sup>187</sup>

Aware of the broader social context from which the policy arose, the observer would recognize the involvement of religiously motivated groups and individuals like Judge White, Senator Nevers, the Louisiana Family Forum, Casey Luskin, and the Discovery Institute in the support and development of the LSEA.<sup>188</sup> Importantly, the observer would associate the Discovery Institute with the failed attempt to insert the

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<sup>183</sup> See *supra* text accompanying note 92.

<sup>184</sup> See *Cnty. of Alleghany v. ACLU*, 492 U.S. 573, 593 (1989).

<sup>185</sup> See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714–15 (M.D. Pa. 2005).

<sup>186</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999).

<sup>187</sup> See *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006); *Kitzmiller*, 400 F. Supp. 2d 707; *Freiler*, 185 F.3d 337.

<sup>188</sup> See *generally supra* notes 153–71 and accompanying text.

unscientific, religious alternative of ID into the public school curriculum.<sup>189</sup>

Familiar with the creationist motivations of the supporters of the Act, the observer would be suspicious of their excitement at the LSEA's enactment, particularly given its use of secular phrases and apparent adherence to the Supreme Court's suggestion in *Edwards*.<sup>190</sup> As the reasonable observer is able to read between the lines, however, gleaning relevant facts from the policy based on its context,<sup>191</sup> he would recognize the attempts to disparage evolution through the use of semantics—referring to it as a theory, mentioned alongside other controversial issues—similar to the approach taken by the disclaimer in *Kitzmiller*.<sup>192</sup> He would also take note that the approach used by the LSEA and the related Academic Freedom Acts—calling for logical analysis, critique, open and objective discussion and review—is simply a disingenuous reincarnation of the earlier failed strategies that called for the academic freedom to teach creation science or its controversy with evolution.<sup>193</sup> Observing the outcry the LSEA provoked nationwide from well-respected scientific organizations, the observer should find his suspicions justified and legitimate.<sup>194</sup> Though the argument could be made that the LSEA itself precludes an interpretation that results in the promotion of religion or discrimination against non-religion, the observer would be aware that courts are entitled to examine the legislative history of a statute to ensure that its stated purpose is not a sham.<sup>195</sup> The combination and interaction of all of these factors would lead the reasonable observer to conclude that the LSEA is promoting a pro-religion message in its call for critical thinking related to evolution.

In the same vein, the LSEA's ultimate intended audience, young students, would also perceive a strong pro-religion message in the implementation of its provisions. As recognized in earlier cases, children—while assumed to have no less knowledge than adults—are impressionable and when presented with evidence contradicting things they have already learned,

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<sup>189</sup> See *Kitzmiller*, 400 F. Supp. 2d at 720, 737.

<sup>190</sup> See Proposed School Board Policy: Science Education, *supra* note 154.

<sup>191</sup> See *Kitzmiller*, 400 F. Supp. 2d at 715.

<sup>192</sup> *Id.* at 725.

<sup>193</sup> *Id.* at 745–46.

<sup>194</sup> See *supra* text accompanying notes 177–79.

<sup>195</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

may fall victim to misconceptions as to the scientific validity of evolutionary theory.<sup>196</sup> When presented with evidence critical of evolution, a child may be less likely to truly exercise critical thinking, and instead disregard evolution in favor of the “alternatives” towards which no criticism is devoted.<sup>197</sup>

With these points in mind, it becomes apparent that a reasonable observer, either an adult or a child, would perceive a strong message of government support for religion. Even though the LSEA appears secular on its face, an examination of its history in the relevant social context and historic jurisprudential background reveals the true message that it sends to those who are in the know: “Even though we cannot talk about God and creation in the classrooms, we can still sabotage evolution and beat secular science at its own game by confusing children as to whether evolution is trustworthy or not.” This message is plain to see for both adults and children and advocates a government endorsement of religion in violation of the endorsement test and the Establishment Clause.

#### B. *The Lemon Test*

Notwithstanding the application of the endorsement test, any court facing a challenge to the LSEA would be remiss if it did not also apply the *Lemon* test. The *Lemon* test examines the challenged action’s purpose, effect and any resulting entanglement of government with religion.<sup>198</sup>

In examining the purpose prong of *Lemon*, it is crucial to remember that if there is at least one secular purpose that is not a sham, the challenged action will proceed to the next inquiry.<sup>199</sup> While *Kitzmiller* seemed to contradict this limitation,<sup>200</sup> it is highly unlikely that a court would find the LSEA to lack a secular purpose. Assuming, for the sake of argument, that the secular purposes most likely being proffered in support of the LSEA would relate to its promotion of critical thinking and desire to improve the quality of education within the state,<sup>201</sup> it is

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<sup>196</sup> See *Kitzmiller*, 400 F. Supp. 2d at 725.

<sup>197</sup> See *id.* at 726.

<sup>198</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

<sup>199</sup> See *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999).

<sup>200</sup> See *Kitzmiller*, 400 F. Supp. 2d at 763.

<sup>201</sup> These purposes are suggested after drawing inferences from Judge White’s Proposed School Board Policy. See *supra* text accompanying note 155.



almost guaranteed that a court will find them both secular and legitimate. These purposes are no doubt legitimate and respectable. Since the Supreme Court has encouraged making science education more effective,<sup>202</sup> they are highly likely to survive the first prong of *Lemon*.

The second prong of *Lemon* asks whether the statute has the primary effect of advancing religion—in other words, whether it conveys a message of endorsement or disapproval<sup>203</sup>—an inquiry strongly influenced by the endorsement test.<sup>204</sup> As has already been established, the LSEA is highly suspect when viewed under the lens of the endorsement test,<sup>205</sup> and the same reasoning that applies to that determination applies here as well, so that a statute that violates the endorsement test is also likely to violate the second prong of *Lemon* as well.<sup>206</sup>

Though these findings ought to be sufficient to cast substantial doubt on the constitutionality of the LSEA, it is important to consider the third prong of *Lemon* as well. One basis of inquiry into whether the government is impermissibly entangled with religion relies on whether the challenged action requires a continuing government surveillance to maintain compliance with the First Amendment.<sup>207</sup> Of all the factors that weigh against the LSEA's constitutionality, this is perhaps the strongest. To achieve its goal of helping students to “understand, analyze, critique, and review scientific theories,” the LSEA permits teachers to use supplemental textbooks and other instructional materials.<sup>208</sup> The LSEA states that the local school boards have the responsibility to approve the materials, unless they are “otherwise prohibited” by the state.<sup>209</sup>

In the best-case scenario, this would require the school boards to make nonbiased and well-informed decisions on the scientific content of whichever supplemental textbooks or materials they were presented with, which is a challenging task due to the ever-changing and advancing nature of science itself. Given the “‘fundamentalist’ religious fervor” historically present

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<sup>202</sup> See *Edwards v. Aguillard*, 482 U.S. 578, 593–94 (1987).

<sup>203</sup> See *Freiler*, 185 F.3d at 346.

<sup>204</sup> See *supra* Part I.C.

<sup>205</sup> See *supra* Part III.A.

<sup>206</sup> See *Freiler*, 185 F.3d at 348; *Kitzmiller*, 400 F. Supp. 2d at 763.

<sup>207</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

<sup>208</sup> LA. REV. STAT. ANN. § 17:285.1(C) (2009).

<sup>209</sup> *Id.*

in Louisiana,<sup>210</sup> however, it is likely the school boards would often be tasked with distinguishing valid scientific critiques of evolution from pseudo-scientific religious alternative theories. Ideally, any close calls or suspicious theories would be resolved by turning to the state board of elementary and secondary education, which retains oversight of the approval process.<sup>211</sup>

As it has been shown, however, school boards do not always properly distinguish between science and religion. *Kitzmiller v. Dover Area School District*<sup>212</sup> clearly illustrated this unfortunate reality.<sup>213</sup> Unlike the school board in *Kitzmiller*, which approved one book, all of the various Louisiana school boards would likely face multiple decisions as to the scientific validity of supplemental materials. This would create the need for a comprehensive, discriminating, and continuing state surveillance to ensure that the First Amendment is respected. This presumes, however, that the school boards are acting in accordance with the First Amendment when they make their decision to permit or disallow certain supplemental materials. If the boards instead decide to take advantage of the system and surreptitiously approve creationist materials, the resulting entanglement between government and religion would be significant indeed.<sup>214</sup>

Nevertheless, the Supreme Court observed that a textbook need only be inspected once for compliance with the First Amendment.<sup>215</sup> While this is true, the Court made this observation to highlight the differences in the kind of oversight that would be required for the state to ensure that teachers respected the limitations imposed by First Amendment: teachers

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<sup>210</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 108–09 (1968).

<sup>211</sup> § 17:285.1(C).

<sup>212</sup> 400 F. Supp. 2d 707 (M.D. Pa. 2005).

<sup>213</sup> See *supra* text accompanying notes 116–34.

<sup>214</sup> One such supplemental textbook has already been released to coincide with the enactment of the LSEA and has already been reviewed and critiqued by biologist John Timmers, who called it “atrociously bad.” John Timmers, A Biologist Reviews an Evolution Textbook from the ID Camp (Sept. 25, 2008), <http://arstechnica.com/reviews/other/discovery-textbook-review.ars>. Timmers noted that there is a “morass of errors, distortions, and faulty logic that comprise the bulk of the book[, while t]he book as a whole acts like a funhouse mirror, distorting and removing the context from the bits of science that do appear.” *Id.* Timmers concludes that “[i]n every way except its use of the actual term, this is a creationist book, but its authors are expecting that legislators and the courts will be too stupid to notice.” *Id.*

<sup>215</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971).

cannot be inspected just once to determine their subjective compliance with the First Amendment. In this sense, the Court remarked that the need to “ensure that teachers play a strictly non-ideological role give[s] rise to entanglements between church and state.”<sup>216</sup>

On this basis, the LSEA will inevitably require the kind of continuing state surveillance and constant review that the Supreme Court explicitly warned against in *Lemon*. To illustrate, a teacher in Louisiana's Ouachita Parish School District, which had previously passed a resolution similar to the LSEA,<sup>217</sup> admitted to using the resolution to teach both sides of an issue and “poke[ ] holes” in science.<sup>218</sup> But Louisiana is not alone in facing this kind of teacher. In a 2007 survey of teachers throughout the nation, eighteen percent of the respondents admitted to spending one to two hours on either creationism or ID and five percent admitted to spending between three to five hours on the topics.<sup>219</sup> While this issue is a national problem, there is no reason to believe that the teachers in Louisiana's public schools, some of whom are already inclined towards presenting creationist material, will not follow the example of their peers and take advantage of the LSEA to “cross the line” in their presentation of supplemental material.<sup>220</sup>

The court in *McLean v. Arkansas Board of Education*<sup>221</sup> recognized another form of entanglement, one similar to that warned of in *Lemon*, cautioning against the need to monitor classroom discussion in order to uphold the prohibition against religious instruction.<sup>222</sup> There, the court observed that in teaching creation science, teachers would necessarily be faced

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<sup>216</sup> *Id.* at 620–21.

<sup>217</sup> See Ouachita Sch. Dist., Ouachita Parish Science Curriculum Policy, *supra* note 153.

<sup>218</sup> Barbara Forrest, Analysis of SB 733, “LA Science Education Act” (June 5, 2008), [http://www.lasciencecoalition.org/docs/Forrest\\_UpdatedAnalysis\\_SB\\_733\\_6.5.08.pdf](http://www.lasciencecoalition.org/docs/Forrest_UpdatedAnalysis_SB_733_6.5.08.pdf).

<sup>219</sup> Michael B. Berkman et al., *Evolution and Creationism in America's Classrooms: A National Portrait*, 6 PLOS BIOLOGY 920, 922 (2008), [http://biology.plosjournals.org/archive/15457885/6/5/pdf/10.1371\\_journal.pbio.0060124-S.pdf](http://biology.plosjournals.org/archive/15457885/6/5/pdf/10.1371_journal.pbio.0060124-S.pdf).

<sup>220</sup> While it may be that the teachers who spend significant time on these materials do so in order to highlight their un-scientific characteristics, the risk that teachers may “cross the line” is still present.

<sup>221</sup> 529 F. Supp. 1255 (E.D. Ark. 1982).

<sup>222</sup> See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1272–74 (E.D. Ark. 1982).

with questions concerning religion, which necessarily involves an excessive and prohibited entanglement with religion.<sup>223</sup> In the context of the LSEA, encouraging students to think critically and keep an open mind is just as likely to provoke students into asking religiously motivated questions, especially when teachers are intentionally attempting to cast doubt on scientific theories. Many students, however, do not need to be prompted by the teacher to ask religiously motivated questions and will often come to class prepared to challenge evolutionary theory, armed with creationist literature found on the Internet.<sup>224</sup> Though asking and answering questions concerning religion is different from intentionally teaching creationism, there is a valid concern that unscrupulous teachers will seize upon the inappropriate questions asked by their students and turn them into opportunities to bolster a religious alternative to evolution.

Admittedly, some of this conduct is undeterrable; students will always ask leading questions, and there will always be some teachers with personal agendas. To promote this kind of behavior, however, by encouraging students to critique and objectively review scientific theories using textbooks that may or may not be scientific runs in the face of the warning given by the Supreme Court in *Lemon* and constitutes the kind of excessive entanglement that is prohibited by *Lemon's* third prong.

#### CONCLUSION

Unfortunately for the supporters of the LSEA, when the Act is seen in the appropriate context, it is hard to escape the realization that it is intended to encourage the presentation of religious material in the public schools. The LSEA's drafters and supporters made a remarkable effort to stay within the confines of what is legally allowed by the Establishment Clause, but their motives were apparent from the beginning. While the LSEA will not likely survive a First Amendment challenge, one would hope that Louisiana's local school boards and teachers remember the Supreme Court's warning in *Edwards*: "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely

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<sup>223</sup> See *id.*

<sup>224</sup> Amy Harmon, *A Teacher on the Front Line as Faith and Science Clash*, N.Y. TIMES, Aug. 23, 2008, at A1.

be used to advance religious views<sup>225</sup> and, in accordance with the text of the LSEA, act in such a manner as to not promote religion or any religious doctrine.

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<sup>225</sup> *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).