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MONKEY BUSINESS AND UNNATURAL SELECTION: OPENING THE SCHOOLHOUSE DOOR TO RELIGION BY DISCREDITING THE TENETS OF DARWINISM

Diana M. Rosenberg[*]

INTRODUCTION

As the war between Darwinism[1] and creationism[2] rages throughout this country, the creationists have developed a new battle plan to infiltrate the public school system. Their mission: to discredit the theory of evolution, and instill the theory of creation in school children.[3] Their obstacle: the First Amendment's Establishment Clause, which prevents government from mixing

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[1] "Darwinism" refers to the belief in the theories posited by Charles Darwin, namely, that organisms in their current form evolved from earlier species, and that mankind shares a common ancestor with other primates. *See generally* CHARLES DARWIN, THE ORIGIN OF THE SPECIES (Random House, Inc. 1993) (1859). For purposes of this Note, I use the terms "Darwinism" and "evolution" interchangeably.

[2] "Creationism" refers to the belief that organisms exist on Earth because a divine being created them in their current form, as suggested in the Book of Genesis. Genesis 1:2 instructs that "In the beginning, God created the heaven and the earth." THE JEWISH PUBLICATION SOCIETY OF AMERICA, THE HOLY SCRIPTURES, 3 (1949). Human origins are set forth in Genesis 1:26, which explains that God, after creating the world and the animals, created man in His own image, and in *Genesis* 2:22 (King James), which explains how woman was created from man's rib. *Id.* at 4-5.

[3] Kenneth R. Miller, *Scientific Creationism Versus Evolution: The Mislabeled Debate*, *in* SCIENCE AND CREATIONISM 18, 21 (Ashley Montagu, ed., 1984).

with religion.[4] The latest strategic maneuver around the Establishment Clause is illustrated by Kansas State Board of Education ("Kansas Board" or "Board"), which has dismissed the fundamental scientific tenets of evolution as mere theory.[5] Accordingly, it deleted all references to Darwin's theory of the Origin of the Species[6] and all references to the Big Bang theory[7] from the required science curriculum, and did not include these subjects on state-wide science exams.[8]

The Establishment Clause prevents states from designing school policies that usher religious beliefs into the classroom.[9] Conse-

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[4] U.S. CONST. amend. I. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.*

[5] Pam Belluck, *Board for Kansas Deletes Evolution From Curriculum*, N.Y. TIMES, Aug. 12, 1999, at A1 [hereinafter Belluck, *Board for Kansas*]. These include theories such as "the Origin of the Species," which posits that mankind and other primates evolved from a common ancestor, *see* DARWIN *supra* note 1, at 148-60, the "Big Bang" theory, which posits that the universe originated from a great explosion, STEPHEN W. HAWKING, A BRIEF HISTORY OF TIME: FROM THE BIG BANG TO BLACK HOLES 46 (1988), and the "Old Earth" theory, which posits that this origination began 4.6 billion years ago. FREDERICK K. LUTGENS & EDWARD J. TARBUCK, ESSENTIALS OF GEOLOGY 5 (4th ed. 1992).

[6] Darwin, *supra* note 1. Darwin's revolutionary work, in pertinent part, states that mankind and other primates descended from a common ancestor. DARWIN, *supra* note 1, at 148-160.

[7] HAWKING, *supra* note 5, at 46. Stephen Hawking defines the "big bang" as the beginning of time. HAWKING, *supra* note 5, at 46. At some point in the past, there was no distance between all of the galaxies in the universe; both the density of the universe and the space-time curvature were infinite. HAWKING, *supra* note 5, at 46. Because all scientific theories assume that space-time is linear, they break down at the big bang, where the curvature of space-time is infinite. HAWKING, *supra* note 5, at 46. Therefore, "time," as we understand it, begins at the big bang, where the universe began expanding, becoming less dense and finite. Hawking argues that we can only determine what has happened since the big bang. Events that occurred before the big bang can have no consequences, and so should not be included in a scientific model of the universe. HAWKING, *supra* note 5, at 46.

[8] Belluck, *Board For Kansas*, *supra* note 5.

[9] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding that the Establishment Clause prevents the government from establishing an official

quently, as the Supreme Court's enforcement of the Establishment Clause grows stronger, creationists are forced to tone down the biblical aspect of their message that life on Earth did not evolve, but was created by a supreme being.[10] Thus, we see a change in the movement's goals, from an outright ban on teaching any theory that conflicts with the story of Genesis,[11] to a mandate that never mentions the religious aspect by name, but requires schools teach the "science" of creation wherever they taught evolution.[12] The Court, however, recognizes each of these attempts as equally religious, some just better disguised.[13]

The latest chapter in the evolution – creationism controversy, which is reflected in the Kansas science curriculum, is a theory called intelligent design. This theory posits that life on Earth is so complex that it could not be the result of random evolution – an intelligent force must have directed it.[14] While the Supreme Court has struck down creationist school programs under the Establishment Clause,[15] it has never ruled on whether the intelligent design theory is religious, and thus subject to the First Amendment's strictures. Furthermore, with the current Court's disagreement over which standard to apply in Establishment Clause cases,[16] proponents of intelligent design may have an easier battle in the

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prayer to be read in schools).

[10] *See infra* notes 35-55 and accompanying text (discussing the creationist movement's response to defeats in the courtroom).

[11] *See supra* note 2 (discussing the story of Genesis); *see also* Scopes v. State, 289 S.W. 363 (Tenn. 1927) (upholding a state statute prohibiting the teaching of any theory that denied creation as described in the Bible).

[12] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578 (1987).

[13] *Id.* at 593-94.

[14] Carl Wieland, *Chemical Soup Is Not Your Ancestor*, CREATION EX NIHILO, Mar. – May 1994, at 46-47, *available at* http://www.answersingenesis.-org/home/area/magazines/docs/v16n2_aw.asp (last visited Feb. 11, 2001).

[15] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that states may not ban evolution from the classroom merely because it challenges the biblical account of creation); *Edwards*, 482 U.S. at 593-94 (holding that states cannot mandate lessons on creation science wherever lessons on evolution are given).

[16] *See infra* note 128 (discussing the current justices' various suggestions on a test to replace *Lemon*).

courtroom arena than they would have fifteen years ago, when *Lemon v. Kurtzman* reigned supreme over this area of law.[17]

This Note argues that intelligent design is a religious theory. Its prevalence throughout the Kansas science curriculum renders those standards likewise religious, thus triggering Establishment Clause scrutiny. Part I traces the history of the evolution – creationism debate, from Darwin's formulation of his still controversial theory to the latest attack on it by the creationist movement. Part II examines how the Supreme Court continued to develop the role of the Establishment Clause until the Court was finally able to develop criteria to detect violations of the First Amendment. It also notes the effect that the newly-empowered Establishment Clause had on the evolution – creationism controversy. Part III analyzes the Kansas science curriculum under the three-pronged *Lemon* test,[18] as well as under the more recent endorsement test.[19] Part IV argues that schools need not teach the theory of evolution as inerrable in order to comport with the Establishment Clause mandates, so long as the evidence offered to refute the theory stems from scientific sources, rather than religious ones. This Note concludes that no matter which standard a court applies, it must find that the Kansas Board's dilution of evolution and incorporation of intelligent design into its science curriculum violates the

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[17] 403 U.S. 602 (1971). The *Lemon* test requires a legislative enactment to meet three criteria before it can be deemed constitutional. First, the enactment must have a secular purpose. *Id.* at 612. Second, the primary effect can neither advance nor inhibit religion. *Id.* Courts have, however, permitted laws to accommodate religion where that effect was merely incidental or secondary. *See, e.g.*, Kiryas Joel Vill. v. Grumet, 512 U.S. 687, 704 (1994). Finally, the enactment must not foster excessive government entanglement with religion. *Lemon*, 402 U.S. at 613.

[18] *Lemon*, 403 U.S. at 612.

[19] Wallace v. Jaffree, 472 U.S. 38 (1985). While the Supreme Court at one time applied the three pronged test from *Lemon* to virtually all of its Establishment Clause cases, it has failed to do so in recent cases. Instead, the Court seems to be moving toward a single test, asking whether the proposed government action would constitute an endorsement of religion. *Kiryas Joel*, 512 U.S. at 704. This note will analyze the Kansas Board's decision under both approaches, as lower courts continue to follow the *Lemon* analysis. *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (1999), *cert. denied*, 120 S. Ct. 2706 (2000) (striking a Louisiana statute under the primary effect prong).

Establishment Clause. No court, therefore, should permit this curriculum to stand – to do so would pave the way for other states seeking to squeeze religion through the schoolhouse door.

I. THE CONTROVERSY

The debate over whether public schools should teach evolution or should not teach creationism has both fascinated and divided this nation for more than seventy years.[20] It began when a high school teacher named John Scopes drew national attention by teaching Darwin's theory of evolution in violation of a Tennessee law, and was recognized by many as the battle between Darwin and God.[21] While the Tennessee Court of Appeals reversed the conviction,[22] the issues presented in the *Scopes* trial sponsored a flood of legal and social activism from both sides of the debate: the creationists struggling to keep their theory of origins in the classroom, and the evolutionists fighting to keep it out. The legal success of the evolutionists in excluding the biblical account of creation from the classroom was largely due to a change in the way the Supreme Court interpreted the First Amendment's requirement that Congress "make no law respecting an establishment of religion."[23] Now faced with a great constitutional hurdle, the creationist movement sought various methods of teaching that would allow public school students to question the validity of evolution, thus giving more credence to the biblical account.

The evolution - creationism debate began in this country when the *Scopes* trial pitted science against God in the battle for the

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[20] *See infra* note 28 and accompanying text (discussing how people across the nation followed the *Scopes* trial through its radio broadcast); *see also infra* notes 26-55 and accompanying text (discussing the sharp disagreement between the creationists and evolutionists over educational policy, and how that disagreement endured through the developing role of the Establishment Clause in American jurisprudence).

[21] Stephen Jay Gould, *Evolution as Fact and Theory*, *in* SCIENCE AND CREATIONISM 126, 129 (Ashley Montagu, ed., 1984). Paul Ellwanger, one of the drafters of a model balanced treatment statute, wrote "I view this whole battle as one between God and anti-God forces." *Id.* (quoting Paul Ellwanger).

[22] Scopes v. State, 289 S.W. 363, 367 (Tenn. 1927).

[23] U.S. CONST. amend. I.

classroom, which resulted in two separate movements: the creationists and the Darwinists. Since their defeat in the famous trial, the creationists have devised several plans to bring God back into the classroom. Their latest attempt is reflected in Kansas's new science curriculum.

A. *Early Beginnings of the Controversy*

Charles Darwin planted the seeds of controversy in 1859 when he published his work, *The Origin of the Species*.[24] Darwin theorized that mankind and other primates evolved from a common ancestor.[25] While this theory of origin forever changed modern science, it posed a great threat to those believing in the theory of creation as described in the bible: if mankind came about as a result of thousands of years of changes to an earlier species, then a divine being could not have instantaneously created mankind in its current form.

This conflict first came to a head in 1927, when Tennessee passed its Anti-Evolution Act.[26] The Act prohibited the teaching of "any theory that denie[d] the story of the divine creation of man as taught in the Bible," including the theory "that man has

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[24] DARWIN, *supra* note 1.

[25] DARWIN, *supra* note 1, at 148-60.

[26] *See* Scopes v. State, 289 S.W. 363, 363 (Tenn. 1927) (quoting chapter 27 of the Acts of 1925 (repealed 1967)). Known as the "monkey law," Section 1 of the Tennessee Anti-Evolution Act forbade teachers in all universities and public schools supported by state funds "to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals." *Id.* Section 2 named violations of Section 1 criminal misdemeanors, imposing a fine on the teacher of not less than $100 and not more than $500. *Id.* Scopes was tried, convicted, and fined $100 for teaching evolution in violation of this Act. *Id.* The court reversed Scopes' conviction only because a jury, and not the judge, should have assessed his fine. *Id.* at 367; *see also* Mark B. Lewis, *The Monkey Trial, Revisited 75 Years Later, Scopes Still Fires the Imagination*, LEGAL TIMES, July 10, 2000, at 30 (stating that an "atmosphere of conflict between science and religion was in place and growing in Tennessee by the time of the Scopes trial," and that the nation was captivated for the duration of the trial as the proceeding pitted the two greatest orators of the era, William Jennings Bryan and Clarence Darrow, against each other).

descended from a lower order of animals."[27] The American Civil Liberties Union (ACLU) decided to challenge this law in a high-profile case, and John Scopes volunteered as the test subject.[28] Scopes was convicted and fined, but the appellate court in Tennessee reversed on a technical issue that neither side had raised: a jury, not a judge, should have assessed Scopes's fine.[29] The court also made its displeasure with the Anti-Evolution Act clear to Tennessee prosecutors, and suggested that no further prosecution be brought under it.[30] This dealt a blow to the creationists, as the court effectively said that it would not help Tennessee ban evolution from the classroom. Therefore, while the Tennessee Court of Appeals put the issue to rest for the next forty years,[31]

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[27] *Scopes*, 289 S.W. at 364.

[28] *Talk of the Nation: Scopes Trial and the Theory of Evolution vs. Creation* (NPR radio broadcast, July 21, 2000) [hereinafter *Talk of the Nation*]. John Scopes was a high school football coach – not a biology teacher. *Id.* He never actually taught evolution in a classroom, and so he did not take the stand during this famous trial. Rather, he took a few students into his car while preparing for the trial and told them about evolution so that these students could honestly testify that Scopes had taught them about evolution. *Id.* Scopes was never ostracized in his community, jailed, or even threatened with the loss of his job. In addition, the prosecutor in the case, William Jennings Bryan, offered to pay Scopes's fine. *Id.* Thus, the purpose of this trial was simply to test the Anti-Evolution Act in a national forum. The Scopes trial was the first trial to receive live coverage – it was broadcast across the nation on the radio. *Id.*

[29] *Id.*; *see also Scopes*, 289 S.W. at 367.

[30] *Scopes*, 289 S.W. at 367. "We see nothing to be gained by prolonging the life of this bizarre case. On the contrary we think the peace and dignity of the State, [in] which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a *nolle prosequi* herein. Such a course is suggested to the Attorney-General." *Id.*

[31] Talk of the Nation, *supra* note 28. The courts did not revisit the evolution-creation controversy until 1968 when Arkansas' anti-evolution statute was challenged in the Supreme Court on First Amendment grounds. Epperson v. Arkansas, 393 U.S. 97 (1968). By that time, the climate of the court system had changed dramatically from the time the Tennessee Court of Appeals had visited the evolution issue in 1927. *See Scopes*, 289 S.W. at 363 (upholding Tennessee's Anti-Evolution Act). By 1968, the issue was finally ripe for Supreme Court review, and the Court finally held that this controversy fell within the mandates of the Establishment Clause. *Epperson*, 393 U.S. at 103; *see also infra* notes 79-114 and accompanying text (disscussing various approaches to the issue).

the creationists were forced to seek another way to protect the teachings of the Bible from Darwin's theory of evolution.

The idea that God and the teachings of the Bible needed protection from competing theories was prevalent throughout the Scopes trial.[32] The Tennessee community's religious fervor was heavily emphasized in the State's case.[33] Prosecutor William Jennings Bryan stated before a national audience that he objected to Darwinism because he "fear[ed] we shall lose the consciousness of God's presence in our daily lives if [people] accept [evolution]."[34] Thus, those who strongly believed in the religious teachings of the book of Genesis began to view the evolution issue as a battle between Darwin and God. This gave birth to a movement called creationism, which worked to promote the biblical account of creation as the true explanation of mankind's origins – that a divinity created life out of nothingness.

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[32] *See, e.g.*, *Scopes*, 289 S.W. at 368, (Chambliss, J., concurring). "As I read it, the act makes no war on evolution, except insofar as the evolution theory conflicts with the recognition of the Divine in creation." *Id.* "The teaching of all sciences may have full legitimate sway, with the restriction only that the teaching shall not convey a denial of man's Divine origin – God as his creator." *Id.* at 369.

[33] Lewis, *supra* note 26. As the teaching of evolution became a political issue, the people of Tennessee cried, "Support Bryan and the Bible." Lewis, *supra* note 26. Before the trial began, Prosecutor William Jennings Bryan announced that his adversary, Clarence Darrow was "the greatest atheist or agnostic in the United States." Lewis, *supra* note 26. The first sentence of Bryan's opening statement warned, "If evolution wins, Christianity goes." Lewis, *supra* note 26. He then asked the jury, "[i]f the people of Tennessee are not to control the schools, who shall control them – scientists?" Lewis, *supra* note 26. This attitude continued throughout the trial, as Bryan attacked the Darwinists with phrases such as "[t]he Christian believes man came from above, but the evolutionists believe he must have come from below," and "[s]lam the door to science when science sets a canker on the soul of a child." Lewis, *supra* note 26. Bryan had help with his religious cause. Judge John Raulston, presiding over the trial, read long verses from the book of Genesis. Lewis, *supra* note 26. A banner hanging outside the courthouse screamed "Read Your Bible Daily." Lewis, *supra* note 26.

[34] Talk of the Nation, *supra* note 28 (stating that the trial received national coverage).

B. *Creationism and Its Attempts to Enter the Classroom*

Since the Scopes trial, the creationist movement has worked to ensure that students do not accept evolution as the only explanation for mankind's origins. As the United States Supreme Court began to redefine the scope of the First Amendment's Establishment Clause, the creationist efforts to enter the classroom adapted to the changing climate of the court system – each new hurdle imposed by the courts and by the Establishment Clause spawned a new attempt.[35] The creationist movement can be divided into three waves: an outright ban on teaching evolution, creation science, and intelligent design.[36]

The first wave of creationism was most prevalent during the Scopes trial, where Darwin's theory of evolution was banned from the classroom.[37] This policy was inherently religious, fearful of what would result should schools teach Darwin's theories as opposed to the Bible's. William Jennings Bryan best articulated this policy when he convinced Scopes's jury to convict. "Slam the door to science when science sets a canker on the soul of a child," he declared.[38]

The movement to "slam the door to science" succeeded from its inception until 1968, when the Supreme Court finally held in *Epperson v. Arkansas* banning evolution from the classroom amounted to an establishment of religion in violation of the First

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[35] *See infra* notes 79-137 and accompanying text (discussing the developing role of the Establishment Clause).

[36] Jerry Coyne, *First Things First; A Paleontologist Makes The Case For Evolution and Against Creationism*, CHIC. TRIB., July 30, 2000, at 4C. Coyne is a professor at the University of Chicago's department of ecology and evolution. *Id.*

[37] *Id.*

[38] Lewis, *supra* note 26 (quoting the trial remarks of William Jennings Bryan). Such religious attitudes prompted Clarence Darrow to announce during the trial that "[w]e are marching backwards to the glorious age of the 16th Century when bigots [burned at the stake] men who dared to bring any intelligence and enlightenment and culture to the human mind." Lewis, *supra* note 26 (quoting the trial remarks of Clarence Darrow).

Amendment.[39] Faced with the reality that they could not keep evolution out of the classroom, the creationists sought a way to bring their message inside it as well.

Working around the limitations imposed by the *Epperson* Court, Bible supporters ushered in the second wave of creationism. This wave introduced creation science – a "science" that conflicted with Darwin and offered evidence that would support the biblical theory of creation.[40] Creationists then argued that their science merited just as much attention in the classroom as did evolution.[41] Creation science succeeded until 1987, when the Court decided in *Edwards v. Aguillard* that states could not force schools to teach creation science in order to discredit the lessons on Darwin.[42] Additionally, other courts have rejected creation science as nothing more than a veiled version of the book of Genesis.[43] The creationists, therefore, needed to find another method of teaching that did not so closely resemble the biblical origins of their movement.

The theory of intelligent design constitutes the third wave of creationism. This latest theory posits that organisms are too complex to have evolved according to Darwin's hypothesis, and

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[39] 393 U.S. 97 (1968). Epperson, a tenth grade biology teacher from Little Rock Arkansas, used a textbook containing "the theory about the origin . . . of man from a lower form of animal," in violation of state law. *Id.* at 99-100. Striking the statute under the *Schempp* test, the Court held that a state may not adopt public school programs that aid or oppose religion. *Id.* at 106. The Court noted that the First Amendment "forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." *Id.* at 106-07.

[40] Coyne, *supra* note 36.

[41] Coyne, *supra* note 36.

[42] 482 U.S. 578, 593 (1987). The Louisiana statute at issue in *Edwards* required public schools to either balance classes on evolution with classes on creation science, or else not teach either theory at all. *Id.* at 578. The Supreme Court struck this under the secular purpose prong of *Lemon*, finding that the purpose of the statute "was to restructure the science curriculum to conform with a particular religious viewpoint." *Id.* at 592.

[43] *See, e.g.*, McLean v. Bd. of Educ., 529 F. Supp. 1255, 1268 (E.D. Ark. 1982) (recognizing that creation science was religious, rather than scientific, because it echoed the book of Genesis).

instead, must have had an intelligent designer.[44] Although no creationist will go so far as to name this designer God, most proponents of this theory believe that the two are synonymous.[45] Intelligent design poses an interesting problem for advocates of both evolution and the First Amendment: while part of the theory refers to a God-like creator and clearly demonstrates religious undertones, another part questions whether Darwinism is still correct in light of newly discovered complexities that were not known to Darwin.[46] This latter question could be considered a valid secular one, and thus, revives the old debate from the famous monkey trial.

This recent theory of intelligent design has re-ignited the national debate over the teaching of evolution in schools. In August 1999, the Kansas Board, headed by creationists,[47] deleted macro-evolution,[48] and all references to the Big Bang theory from its

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[44] Wieland, *supra* note 14, at 46-47. Intelligent design theory posits that the biological cell is so complex, so intricate, that it could not have evolved by a purely random process over time; it must have an intelligent creator directing it. Wieland, *supra* note 14, at 46-47.

[45] Coyne, *supra* note 36.

[46] *See, e.g.*, ROBERT H. FRONK & LINDA B. KNIGHT, EARTH SCIENCE 278-79 (1994) (stating that while scientists acknowledge that the Earth is 4.6 billion years old, there is no complete record of the Earth's history – eighty-seven percent of that history is almost without fossil evidence, which is why geologists call this the Cryptozoic era, meaning "secret life").

[47] *Question Shouldn't Be Ancestry, It Should Be Students' Future,* TOPEKA CAP. J., July 28, 2000. Board member Steve Abrams, who authored most of the changes to the science curriculum, admits to being a member of the Creation Science Association of Mid-America, and says that some of the wording that he used was the work of this organization. Additionally, Ken Ham, the director of Answers in Genesis, another creationist organization, claims that Abrams is "quite familiar" with his publications as well. Francis X. Clines, *Creationist Captain Sees Battle "Hotting Up,"* N.Y. TIMES, Dec. 1, 1999, at A18.

[48] KANSAS STATE DEP'T OF EDUC., KANSAS SCIENCE EDUCATION STANDARDS, *at* http://www.ksbe.state.ks.us/outcomes/science_12799.html (last visited Feb. 11, 2001) (on file with the *Journal of Law and Policy*) [hereinafter KANSAS SCIENCE EDUCATION STANDARDS]. Kansas's new curriculum defines evolution as "a scientific theory that accounts for present day similarity and diversity among living organisms and changes in non-living entities over time," and divides biological evolution into two categories. Micro-evolution, which remains in the curriculum, refers to changes within a species, such as genetic variation

statewide science curriculum and statewide exams.[49] This decision was considered one of the most significant victories for advocates of the intelligent design theory.[50] It also proved to be a significant issue in the Republican primary election in August 2000, where Kansas citizens drew national attention to a school board campaign.[51] Voters ousted three of the six school board members who voted for the new science standards.[52] The resulting less conservative school board, as expected, reinstated evolution in the science curriculum on February 14, 2001, by a vote of seven to three.[53]

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and natural selection. Macro-evolution, however, which refers to the origin of the species, (i.e. theories such as man's and ape's descent from a common ancestor and the Big Bang) has been eliminated. *Id.*

> The Kansas Board adopted the Kansas Curricular Standards for Science on December 7, 1999. The Board also directed that the standards be submitted for review by an external panel. Mass distribution of the standards will not be made until the State Board has received comments from the external review and determined what action, if any, to take as a result of the review. Visitors to this website may, of course, download copies if they wish.

Id. at http://www.ksbe.state.ks.us/outcomes/science_stds99.html (last visited Feb. 11, 2001).

[49] Belluck, *Board for Kansas*, *supra* note 5.

[50] Pam Belluck, *Evolution Foes Dealt a Defeat in Kansas Vote*, N.Y. TIMES, Aug. 2, 2000, at A1 [hereinafter Belluck, *Evolution Foes*].

[51] Pam Belluck, *Board Decision on Evolution Roils an Election in Kansas*, N.Y. TIMES, July 29, 2000, at A1. The School Board election campaign in Kansas saw much more campaigning than is the norm in such a minor election. While previous candidates had raised a few hundred dollars, these candidates raised tens of thousands of dollars. *Id.* School board candidates for the first time ran television ads, and printed thousands of leaflets. *Id.* Interest in this race was so great that some Democrats switched their party affiliation in order to vote. *Id.*

[52] *Id.* Five seats were up for re-election. Linda Holloway, chairperson of the Kansas Board, lost her seat to Sue Gamble, by a vote of sixty percent to forty percent. Mary Douglass Brown lost to Carol Rupe by a vote of fifty-two to forty-eight percent, and Bruce Wyatt defeated Brad Angell by a vote of fifty-eight to forty-two percent. Only Steve Abrams, who helped draft the new science standards, and one member who ran unopposed survived their primary elections. *Three Evolution Foes Lose Board Seats in Kansas*, CHIC. TRIB., Aug. 2, 2000, at 4N.

[53] John W. Fountain, *Kansas Puts Evolution Back Into Public Schools*, N.Y. TIMES, Feb. 14, 2001, at A18. The newly adopted curriculum also contained

Because many other states are similarly influenced by advocates of intelligent design, however, the dilution of evolution, or even its removal from the classroom, remains a center of controversy.[54] Because these other states would like to develop science curricula similar to the one that Kansas had previously created,[55] it remains necessary to analyze the constitutionality of the previously adopted Kansas curriculum.

C. *The Science Curriculum Lacking Evolution*

The Kansas Board, which is a government office, oversees the Kansas school system.[56] A school cannot receive state accreditation unless its science program comports with the general requirements established by the state board.[57] Thus, by writing a state-

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language to appease the creationists:

> 'Understand' does not mandate 'belief.' While students may be required to understand some concepts that researchers use to conduct research and solve practical problems, they may accept or reject the scientific concepts presented. This applies particularly where students' and/or parents' beliefs may be at odds with the current scientific theories or concepts.

Id.

[54] *See infra* appendix, notes 1-80 and accompanying text (discussing other states' treatment of evolution in their science curricula). Alabama textbooks carry a disclaimer stating that evolution is only a theory. Illinois and Colorado do not offer evolution as part of their science curricula. Until the courts struck the policy, Louisiana required its teachers to disclaim evolution, telling students that evolution should not conflict with their religious beliefs.

[55] *See infra* appendix, notes 46-81 and accompanying text (describing the ways in which other states dilute evolution).

[56] KAN. CONST. art. 6 § 2(a). Kansas's state constitution authorizes the state board of education to generally supervise the public schools. *Id.* "General supervision" is interpreted to mean "power to inspect, to superintend, to evaluate, and to oversee for direction." Marshall County v. McMillen, 845 P.2d 676, 683 (Kan. 1993).

[57] KAN. STAT. ANN. § 72-6439 (1999). "The state board of education shall provide for assessments in the core academic areas of mathematics, science, reading, writing, and social studies, and shall establish curriculum standards for such core academic areas. . . .The state board shall ensure compatibility between the statewide assessments and the curriculum standards." *Id.* § 72-6439(b).

wide science curriculum, the Kansas Board sets the standard for science education throughout the state.

That standard having been established, local school boards must then devise their own science curricula in accordance with the state's guidelines. Kansas has established a low science standard as compared to the requirements of most other states.[58] It requires its students to learn only micro-evolution, which discusses changes within a species, such as genetic mutation.[59] It does not, however, require students to learn the scientific explanation for human or the Earth's existence, which is macro-evolution.[60] By removing macro-evolution from its statewide requirements, the Kansas Board allows local school boards to determine whether their schools will teach Darwin's secular theory of biological evolution, or the Judeo-Christian theory that a supreme being created the universe.

The Kansas Board took the Judeo-Christian version of creation into account when it developed its science curriculum. While the Board does not require the teaching of macro-evolution, it does require that teachers discredit that theory. Additionally, the Board went beyond the biology portion of the curriculum in its effort to comport with the Bible, removing parts of the Earth Science portion that discussed the age of the Earth.

While Kansas no longer mandates the teaching of the scientific macro-evolution, it's new science curriculum contains some references to creationism that discredit Darwin's theory.[61] According to the new curriculum, fourth grade students will learn that fossils indicate that organisms lived in the past; eighth grade students will use fossil evidence to understand extinction as "a natural process that has affected the Earth's species;" and twelfth grade students will learn different methods of dating fossils, be able to identify "assumptions used in radioactive decay methods of dating," and compare radioactive dating to the data on ages

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[58] *See infra* appendix notes 1-80 and accompanying text (discussing other states' science standards).

[59] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[60] *See* KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48 (discussing the difference between micro and macro evolution).

[61] Belluck, *Board for Kansas*, *supra* note 5.

obtained from the creationist studies of Mount St. Helens.[62] While most state science curricula require schools to demonstrate the link between fossil evidence and the theory of evolution,[63] Kansas's curriculum does not. Instead, it requires that students learn to question evidence supporting evolutionary theory, thus suggesting that they find fault with evolution.[64] The Board even provided examples of questions that students should ask. For instance, by eighth grade, the Board expects students to "[i]dentify faulty reasoning of conclusions which go beyond evidence and/or are not supported by data in a current scientific hypothesis or theory." [65]Students should also "analyze hypotheses about characteristics of and extinction of dinosaurs, [identify] the assumptions behind the hypothesis, and [demonstrate] the weaknesses in the reasoning that led to the hypothesis."[66]

Hoping to further dissuade students from believing evolutionary theories, the Board also requires that by eighth grade, students should be able to suggest "alternative scientific hypotheses or theories to current scientific hypotheses or theories."[67] "Current scientific theory" clearly refers to evolution, although the Kansas Board's curriculum does not explicitly say so. The Board provides a creationist study as an example of an alternative theory, which suggests that some stratified rocks in Mount Etna and Mount St. Helens were formed quickly and not by evolution.[68] Thus, while the new curriculum does not require schools to teach evolution, it does require them to teach some evidence contradicting it.

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[62] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[63] *See, e.g.*, N.Y. STATE EDUC. DEP'T, THE LIVING ENVIRONMENT CORE CURRICULUM, *at* http://www.nysed.gov/ciai/mst/pub/livingen.pdf (last visited Feb. 11, 2001) [hereinafter LIVING ENVIRONMENT] (stating that human existence is much younger than the vast age of the planet, as demonstrated by the fossil record).

[64] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[65] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[66] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[67] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[68] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48; *see also* Belluck, *Board for Kansas*, *supra* note 5 (reporting that the Mount Etna and Mount St. Helens studies were performed by creationists, and were offered to disprove the theory of evolution).

In addition to contradicting Darwin's theories of mankind's origins, the new curriculum omits other aspects of science that challenge the biblical account of creation. For instance, scientists estimate the age of the Earth at approximately 4.6 billion years.[69] This, however, conflicts with the Bible's view that the Earth is only about six thousand years old.[70] Therefore, it has been removed from the science curriculum. Such deletion, however, has left a wide gap in the area of geological science. Not only are students denied information that is heavily supported in the scientific community, but the gap in this area of science will lead them to believe information that is clearly false.[71] The Board has left the door open for each school district to decide whether its students should study the origin of the world from a Darwinian or a biblical perspective.

The evolution – creationism controversy has deep roots in the Judeo-Christian religions. To date, all creationist attempts to infiltrate the public schools have been called religious, and therefore, have failed in the courts because of the Establishment Clause bar. The current creationist venture, the theory of intelligent design, does not have such an obvious link to the religious tenets as did its predecessors. The Kansas Board and the creationists who

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[69] LUTGENS & TARBUCK, *supra* note 5, at 5.

[70] Russell Humphreys, *Evidence For a Young World, at* http://www.answers-ingenesis.org/docs/4005.asp (last visited Jan. 17, 2001). Humphreys lists twelve natural phenomena that conflict with the evolutionary view that the world is billions of years old, arguing that while the maximum age of the Earth is closer to a few million years, the "biblical age," which ranges between 6,000 and 10,000 years, "fits comfortably" in that estimated time period. *Id.* Humphreys's article appears on the web site of Answers In Genesis, a creationist organization that is committed to "debunk" evolution, and to advocate the literal word of Genesis. Clines, *supra* note 47.

[71] *See, e.g.*, John Hanna, *Kansas Schools Unlikely to Ignore Evolution*, ATLANTA J. AND CONST., Aug. 13, 1999, at 14A (discussing the weight given to evolution theory throughout the scientific community). The scientific community asserts that the origin of the universe can be explained by "fundamental tenets" such as evolution and the Big Bang theories. *See id.* (reporting that the committee of twenty-seven science educators who wrote the original curriculum described evolution as a fundamental tenet). Kansas, however, will teach its students that the origin of the universe continues to remain a scientific mystery, and will not mandate standards regarding that origin.

served on it, therefore, incorporated this theory into the state science curriculum in the latest endeavor to maneuver the biblical account of origins around the Establishment Clause and into the classroom. While intelligent design may pose a more difficult challenge to the Darwinists than did its predecessor theories, it will nevertheless suffer the same fate.

II. THE STATE OF THE LAW

The Supreme Court did not invoke the Establishment Clause mandates before 1947.[72] Creationists, therefore, enjoyed a legal atmosphere that was much friendlier towards their cause than the jurisprudence of today. This began to change in 1947, when the Court acknowledged for the first time that the Establishment Clause prohibited legislation that aided religion.[73] That recognition gave birth to a new era of jurisprudence, where the Establishment Clause would continually grow stronger until it became powerful enough to segregate religion from the government-supported public schools – a great victory for the Darwinists.[74] The Bible advocates, throughout the 1970s and 1980s, saw their attempts at reentering the classroom fail under the stringent three-pronged test from *Lemon v. Kurtzman*, because they could not demonstrate a secular purpose, a primary effect that did not advance religion, or that their program did not excessively entangle the government with religion.[75] Recent cases, however, indicate that *Lemon* does not pack the punch that it used to.[76] Having heavily criticized the three-pronged analysis, the Court is beginning to apply a single-pronged test, asking whether the legislation endorses religion.[77]

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[72] *See infra* note 83 and accompanying text (explaining that the *Everson* decision marked the first time the Court held that the Establishment Clause prevented the government from passing laws that aided or preferred religion).

[73] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[74] *See infra* notes 79-137 and accompanying text (discussing the development of the Establishment Clause in American Jurisprudence).

[75] 403 U.S. 602, 612-13 (1971).

[76] *See infra* notes 115-122 and accompanying text (criticizing *Lemon*).

[77] *See, e.g.*, Santa Fe v. Doe, 120 S. Ct. 2266 (2000) (applying the endorsement test to a school policy of official prayer before the start of high school football games). In *Santa Fe*, students, according to school policy, held

While the endorsement test offers a relaxed standard of First Amendment analysis, this does not mean that the creationists can expect to overcome a smaller hurdle in court. As the Supreme Court has not overruled *Lemon*, the lower courts continue to apply it.[78] Thus, until the high Court says otherwise, creationists must continue to defend their program under *Lemon*.

A. *The Developing Role of the Establishment Clause*

The Establishment Clause mandates that "Congress shall make no law respecting the establishment of religion."[79] In its early cases, the United States Supreme Court did not interpret this clause to require a separation between public school and religion.[80] The Court, however, slowly began to recognize that the Establishment Clause prohibited the government from becoming involved in religious activity, especially in schools. That principle having been established, the Court then began to develop its own tests in order to determine which levels of government involvement were forbidden.

The Supreme Court began changing its approach toward Establishment Clause cases in 1947 when it decided *Everson v.*

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elections to determine first, whether student-led prayer should be delivered at football games, and secondly, which student would deliver such prayers. *Id.* at 2272. The Court found this program to violate the Establishment Clause because it violated both the endorsement test, as students could perceive the prayer as "stamped with their school's seal of approval," as well as the coercion test, as students could feel great social pressure to attend their school's football games, where they would hear government sponsored prayer. *Id.* at 2279-81; *see also infra*, notes 126-28 and accompanying text (explaining both the endorsement and coercion tests).

[78] *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999) (applying *Lemon* analysis to a Louisiana requirement that science teachers read a disclaimer before teaching the unit on evolution).

[79] U.S. CONST. amend. I. The Supreme Court applied this requirement to state governments through the Fourteenth Amendment's Due Process clause in *Fiske v. Kansas*, 274 U.S. 380 (1927). That clause states, "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[80] *See, e.g.*, *Everson*, 330 U.S. at 17 (holding that reimbursement of transportation to religious schools did not violate the Establishment Clause).

Board of Education.[81] Although *Everson* held that a school policy reimbursing parents for their children's transportation to religious schools did not violate the Establishment Clause,[82] it marked the first time that the Court interpreted the Establishment Clause as prohibiting the government from "pass[ing] laws which aid one religion, aid all religions, or prefer one religion over another."[83] One year later, Justice Frankfurter expounded on the *Everson* decision in *McCollum v. Board of Education* and acknowledged that the Establishment Clause did not mean that the government should treat all religions equally, but that the government should instead adopt a neutral stance toward religion, and "abstain from fusing functions of Government and of religious sects."[84] *McCollum*, therefore, used the Establishment Clause to strike an Illinois

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[81] 330 U.S. 1 (1947).

[82] *Id.* at 17. Justice Black noted, however, that while New Jersey was within its constitutional power to enact such a statute, the state was approaching "the verge of that power." *Id.* at 16. *See also* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (stating that the "lines of demarcation" separating church and state can be dimly perceived). The Court had ruled seven years before *Everson* that the Establishment and Free Exercise Clauses of the First Amendment applied to the states through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[83] *Everson*, 330 U.S. at 15. Justice Black, writing for the Court, recognized that:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion to another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount . . . can be levied to support any religious activities . . . or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Id. at 15-16.

[84] 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring). "[T]he Constitution . . . prohibit[s] the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *Id.* at 228.

program that allowed public school children to receive sectarian education during school time and on school premises.[85] By the end of the 1940s, the role of the Establishment Clause in cases involving school and religion had become much more prominent as courts were now beginning to strike school programs that offended the new interpretation of the clause.

The recognition that the Establishment Clause meant a governmental policy of neutrality toward religion invited further interpretation of the clause. The Court in *Zorach v. Clauson*, therefore, expanded on the newly established policy of government abstention and held that the Establishment Clause required a complete separation of church and state.[86] The *Zorach* Court held that "[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment of religion' are concerned, the separation must be complete and unequivocal."[87] Complete separation of church and state meant that the government could no longer use its voice to further a religious purpose. This principle gave the Establishment Clause even more power to strike government programs that mixed with religion, and hence, created a hostile environment for proponents of public school prayer when they brought their case to the Supreme Court in 1962.[88]

Under the new interpretation of the Establishment Clause, prayer in schools did not withstand the scrutiny of the First Amendment. In *Engel v. Vitale*, the Court held that the government could not compose an official prayer to be recited in a public

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[85] *Id.* at 209-10; *see also infra* notes 243-47 and accompanying text (discussing the *McCollum* decision).

[86] Zorach v. Clauson, 343 U.S. 306, 312 (1952). *Zorach* involved a release-time program allowing public school children to leave school early in order to receive religious education at a religious center. *Id.* at 306. The Court distinguished *Zorach* from *McCollum*, finding that the release program at issue in *Zorach* was funded solely by the religious organization, and did not utilize public funds. *Id.* at 308-09. This constituted enough of a separation between church and state to satisfy the First Amendment. *Id.* at 312.

[87] *Id.* at 312.

[88] *See* Engel v. Vitale, 370 U.S. 421 (1962) (eliminating prayer from the classroom).

school.[89] To do so would officially establish the religious beliefs embodied in the prayer, thus violating the "wall of separation" between church and state.[90] Thus, over a course of fifteen years, the Establishment Clause had progressed from a state of virtual inertia to become the Court's strongest tool in separating the actions of government from religious undertakings.

B. The Lemon Test

The newly recognized line of separation between church and state required the Court to devise standards that would detect violations of the Establishment Clause. The *Schempp* test came first, requiring that a government action neither have the purpose nor primary effect of advancing religion.[91] These standards created a hostile legal environment for the creationist movement, resulting in a significant victory for the Darwinists as the Court finally held that states could not, in accordance with the First Amendment, ban the theory of evolution from the classroom.[92] The expansion of the two-pronged *Schempp* test into the three-pronged *Lemon* test[93] imposed an even heavier burden on the creationist movement, as it became clear that so long as *Lemon* reigned over Establishment Clause jurisprudence, evolution would prevail over creationism in the classroom. *Lemon*, however, has received much criticism from the current Supreme Court justices, particularly on the secular purpose prong.

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[89] *Id.* at 425. "[T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of the government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." *Id.*

[90] *Id.* at 430.

[91] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

[92] Epperson v. Arkansas, 393 U.S. 97, 103 (1968).

[93] Lemon v. Kurtzman, 403 U.S. 602, 611-12 (1971). *Lemon* incorporated the two criteria established in *Schempp* and added a third requirement articulated in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) that the program not foster "excessive entanglement" between government and religion. *Lemon*, 403 U.S. at 612.

1. *How Lemon Developed and Affected the Evolution – Creation Controversy*

Once the Supreme Court had propounded enough precedent, it was able to develop guidelines for testing whether government programs that in any way involved religion violated the Establishment Clause. The first test that the Court articulated came from *Abington v. Schempp*, which gleaned from previous cases the principles of neutrality mandated by the Establishment Clause and fashioned a two-pronged test.[94] The *Schempp* Court mandated that first, the law must have a secular purpose, and second, that the primary effect of the enacted statute (or program) should neither advance nor inhibit religion.[95] Because the Establishment Clause circumscribes the scope of legislative power, if either prong is not satisfied, then the enactment cannot stand – the legislature has exceeded that scope.[96]

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[94] 374 U.S. 203 (1963).

[95] *Id.* at 222. Justice Brennan gave the following explanation of the two-pronged test:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers – as much to church as to state – which the Framers feared would subvert religious liberty and the strength of a system of secular government.

Id. at 294-95 (Brennan, J., concurring); *see also* Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (stating that "[t]he purpose prong of the Lemon test asks whether the government's actual purpose is to endorse or disapprove of religion") (quoting from Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

[96] *Schempp*, 374 U.S. at 222. The Court in *Schempp* noted that the scope of legislative power is circumscribed by the Constitution. *Id.* Thus, a statute that did not comport with the First Amendment requirements of a secular purpose and a primary effect that neither advanced nor inhibited religion would lie outside the

The two-pronged *Schempp* test further facilitated use of the Establishment Clause as the standard for evaluating governmental involvement with religious classrooms. The Court in *Board of Education v. Allen,* applying this two-pronged test, upheld state programs that provided textbooks to parochial classrooms teaching secular subjects.[97] The Court found a secular legislative purpose in teaching such subjects, and determined that secular and religious teachings were not "so intertwined" that the state's aid to the secular aspects of education would automatically further the religious ones.[98] Thus, the Establishment Clause permitted government aid to religious schools, provided that the aid was used for purely secular purposes.

The newly established *Schempp* test also created a friendly forum for proponents of Darwin's theory of evolution. With guidelines for enforcing the Establishment Clause now in place, the evolution controversy was finally ripe for Supreme Court review in 1968 – more than forty years after the Scopes trial.[99] The Court in *Epperson v. Arkansas* finally ruled that states could not prohibit the teaching of evolution in public schools without running afoul of the First Amendment's Establishment Clause.[100] Justice Fortas, writing for the Court, applied the test from *Schempp* and held a statute prohibiting the teaching of evolution unconstitutional

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boundaries of legislative power. *Id.*

[97] 392 U.S. 236 (1968).

[98] *Id.* at 248.

[99] Aside from the Court's new treatment of the Establishment Clause, many social phenomena occurred that caused a shift in the nation's attitude, making the teaching of evolution a more favorable choice than it was in 1927. The Soviet Union in 1957 launched Sputnik, the first space satellite. McLean v. Bd. of Educ., 529 F. Supp. 1255, 1259-60 (E.D. Ark. 1982). This made American schools take an interest in modernizing science education, lest the United States fall behind the Soviet Union intellectually. *Id.* The Scopes trial was also receiving renewed attention. The movie "Inherit the Wind," which depicted the famous trial, was released in 1960, and John Scopes had published his autobiography in 1965. *Talk of the Nation*, *supra* note 28. Thus, it had practically become fashionable to discuss Darwinism.

[100] 393 U.S. 97 (1968). Arkansas adopted its anti-evolution statute in 1928, molding it in the image of the Tennessee law challenged in the Scopes trial. *Id.* at 98; *see also* Scopes v. State, 289 S.W. 363, 364 (Tenn. 1927) (discussing the Tennessee Anti-evolution Act).

because it violated the secular purpose prong.[101] Seven justices agreed that the sole purpose of the statute was a religious one because it sought to bar the teaching of a theory that challenged the biblical account of creation.[102] *Epperson* was a devastating defeat to the creationist movement. In fact, this defeat was worse than the one in *Scopes* because the Court showed a willingness to actively strike policy on constitutional grounds, rather than merely declining to enforce such policy.

While the Court continued to use Establishment Clause analysis, it began to recognize a danger in rigidly applying a standard that required complete separation of church and state. In the Court's view, some relationship between the two would be inevitable, yet this would not always amount to an Establishment Clause violation.[103] This prompted the Court in *Walz v. Tax Commission*[104] to note that it would no longer view church and state as separated by a wall, but rather, by a "blurred" line, meaning that it would not always be clear which areas should involve only government, and which should involve only religion.[105] The *Walz* Court upheld New York's tax exemptions for property owned by religious organizations and used for religious worship. Recognizing that total separation of church and state was not possible, the Court held that the government need not avoid *any* relationship with religious organizations, only those relationships that foster an "excessive entanglement" with religion.[106]

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[101] *Epperson*, 393 U.S. at 103.

[102] *Id.*

[103] *Lemon*, 403 U.S. at 612.

[104] 397 U.S. 664 (1970).

[105] *Lemon*, 403 U.S. at 614. "[T]he line of separation, far from being a wall, is a blurred, indistinct, and invariable barrier depending on all the circumstances of a particular relationship." *Id.* Justice O'Connor would later point out that chaos would ensue if every statute that incorporated some religion fell under the Establishment Clause. She gives an example of a state not being allowed to criminalize murder for fear that it would "promote the biblical command against killing." Wallace v. Jaffree, 472 U.S. 38, 70 (1984) (O'Connor, J., concurring).

[106] *Walz*, 397 U.S. at 674. The Court would later point out in *Lemon* that some kind of relationship between governmental and religious organizations was inevitable. *Lemon*, 403 U.S. at 614. Some examples of permissible contacts include fire inspections, building and zoning regulations, and compulsory school

This new "excessive entanglement" test from *Walz* complimented the two-pronged test from *Schempp*.

With the additional criterion from *Walz*, the Court in 1971 articulated its new three-pronged test for Establishment Clause analysis in the landmark case of *Lemon v. Kurtzman*.[107] In order to survive judicial scrutiny, a statute or program must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion.[108] If a program did not meet all of these criteria, it would violate the Establishment Clause.[109]

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attendance. *Id.*

[107] 403 U.S. 602 (1971). The *Lemon* case involved a Pennsylvania statute that reimbursed parochial schools for teachers' salaries, textbooks, and instructional materials in specified secular subjects, and a Rhode Island statute that allowed the state to supplement the income of private school teachers by directly paying them fifteen percent of their annual salary. *Id.* at 606. The Court held both statutes unconstitutional because the "cumulative impact of the entire relationship" between government and religion resulted in excessive entanglement between the two. *Id.* at 613-14.

[108] *Id.* at 612-13. The *Lemon* Court recognized three evils against which the Establishment Clause protects: "'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Id.* at 612 (quoting *Walz*, 397 U.S. at 668).

[109] *Id.* During the period from 1971 to around 1994, *Lemon* served as the Court's main test in Establishment Clause cases. During that time, the Court declined to apply *Lemon* in only a handful of its cases, where it deemed *Lemon* analysis to be inappropriate. *See* Kiryas Joel Vill. v. Grumet, 512 U.S. 687, 702 (1994) (holding that New York's Act permitting a Satmar sect to establish its own school district for handicapped Satmar children violated the Establishment Clause because it resulted in a "purposeful and forbidden 'fusion of governmental and religious functions'"); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8 (1989) (stating that the main test of whether an Act violates the Establishment Clause is whether the legislation "constitutes an endorsement of one or another set of religious beliefs or of religion generally"); Marsh v. Chambers, 463 U.S. 783, 790-95 (1983) (holding that a state legislature may, in accordance with the Constitution, pay a chaplain to open the day by reading a non-denominational prayer). The *Marsh* Court did not find it necessary to apply the *Lemon* test due to this country's long history of such prayer, and the fact that such does not threaten the evils feared by the Framers of the Establishment Clause. *Id.*

The three-pronged *Lemon* test applies only in cases where the Government prefers religion over non-religion, or vice versa. In cases where government

By 1987, with the *Lemon* framework in place, the evolution – creationism controversy once again returned to the legal arena in the form of Louisiana's Creationism Act.[110] This law forbade the teaching of evolution unless creation science was taught along with it, to give both theories a "balanced treatment," and it came under attack in *Edwards v. Aguillard*.[111] In *Edwards*, however, the Court recognized that creation science was nothing more than the book of Genesis in disguise, and found that the true purpose of the creationism class was to discredit evolution by countering it with a competing theory, teaching students that evolution was a lie.[112] The Court declared it unconstitutional to force schools to balance

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prefers one religion over another, the Court applies a strict scrutiny test, requiring a compelling governmental interest in the enactment, and that the means be narrowly tailored to further that interest. *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982) (holding that a state university policy to deny access of school facilities to student religion groups violated the First Amendment because it neither served a compelling state interest nor used narrowly tailored means); Widmar v. Vincent, 454 U.S. 263 (1981) (holding that courts must apply strict scrutiny to a law giving denominational preference).

[110] LA. REV. STAT. ANN. § 17:286 (West 2001). Louisiana's Creationism Act defined creation science as "scientific evidences for creation and inferences from those scientific evidences." LA. REV. STAT. ANN. §17:286.3(2) (West 2001). The Act required "[e]ach city and parish school board . . . [to] develop and provide to each public school classroom teacher in the system a curriculum guide on presentation of creation-science." LA. REV. STAT. ANN. § 17:286.7 (West 2001). "The governor shall designate seven creation-scientists who shall provide resource services in the development of curriculum guides to any city or parish school board upon request." *Id.* The Act required public schools to "give balanced treatment to creation-science and to evolution-science. Balanced treatment . . . [applied to] classroom lectures . . . textbook materials . . . library materials . . . [and] in other educational programs in public schools, to the extent that such . . . deal in any way with the subject of the origin of man, life, the earth, or the universe. When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact." LA. REV. STAT. ANN. § 17:286.4.A (West 2001). "This Subpart does not require any instruction in the subject of origins but simply permits instruction in both scientific models . . . if public schools choose to teach either." LA. REV. STAT. ANN. § 17:286.5 (West 2001); *see also Edwards,* 482 U.S. at 586-87 (discussing how the Act's legislative history reflected a non-secular purpose).

[111] 482 U.S. 578 (1987).

[112] *Id.* at 589.

the classroom discussion of evolution with a countervailing religious theory.[113] Such balancing violated the secular purpose prong and accordingly, the Establishment Clause by advancing a religious viewpoint that rejects evolution.[114]

2. *Criticisms of the Lemon Test*

Lemon served as the Court's primary test for Establishment Clause violations until the early 1990s.[115] Despite its prevalence during that period, several justices began to find the three-pronged test problematic. Justice Scalia, the Court's most vehement critic of *Lemon*, would like to abandon the test completely.[116] His scathing dissent in *Edwards* admonished the Court's stringent application of the secular purpose prong, and for finding a religious motivation wherever a law "happens to coincide or harmonize with the tenets of some or all religions."[117]

Justice Scalia does not believe that legislation should be invalidated solely on the basis of the motivation behind it.[118] He cites three objections to the secular purpose prong: (1) legislators may have multiple motives; (2) since legislators may disagree with the purpose expressed in committee reports, it may be impossible

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[113] *Id.*

[114] *Id.* at 596-97.

[115] *See supra* note 109 (stating that *Lemon* was strictly applied during the period from 1971 to around 1994, and listing a handful of Establishment Clause cases during that period that did not employ *Lemon* analysis).

[116] *See, e.g., Freiler*, 120 S. Ct. 2706, 2707-08 (2000) (Scalia, J., dissenting) (chastising the Fifth Circuit for applying *Lemon*, and noting that he would have granted *certiorari* "if only to take the opportunity to inter the *Lemon* test once for all"). Justice Scalia has likened *Lemon* to the "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . stalk[ing] our Establishment Clause jurisprudence." Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993).

[117] *Edwards*, 482 U.S. at 615 (Scalia, J., dissenting) (citations omitted).

[118] *Id.* at 610. Motivation analysis might be particularly dangerous at times, because laws that pass for legitimate secular reasons, which for some reason do not appear in committee reports, will nevertheless fall to the Establishment Clause. Hal Culbertson, Note, *Religion in the Political Process: A Critique of Lemon's Purpose Test*, 1990 U. ILL. L. REV. 915, 919 (1990).

to determine these motives; and (3) there is no standard to determine the legislative intent.[119]

Chief Justice Rehnquist also heavily criticizes *Lemon*, stating that it is not grounded in the history of the First Amendment, and that the three-pronged test does not provide adequate standards for Establishment Clause cases.[120] The Chief Justice would also abandon the test completely, noting that the use of the *Lemon* analysis has fractured the Court, resulting in "unworkable plurality opinions."[121] Other staunch critics point out that the *Lemon* test proves hostile toward religion, and actually favors the "religion" of non-religion. They argue that in the effort to avoid entanglement with religion, the government denies benefits to religious bodies that would otherwise be available.[122]

C. Justice O'Connor's Endorsement Test

Despite *Lemon*'s thirty-year reign over Establishment Clause cases, several justices have suggested alternative tests to govern this area of law.[123] Justice O'Connor's concurrence in the 1984 case of *Wallace v. Jaffree*[124] suggests that despite *Lemon's* initial

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[119] *Edwards*, 482 U.S. at 636-39. Justice Scalia makes this third point clear by exaggerating the difficulties in using a motivation test, asking exactly how many legislators must have the invalidating intent:

> If a state senate approves a bill by vote of 26 to 25, and only one of the 26 intended solely to advance religion, is the law unconstitutional? What if 13 of the 26 had that intent? . . . Or is it possible that the intent of the bill's sponsor is alone enough to invalidate it . . . that even though everyone else's intent was pure, what they produced was the fruit of a forbidden tree?

Id. at 638.

[120] Robert L. Kilroy, Note, *A Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of* Rosenberger v. Rector & the Visitors of the University of Virginia, 6 CORNELL J.L. & PUB. POL'Y 701, 709 (1997).

[121] Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting).

[122] Kilroy, *supra* note 120, at 711.

[123] *See infra* note 128 (listing possible alternatives to *Lemon* analysis).

[124] 472 U.S. 38 (1985). The *Wallace* decision rests wholly on the *Lemon* analysis. *See id.* at 42-45 (striking a state statute establishing a moment of silence for voluntary prayer because such statute lacked a secular purpose); *see also*

promise of efficiency, the test "has proved problematic."[125] Rather than call for *Lemon*'s abandonment, as do some of her colleagues, Justice O'Connor has re-worked the secular purpose and primary effect prongs and formulated the endorsement test. Endorsement analysis asks "whether the government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[126] A message of endorsement, according to the Court, is one that "conveys a message that religion is favored, preferred, or promoted over other beliefs."[127] This test essentially reiterates the heart of the *Lemon* test, as it inquires into both the purpose and effect of the enactment. Although the Court has never overruled *Lemon*, the current justices appear to favor using this Endorsement test in more recent Establishment Clause cases.[128]

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infra notes 182-191 and accompanying text (discussing the *Wallace* holding as applicable to the situation in Kansas).

[125] *Wallace*, 472 U.S. at 68 (O'Connor, J., concurring) (stating that despite its initial promise, *Lemon* has proved unworkable, specifically on the entanglement prong).

[126] *Id.* at 69.

[127] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999) (quoting Allegheny v. ACLU, 492 U.S. 573, 593 (1989)).

[128] *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000) (holding that school sanctioned pre-game prayer violates the Establishment Clause because objective observers could perceive it as a state endorsement of prayer); Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 389 (1993) (holding that the showing of religiously oriented films in a public school after school hours did not convey a message of government endorsement of such film to the community). If *Lemon* is not applied, there is no real consensus on the Court on which test to apply to an Establishment Clause case. Andrea Ahlskog Mittleider, Note, *Casenote: Freiler v. Tangipahoa Parish Bd. of Educ.: Ignoring the Flaws in the Establishment Clause*, 46 LOY. L. REV. 467, 471 (2000). The Court has at times used a coercion test, mainly when the issue involved school prayer at ceremonies such as graduation. *See* Lee v. Weisman, 505 U.S. 577 (1992). While an argument could be made that the Kansas curriculum fails the coercion test because compulsory attendance laws force students to study creationism, the coercion test is too narrow; the issue of teaching creationism in public schools is much broader than a compulsory attendance law, and thus does not lend itself to analysis under this test. The Court has also applied a neutrality analysis, requiring the government to employ neutral standards that benefit all viewpoints. *See* Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819 (1995).

The Court used the endorsement test in its most recent Establishment Clause case, which challenged a school policy of student led prayer at football games. In *Santa Fe v. Doe*[129] a public high school sanctioned a pre-game prayer from an elected student representative. The Court held this policy to violate the Establishment Clause because an "objective observer . . . would perceive it as a state endorsement of prayer in public schools."[130] Additionally, the Court rejected Santa Fe's stated secular purpose, which was "to foster free expression of private persons . . . and to establish an appropriate environment for competition."[131] The Court found this stated purpose to be a sham, noting that officially sanctioned prayer did not achieve the goal of fostering free expression, and attempts to solemnize the event are impermissible when they actually constitute prayer.[132] Thus, while this school policy could have easily fallen under *Lemon's* secular purpose prong, the Court chose not to use that test.

While the current Court seems to favor the Endorsement test over *Lemon*, it has not yet abandoned the earlier test. On the same day it decided *Santa Fe*, the Court declined to review *Freiler v. Tangipahoa Parish Board of Education*,[133] letting stand a lower court ruling that was based mainly on the *Lemon* analysis.[134] *Freiler* represented a recent chapter in the evolution – creationism controversy, as Louisiana's disclaimer requirement was chal-

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Contrary to the coercion test, the neutrality test is too broad – evolutionists can easily argue that creationism favors Judeo-Christian religions and thus violates the Establishment Clause. Therefore, endorsement analysis is the most appropriate alternative test for the creationism controversy in schools.

[129] 120 S. Ct. 2266 (2000).

[130] *Id.* at 2278 (quoting *Wallace*, 472 U.S. at 73).

[131] *Id.* at 2278-79.

[132] *Id.* at 2279.

[133] 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2706 (2000).

[134] *Id.* The Court voted 6-3 to deny *certiorari*. Justice Scalia dissented, noting that the *Lemon* test has been widely criticized and that the Fifth Circuit erred in applying it. *Id.* at 2707. Assuming that the court was correct in applying that test, Scalia further disagreed with the court's analysis, arguing that the primary effect of the disclaimer merely advanced freedom of thought, and so did not fail the second prong. *Id.*

lenged.[135] Before teaching the chapter on evolution, Louisiana's science teachers were required to read a disclaimer, telling students that the lesson was being presented merely to inform them of the scientific concept of evolution, and should not dissuade them from believing the biblical version of creation.[136] The Fifth Circuit held that such a requirement violated the second prong of *Lemon* because the primary effect of the disclaimer was to protect and maintain the belief in the biblical account of creation, which is a religious viewpoint.[137] Thus, while the Supreme Court seems to be moving away from *Lemon* and leaning toward the Endorsement test, the lower courts, lacking proper guidance, continue to use the *Lemon* analysis.

D. *Despite the Supreme Court's Recent Treatment of* Lemon, *School Programs Fostering Creationist Theories Still Must Pass the Three-Pronged Test*

Because of the Supreme Court's inability to agree on a standard to replace the three-pronged test, it has not overruled *Lemon*.[138]

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[135] *Freiler,* 185 F.3d at 341. The disclaimer stated the following:

> It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept. It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

Id.

[136] *Id.*

[137] *Id.* at 348. The court also held that because the disclaimer failed the second prong of *Lemon*, it also violated the endorsement test, as students and parents could easily perceive an endorsement of the biblical version of creation. *Id.*

[138] Penny J. Meyers, Note, *Lemon Is Alive and Kicking: Using the Lemon Test to Determine the Constitutionality of Prayer at High School Graduation*

Therefore, since the lower courts are bound by Supreme Court precedent, they continue to apply the three criteria.[139] Some circuits have stated that they will continue to apply *Lemon* until the Supreme Court overturns it.[140] Others are unclear as to which test should be applied, and so apply *Lemon* as well as newer tests.[141]

Until *Lemon* is expressly overruled, this is the correct approach for the lower courts to employ. The lower courts have no power to declare that a Supreme Court precedent no longer applies, even when subsequent decisions of the Court indicate otherwise.[142] For example, in *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, the lower court, noting that the Supreme Court had significantly narrowed the scope of one of its precedents, doubted that the case was still good law and therefore, declined to apply the prece-

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Ceremonies, 34 VAL. U. L. REV. 231, 264 (1999); *see also supra* note 128 (listing various suggestions by the current justices of a test to replace *Lemon*).

[139] *Id.*

[140] *See, e.g.*, Koenick v. Felton, 190 F.3d 259, 264 (4th Cir. 1999); ACLU v. Black Horse Pike Reg'l Bd. of Educ., 84 F.3d 1471 (3d Cir. 1996) (stating that *Lemon* will continue to govern Establishment Clause cases until it is expressly overruled).

[141] *See, e.g., Freiler*, 185 F.3d at 348 (using the endorsement test in addition to the *Lemon* test to strike Louisiana's disclaimer policy).

[142] *See, e.g.*, Dickerson v. United States, 120 S. Ct. 2326, 2333 (2000) (holding that notwithstanding previous Supreme Court decisions indicating that the *Miranda* warnings were merely "prophylactic" and "not themselves rights protected by the Constitution," the lower court erred by concluding that *Miranda* was not a constitutional decision and could therefore be superceded by an act of Congress).

dent.[143] The Supreme Court reversed, declaring that "only this Court may overrule one of its precedents."[144]

Likewise, as long as *Lemon* exists as precedent, a lower court would exceed the scope of its authority by failing to apply *Lemon* to an Establishment Clause issue. Mere criticism of the three-pronged test is not sufficient to authorize the lower courts to jettison a Supreme Court decision. For example, in *Dickerson v. United States*, the lower courts interpreted later Supreme Court rulings to mean that the *Miranda* warnings[145] were not constitutionally required, and that the precedent could, therefore, be superseded by an act of Congress.[146] The Supreme Court disagreed, holding that despite its reluctance to apply *Miranda* in certain situations, it was nevertheless a constitutional decision, and thus, could only be overturned by the Court.[147] Although the Court has likewise criticized and at times opted not to apply *Lemon*, the lower courts do not have licence to ignore the three-

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[143] 682 F.2d 811, 813 (9th Cir. 1982). Thurston, a common carrier authorized by the Interstate Commerce Commission (ICC), brought suit against Rand in order to recover to collect $661.41 that he was owed for his services. In *Louisville & Nashville R. Co v. Rice*, 247 U.S. 201 (1918), the Supreme Court held that subject matter jurisdiction existed over a case where a common carrier was owed $145 in tariffs regulated by the Interstate Commerce Act. The court of appeals, however, refused to extend subject matter jurisdiction. The court announced that it doubted whether *Rice* remained good law, noting that while the Supreme Court had once construed the terms in *Rice* expansively, it had since narrowed its interpretation. 682 F.2d 811, 813-14 (1982). The Supreme Court reversed, holding that *Rice* still applied, and made it clear that the lower court had no power to overturn a precedent set by the Supreme Court. 460 U.S. at 535.

[144] *Thurston*, 460 U.S. at 535.

[145] When a suspect's liberty is restricted in any way, he must be informed of his right to remain silent, that anything said may be used against him in a court of law, that he has the right to an attorney, and that if he cannot afford an attorney, one will be provided for him. Miranda v. Arizona, 384 U.S. 436 478-79 (1966).

[146] 120 S. Ct. at 2333. The lower court relied on the fact that the justices had carved out several exceptions to *Miranda*, and that they had characterized the warnings as precautionary, rather than rights guaranteed by the constitution. *Id.*

[147] *Id.* at 2336-37. "*Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves." *Id.*

pronged test until the Supreme Court decides to liberate Establishment Clause jurisprudence from *Lemon*'s reign.

The Court, however, is unwilling to be so bold. By denying to review *Freiler v. Tangipahoa Parish Board of Education*, a case that rested mainly on the primary effect prong,[148] the Supreme Court relinquished its opportunity to put *Lemon* to rest permanently.[149] The lower courts, therefore, must continue to abide by the three criteria set forth in that case.[150]

Creationists in the first half of the century found it relatively easy to either indoctrinate public school children with the biblical account of creation or else protect them from Darwin's version of it. All of this changed once the Supreme Court began to develop the Establishment Clause. *Lemon* and its predecessor tests proved to be a powerful nemesis to the creationist movement. Although the Court may be on the verge of replacing *Lemon* with the less stringent endorsement test, this will not affect the evolution – creationism controversy as it battles its way through the lower courts. The Supreme Court's refusal to revisit the issue keeps the controversy in the lower court system. Still governed by *Lemon*, those courts continue to require that a school program satisfy all three criteria of that test.

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[148] *Freiler*, 185 F.3d at 346 (5th Cir. 1999). While the court also employed endorsement analysis, it did so as an afterthought while analyzing Louisiana's statute under the primary effect prong. *Id.* "Lemon's second prong asks whether . . . 'the practice under review in fact conveys a message of endorsement or disapproval' . . . This is similar to analysis pursuant to the endorsement test . . . In assessing the primary effect . . . we focus on the message conveyed." *Id.*

[149] *But see Freiler*, 120 S. Ct. at 2707 (Scalia, J., dissenting). Justices Scalia, Rehnquist, and Thomas, all of whom favor overturning *Lemon*, would have granted *certiorari* in the *Freiler* case. As only four justices are required to grant *certiorari*, it does not seem likely that the Court will keep itself away from the controversy for long.

[150] It is especially necessary for states entrenched in the evolution-creationism controversy to prove that their school programs satisfy the *Lemon* test. The Court's refusal to review *Freiler* demonstrated its current unwillingness to revisit the issue of teaching evolution in schools. 120 S. Ct. 2706 (2000). Therefore, parties to this issue must fight their battle in the lower court system, which continues to apply the three-pronged test. *See Freiler*, 185 F.3d at 344 (recognizing that *Lemon* remains the proper test for Establishment Clause issues, notwithstanding recent criticism of that test from the Supreme Court).

III. THE KANSAS CURRICULUM VERSUS THE ESTABLISHMENT CLAUSE

While the Supreme Court has suggested that it may be constitutional to remove evolution from a school's science curriculum entirely,[151] the Kansas Board has not done so in a manner that comports with the First Amendment. A court subjecting the Kansas curriculum to *Lemon* scrutiny would not have to look past the secular purpose prong to find that such science standards violate the Establishment Clause.[152] The edited curriculum neither promotes its articulated goals, nor achieves new goals that were not already met. Moreover, closer inspection of the Board's decision-making process discloses an insincere secular purpose that only masks the inherently religious motivation behind the Board's decision.[153] The primary effect prong is also problematic, because Kansas would directly aid religion by using its facilities to advance a religious message, and by using its laws to provide creationist teachers with a captive audience to hear that message.[154] The

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[151] *Edwards*, 482 U.S. at 593-94.

[152] While the Court has questioned the framework of *Lemon*, its basic principles remain intact. Agostini v. Felton, 521 U.S. 203, 222-23 (1997). "[T]he general principles we use to evaluate whether government aid violates the Establishment Clause have not changed . . . [W]e continue to ask whether the government acted with the purpose of advancing or inhibiting religion . . . Likewise, we continue to explore whether the aid has the 'effect' of advancing or inhibiting religion." *Id. Agostini* held an injunction barring public school teachers from providing remedial education in sectarian schools invalid because it was based on a case that was no longer consistent with the Court's Establishment Clause jurisprudence. *Id.* Since the Court in *Zobrest v.Catalina Foothills School District*, 509 U.S. 1 (1993), rejected the presumption that a public employee's presence in a sectarian school will "inculcate religion in the students," the injunction, which was granted because the Court believed mixing public teachers with private schools constituted an impermissible entanglement, was no longer required by the First Amendment. *Agostini*, 521 U.S. at 208, 223-24.

[153] *See infra* notes 159-224 (discussing how the Kansas curriculum violates the secular purpose prong).

[154] *See infra* notes 225-59 and accompanying text (discussing how the Kansas curriculum violates the primary effect prong).

resulting fusion between the state law and the religious message would amount to an excessive government entanglement, in violation of the third prong of *Lemon*.[155]

Although the *Lemon* test has received heavy criticism from some justices on the Court, the specific circumstances of the Kansas controversy render many of those criticisms moot.[156] Even if *Lemon* were not applied, however, the Kansas curriculum would still falter under the endorsement test. By putting this curriculum into effect, Kansas would create the perception in students that the government approved of the biblical account of creation, thus turning its schools into "a forum for religious debate,"[157] and giving approval to local orthodoxy.[158]

A. *The Secular Purpose Prong*

The secular purpose prong presents the greatest challenge to the Kansas curriculum. The Constitution will only permit a law to have a religious purpose if it also has a dominant secular purpose.[159] Thus, if Kansas's policy had a "clear secular intent of enhancing

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[155] *See infra* notes 260-70 and accompanying text (discussing how the Kansas curriculum violates the entanglement prong).

[156] *See infra* notes 271-90 and accompanying text (discussing and refuting some criticisms of the *Lemon* test).

[157] Santa Fe Ind. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2283 (2000).

[158] Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973); *see also infra* notes 291-309 and accompanying text (discussing how the Kansas curriculum violates the endorsement test).

[159] *See* Wallace v. Jaffree, 472 U.S. 38, 74, 82 (1985) (O'Connor, J., concurring). If the state shows a secular purpose for its program, it satisfies the secular purpose prong, even though there may also have been a religious motive. *Id.* The difference between this situation and others with religious purposes is that here, the secular purpose dominates any co-existing religious ones. *Id.* The Court in *Wallace* struck an Alabama statute mandating "that a period of silence, not to exceed one minute in duration, shall be observed for meditation or voluntary prayer." *Id.* at 40. While a state may legitimately protect a student's right to pray during an appropriate moment of silence, Alabama had already achieved that secular purpose through an earlier statute providing a moment of silence for meditation. *Id.* at 58-60. Therefore, the Court held, by adding the words "or voluntary prayer" to its law, Alabama had intended to endorse prayer as a favored practice, and thus ran afoul of the Establishment Clause. *Id.*

the effectiveness of science instruction," it would be constitutional.[160] The Board cites, as its secular purpose, the desire to achieve high levels of scientific literacy by not teaching theories that are not scientific fact. Nevertheless, the science curriculum fails the secular purpose prong in four ways. First, the Board undermines its secular purpose of attaining scientific literacy by diluting the dominant scientific theory of evolution in the science curriculum. Secondly, an earlier version of the curriculum, which included evolution, fully achieved the Board's stated secular purpose, so removing evolution from that curriculum achieved nothing towards that goal. Thirdly, the Board's stated secular purpose does not prove sincere when considered in light of the history behind the decision to delete evolution. Finally, the Board's distrust of evolution as a scientific theory is not sufficiently divorced from its religious origins to be considered secular.

1. The Board Undermines, Rather Than Promotes Its Stated Goals

A program that does not promote its stated secular purpose will not pass the first prong of *Lemon*.[161] Such was the case in *Edwards v. Aguillard*,[162] which involved Louisiana's Balanced Treatment Act,[163] requiring that schools either balance the teaching of evolution with classes in creation science, or else not teach either theory.[164] The Court rejected Louisiana's stated secular purpose of "protect[ing] academic freedom," because it found that the Act inhibited academic freedom rather than promoting it.[165]

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[160] *Edwards*, 482 U.S. at 593.

[161] Edwards v. Aguillard, 482 U.S. 578, 587-89.

[162] 482 U.S. 578 (1987).

[163] LA. REV. STAT. ANN. §§ 17:286.1- 17:286.7 (West 2001). The Act did not force schools to teach either creationism or evolution, but required that where one theory was taught, the other must be taught as well. *See id.* § 17:286.4.

[164] *Edwards*, 482 U.S. at 578.

[165] *Id.* at 586. "It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom." *Id.* at 587. The Court further reasoned, the Act did not "grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life." *Id.*

Thus, the Court recognized that if Louisiana's purpose was solely "to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind."[166]

Like the program in *Edwards*, the new science curriculum fails the first *Lemon* prong because it frustrates its stated secular purpose, rather than promotes it. The Kansas Board listed legitimate secular goals in its mission and vision statements.[167] The vision statement seeks that all students have the opportunity "to attain high levels of scientific literacy."[168] Its mission statement reads that science educators should "utilize science as a vehicle to prepare all students as lifelong learners who can use science to make reasoned decisions, contributing to their local, state, and international communities."[169] The Board argues that such goals dictate that evolution should not be taught as fact rather than theory.[170] It argues that because "good science consist[s] of what [is] 'observable, measurable, repeatable, and falsifiable,'" evolution is not sound science, and therefore, schools should not be forced to teach it as scientific fact.[171]

This policy, however, hinders the goals set forth in the mission and vision statements. By keeping evolution – a theory that is both dominant and prevalent throughout the scientific community – out of the science curriculum, the Board ensures that Kansas students will not learn theories that are considered fundamental scientific

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[166] *Id.* at 587. Thus, the Court, agreeing with the court of appeals, held that the Act did not serve to protect academic freedom, but had the "distinctly different purpose of discrediting evolution by 'counterbalancing its teaching at every turn with the teaching of creationism.'" *Id.* at 589 (quoting *Aguillard v. Edwards*, 765 F.2d 1251, 1257 (5th Cir. 1985)).

[167] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[168] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[169] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[170] *World News Tonight With Peter Jennings* (ABC television broadcast, Aug. 12, 1999) (broadcasting comments from Kansas School Board Chairperson Linda Holloway).

[171] KANSAS STATE DEP'T OF EDUC., *Meeting Minutes*, (May 11-12, 1999), *at* http://www.ksbe.state.ks.us/commiss/bdmin/0599boardmin.html (last visited Feb. 11, 2001).

tenets throughout the world.[172] It is therefore unlikely that these students will attain scientific literacy. The new standards do not present an alternative theory as scientific fact, nor does it offer one that has as much scientific support as evolution.[173] Rather, when addressing certain controversial subjects,[174] the new science standards contain a void where evolution once provided a scientific explanation.[175] The Board cannot hope to attain scientific literacy when it requires, for instance, high school seniors to understand the world's origins, and then intentionally leaves that section blank in the statewide guidelines.[176]

Such a contradiction can only have two purposes: either the Board does not wish students to study a theory that contradicts religious teachings, or else it hopes that school districts will insert religious theory into the void.[177] While a district can just as easily re-insert Darwinism into that void,[178] one cannot accept that possibility as one of the Board's goals. If the Board intended for districts to put evolution back into the curriculum, then it would make no sense to remove it in the first place. Thus, Kansas cannot hope to attain its goal of high scientific literacy with this vague

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[172] Belluck, *Board For Kansas, supra* note 5. Kansas appointed a committee of twenty-seven scientists and professors to write a new state curriculum based on the new national science guidelines. These scientists included language in their curriculum describing evolution as a "fundamental scientific tenet." Hanna, *supra* note 71. The creationists on the board, however, deleted this along with most of the two pages dealing with evolution, claiming that it was "not good science to teach evolution as fact." Belluck, *Board for Kansas, supra* note 5.

[173] *See* KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[174] Including subjects such as macro-evolution, the Old Earth theory or the Big Bang theory.

[175] *See supra* notes 63, 69-71 and accompanying text (describing scientific explanations that the Board eliminated from the curriculum).

[176] KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[177] Giving the Kansas Board the benefit of the doubt and categorizing Darwinism as theory rather than fact, one still has trouble understanding why the Board would have such concern over students studying this theory, but for the Biblical issue. Students learn several theories throughout their academic careers in subjects such as math, history, and even other areas of science such as physics.

[178] *See* Belluck, *Board for Kansas, supra* note 5 (stating that individual school districts are free to include evolution in their curricula if they so desire).

curriculum. Because the program does not advance its secular goals, the mere statement of such goals cannot suffice as a secular purpose.

2. *The Board's Stated Secular Purpose Was Already Served by Drafts That Included Evolution*

The Kansas Board's stated secular purpose – that macro-evolution should not be taught as fact because it is not based on sound science[179] – will not suffice as a legitimate secular purpose under the *Lemon* test because such concerns were addressed in previous curriculum drafts.[180] To satisfy the secular purpose prong of *Lemon*, the government must identify a "secular purpose that was not fully served by existing state law before the enactment

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[179] KANSAS STATE DEP'T OF EDUC., *Meeting Minutes* (May 11-12, 1999), *at* http://www.ksbe.state.ks.us/commiss/bdmin/0599boardmin.html (last visited Feb. 11, 2001). Dr. Steve Abrams, one of the three creationists who proposed changes to the curriculum drafted by the scientists, stated that "good science consisted of what was 'observable, measurable, repeatable, and falsifiable.'" Linda Holloway, who chairs the Board, agreed that evolution is "called a theory, and [she] would sure like to see it be continued to be taught as a theory." *Today* (NBC television broadcast, Aug. 13, 1999).

According to its vision statement, the Board purports to give students the opportunity to "attain high levels of scientific literacy." *See* KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48. In its preface to the science curriculum, the Board lists four criteria that scientific explanations must meet in order to be accepted. They must be: logical; consistent with experimental and/or observational data; testable through additional experimentation and/or observation; and repeatable. KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48. "The effect of these criteria is to insure that scientific explanations about the world are open to criticism and that they will be modified or abandoned in favor of new explanations if empirical evidence so warrants." KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48. Because evolution cannot be repeated in a laboratory, the Board claims it does not meet the definition of science and is therefore merely a theory. KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[180] *See* KANSAS STATE DEP'T OF EDUC., KANSAS SCIENCE EDUCATION STANDARDS, *Fourth Working Draft* (Apr. 1999), *at* http://www.ksbe.state.ks.-us/outcomes/scidraft4.html (last visited Nov. 5, 1999) (on file with the *Journal of Law and Policy*) [hereinafter *Fourth Draft*].

of the statute [or program] in question."[181] For example, in *Wallace v. Jaffree*,[182] a student challenged an Alabama statute providing a one-minute period of silence at the beginning of each school day to be used for meditation or voluntary prayer.[183] Alabama offered as a secular purpose its desire to create a one-minute silent period during which students could meditate.[184] While this did constitute a secular purpose, the Court nevertheless rejected it because Alabama had previously enacted a law that provided a moment of silence.[185] Thus, the Court found, the

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[181] Edwards v. Aguillard, 482 U.S. 578, 588 (1987) (quoting Wallace v. Jaffree, 472 U.S. 38, 59 (1985)).

[182] 472 U.S. 38 (1985).

[183] *Id.* at 40. The statute provided:

> At the commencement of the first class of each day in *all grades in all public schools* the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed *for mediation or voluntary prayer*, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1984) (repealed 1998) (emphasis added). Another Alabama statute provided:

> From henceforth, any teacher or professor in any public educational institution within the state of Alabama recognizing that the Lord God is one, at the beginning of any home room or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> "Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen."

ALA. CODE § 16-1-20.2 (2000).

[184] *Wallace*, 472 U.S. at 57-59.

[185] *Id.* at 59. Alabama's newly enacted law read essentially the same as a pre-existing law. The only difference involved the age of the school children, and the addition of the words "voluntary prayer." The older law read:

> At the commencement of the first class each day *in the first through the sixth grades in all public schools*, the teacher in charge of the room in which each such class is held shall announce that a period of silence, not to exceed one minute in duration, *shall be observed for meditation*, and during any such period silence shall be maintained and no activities engaged in.

State's true purpose in passing the new law was to add the words "voluntary prayer," which amounted to a religious purpose.[186] Therefore, the statute failed the first prong of *Lemon*.[187]

Like Alabama, Kansas did not need to take further action in order to achieve its articulated purpose. The Kansas Board's concerns about presenting the evolutionary theory as fact were fully addressed in an earlier draft version of the life science curriculum.[188] Before board members deleted the sections on biological evolution, the science curriculum required students to understand macro-evolution. It defined that term as "the scientific *theory* that living things share common ancestry, and that through time, changes have occurred in different lineages as they became adapted to different ways of life."[189] This draft also required students to understand that "biologists use evolution *theory* to explain the Earth's present day biodiversity which developed over approximately 3.8 billion years."[190] Finally, at the end of the life science portion of the curriculum, this earlier draft made a special point of stating that "'[u]nderstand' does not mandate 'belief.' While students may be required to understand some concepts . . . they may accept or reject the scientific concepts presented. This applies particularly where students' and/or parents' religion is at odds with science."[191] Thus, the Kansas Board's concerns that schools

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ALA. CODE § 16-1-20 (2000) (emphasis added).

186 *Wallace*, 472 U.S. at 59.

187 *Id.*

188 The Kansas Board voted to adopt the fifth draft of the science curriculum. *See* KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48. This draft essentially constituted the fourth working draft, which was written by the scientists and included evolutionary theories. *Fourth Draft, supra* note 180. The adopted fifth draft, however, included the changes made by the board members. These changes included: deleting the references to macro-evolution, the Big Bang theory, and the theory of Old Earth. *Fourth Draft, supra* note 180; *see also* Belluck, *Board For Kansas, supra* note 5 (reporting that the Board deleted evolution language from previous drafts of the curriculum).

189 *Fourth Draft, supra* note 180.

190 *Fourth Draft, supra* note 180, at 60 (emphasis added). This is the Old Earth theory. *Fourth Draft, supra* note 180. Note, however, that this draft clearly describes evolution as a biologist's viewpoint. *Fourth Draft, supra* note 180.

191 *Fourth Draft, supra* note 180, at 61. In addition, the glossaries of both

should not teach theory as fact are unfounded. The Board clearly stated in several places in the earlier drafts of the curriculum that evolutionary concepts are theories which students are free to reject. Just as Alabama did not need to pass a second statute to achieve its secular purpose in *Wallace*, the Kansas Board did not need to modify the curriculum in order to achieve its stated secular purpose. Therefore, as the Court held in *Wallace*, such an ornamental purpose will not suffice to clear the secular purpose requirement of *Lemon*.

3. *The Board's Stated Secular Purpose Is Insincere*

The Board's decision to remove evolution from the science curriculum will fail the secular purpose prong of *Lemon* because the true purpose of the action is sectarian. More pointedly, the stated secular purpose is not sincere. Although the Court will normally defer to a state's articulation of a secular purpose, it requires "that the statement of such a purpose be sincere and not a sham."[192]

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the fourth draft and the final draft define a scientific theory as "a well substantiated explanation of some aspect of the natural world that can incorporate facts, laws, inferences, and tested hypotheses," and list as an example, "evolutionary theory." *Fourth Draft, supra* note 180, at 82. The fourth draft's glossary defines evolution as:

> [a] scientific *theory* that accounts for present day similarity and diversity among living organisms and changes in non-living entities over time . . . evolution has two major perspectives: The long-term perspective [macro-evolution] focuses on the branching of lineages; the short-term perspective [micro-evolution] centers on changes within lineages. In the long term, evolution is the descent with modification of different lineages from common ancestors. In the short term, evolution is the on-going adaptation of organisms to environmental challenges and changes.

Fourth Draft, supra note 180, at 81 (emphasis added). The adopted curriculum's glossary also defines evolution as a scientific theory, but defines macro-evolution only as the branching of lineages; it does not mention common ancestry. *See* KANSAS SCIENCE EDUCATION STANDARDS, *supra* note 48.

[192] *Edwards*, 482 U.S. 578, 586-87 (1987).

The Kansas Board's stated secular purpose *is* a sham and courts should not uphold it. Courts generally determine whether a law has a true secular purpose by reviewing its legislative history and committee reports.[193] The Kansas Board's meeting minutes demonstrate that the board members did not have a secular purpose for changing the science curriculum.[194] The scientists on the science standards writing committee, who authored the original curriculum containing evolution, argued that the curriculum changes, deleting the theory of origins, were unacceptable.[195] In fact, they argued, such treatment rendered the curriculum incomplete in its treatment of science.[196] To further rebut the need to alter the state's treatment of the theory of origins, Dr. John Staver, the co-chair of the science standards writing committee, went so far as to read the Roman Catholic Church's official position statement on evolution.[197] The fact that Kansas Board members needed to

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[193] *See, e.g., id.* at 586, 591-93 (reviewing the legislative history behind Louisiana's Creationism Act). The Louisiana bill's sponsor, Senator Bill Keith, stated that his "preference would be that neither [creationism nor evolution] be taught." *Id.* at 586 (*parentheses in original*). At the legislative hearings, the senator presented a leading expert on creation science who testified that the theory of creation science included a belief in the existence of a supernatural creator. *Id.* at 591. Senator Keith also explained that his disdain for evolution stemmed from the fact that it contradicted his own religious beliefs, and that it was akin to religions such as atheism, secular humanism, and the like. *Id.* at 592. He described the evolution-creationism debate as a "battle . . . between God and anti-God forces. If evolution is permitted to continue . . . it will continue to be made to appear that a Supreme Being is unnecessary." *Id.*

[194] *See* KANSAS STATE DEP'T OF EDUC., *Meeting Minutes*, (Aug. 10, 1999) [hereinafter "*Meeting Minutes*"], *at* http://www.ksbe.state.ks.us/comiss/bdmin/-09899boardmin.html (last visited Feb. 11, 2001) (discussing whether to adopt the science curriculum as edited by the Board).

[195] *Id.* at http://www.ksbe.state.ks.us/comiss/bdmin/09899boardmin.html.

[196] *Id.* at http://www.ksbe.state.ks.us/comiss/bdmin/09899boardmin.html.

[197] *Id.* at http://www.ksbe.state.ks.us/comiss/bdmin/09899boardmin.html. Pope John Paul II and the Roman Catholic Church accept the theory of evolution. *Id.* In his 1996 address to the Pontifical Academy of Sciences, the Pope recognized that "new knowledge has led to the recognition of the theory of evolution as more than a hypothesis." Pope John Paul II, *Address to the Pontifical Academy of Sciences, available at* http://www.sni.net/advent/docs/-jp02tc.htm (last visited Oct. 22, 2000). He also noted that evolution has been accepted by researchers who had made a series of discoveries in many different

use a religious viewpoint to refute the need to change the curriculum suggests that those in favor of the changes may have been concerned with contradicting the biblical account of creation, or had voiced concerns of a religious nature. In any event, it is obvious that the mere existence of the curriculum changes ushered the Roman Catholic Church into a public school board's discussion on educational policy, where it clearly had no place.

Board members insisted that they rejected evolution merely because it was bad science, and made no actual mention of religion.[198] The Board, however, later made it clear that "local districts can allow other theories to be discussed in class, including creationism – the belief that God made human beings fully formed."[199] In addition, Dr. Steve Abrams, who authored most of the changes to the science standards, included language to encourage students to propose and defend alternative theories, including creation science.[200] He also tried to insert the words, "[t]he design and complexity of the design of the cosmos requires an

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fields, calling it a "significant argument in favor of this [evolutionary] theory." *Id.* Regarding the conflict between the Bible and science, the Pope adopted the position of his predecessor, Pope Pius XII, and divided man into two distinct parts: a corporeal body and a spiritual soul. *Id.* Evolutionary science may describe the *body*, and may correlate its evolution with a scientific time line. Thus, as more information about the body, such as its origins, becomes available, it does not pose a threat to the tenets of religion. *Id.* However, while the body may originate from "pre-existent living matter, the spiritual soul is immediately created by God." *Id.* The relationship between God and the spiritual soul is one that transcends time – it is eternal. Therefore, science only conflicts with the Catholic point of view when it tries to explain the existence of the *spiritual soul* – an existence that can only be explained by philosophical and theological arguments, not by scientific ones. *Id.*

198 *Meeting Minutes, supra* note 194; *see also* KANSAS STATE DEP'T OF EDUC., *Meeting Minutes* (May 11-12, 1999), *at* http://www.ksbe.state.ks.us/-commiss/bdmin/0599boardmin.html (last visited Feb. 11, 2001).

199 *World News Tonight With Peter Jennings* (ABC television broadcast, Aug. 12, 1999) (broadcasting a report by Jim Williams).

200 KANSAS STATE DEP'T OF EDUC., *Meeting Minutes* (May 11-12, 1999), *at* http://www.ksbe.state.ks.us/commiss/bdmin/0599boardmin.html (Feb. 11, 2001). Chairperson Linda Holloway, who supported the new science standards, applauded Dr. Abrams' effort to foster open-mindedness in the classroom. *Id.*

intelligent designer" into the statewide science guidelines.[201] This demonstrates that Abrams was trying to bring the creationist theory of intelligent design into the classroom.

Furthermore, some members of the Kansas Board, such as Abrams, belong to one of the nation's dominant creationist groups, Answers in Genesis, and have incorporated some of that group's ideas into the science curriculum.[202] This fundamentalist organization preaches that creationist philosophies are "a supplement to the church."[203] Ken Ham, the organization's director, views the debate between creation-based and evolutionary philosophies as a war between "Christian morality and relative morality."[204] He argues that giving the Bible a metaphorical, rather than a literal interpretation would "blur divinity's role," and thus make the Bible fallible, reducing morality "to human whim."[205] Student members of this group challenge evolution when the subject is taught in the classroom, thus discouraging teaching of the subject.[206] Unfortunately, membership in the organization does not stop with students. Ham "happily claims that some Kansas officials involved in the curriculum decision are quite familiar with his publications."[207] The fact that some members of the writing committee, such as Abrams, have adopted many of Ham's statements proves that their decision to discredit evolution was driven by creationist philosophy,

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[201] Belluck, *Board for Kansas*, *supra* note 5.

[202] Clines, *supra* note 47. Steve Abrams has also confessed his membership in the Creation Science Association of Mid-America, and admitted that some of the wording in the new standards came from the work of this group. *Question Shouldn't Be Ancestry, It Should Be Students' Future,* TOPEKA CAP. J., July 28, 2000.

[203] Clines, *supra* note 47. Answers in Genesis does not lobby government, but gives information to anyone upon request. Clines, *supra* note 47. Answers in Genesis sponsors 110 "creation clubs" in schools nationwide. Clines, *supra* note 47. These clubs advocate the literal word of Genesis that the world was created in six days, and debunk evolution. Clines, *supra* note 47. To sponsor a creation club, a teacher must sign a commitment to "the inerrant word of God." Clines, *supra* note 47.

[204] Clines, *supra* note 47.

[205] Clines, *supra* note 47.

[206] Clines, *supra* note 47.

[207] Clines, *supra* note 47.

and that the Board intended to open the schoolhouse door to creation science and the idea of a supreme creator.

4. The Board's Distrust of Evolution as a Scientific Theory Is Inherently Religious Because the Controversy Is Not Sufficiently Removed from Its Religious Origins

While it is entirely possible to question Darwinism as a scientific theory in a secular manner, the Kansas Board does little to separate its distrust of macro-evolution from the religious origins of the evolution – creationism debate.[208] The Board cannot argue that there is enough separation from the religious origins simply because the curriculum does not mention God.[209] First, several philosophies that qualify as religions do not advance a belief in the existence of God, yet might still invoke Establishment Clause protection.[210] Second, as a New Jersey district court held in

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[208] *See supra* notes 32-34 and accompanying text (discussing the religious fervor of the *Scopes* trial and how those religious undertones spawned both the creationist movement and the desire to keep young students from learning scientific theories that contradicted the Bible).

[209] Coyne, *supra* note 36; *but see Edwards*, 482 U.S. at 612 (Scalia, J., dissenting). Justice Scalia is prepared to accept creationism as a scientific concept where there is mere omission of direct religious reference:

> In . . . affidavits [filed by] two scientists, a philosopher, a theologian, and an educator, all of whom claim extensive knowledge of creation science, [each] swear[s] that it is essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing. These experts insist that creation science is a strictly scientific concept that can be presented without religious reference.

Id. (citation omitted).

[210] Torasco v. Watkins, 367 U.S. 488, 495 n.11 (1961). These include Buddhism, Taoism, Ethical Culture, and Secular Humanism. *Id.* The *Torasco* Court held that Maryland unconstitutionally invaded a person's freedom of belief and religion by requiring a candidate for public office to declare a belief in the existence of God. *Id.* at 495. The Court demonstrated that a belief can amount to a religion, even in the absence of a supreme being, by distinguishing between religions based on a belief in God, and those that are not:

> [N]either a State nor the Federal Government can constitutionally force a person to "profess a belief or disbelief in any religion." Neither can

Malnak v. Yogi,[211] philosophies that suggest an intelligent creator are the "functional equivalents of religions."[212] Concepts concerning a supreme being "do not shed their religiosity merely because they are presented as a philosophy or as a science."[213] The court in *Malnak* held that a philosophy called "creative intelligence" constituted a religion because it contained parallel characteristics to a supreme being.[214] Whether the local school boards call the concept "creative intelligence," "creation science," or "intelligent design," all of these theories presuppose a supreme being, and are, therefore, inherently religious. By inviting local districts to teach these theories, the Kansas Board adopts a religious purpose.

In its attempt to demonstrate a purpose that is not sectarian, the Board cannot dispute the significance of the common link between creation science and religion.[215] The history of the origin of life debate evidences a clear hostility towards evolution. This hostility stems from the fact that Darwin's theory directly contradicts the biblical story of creation.[216] While there are no references to the

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> constitutionally pass laws or impose requirements which aid all religions as against non-believers, and *neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.*

Id. at 496. (emphasis added). Thus, the fact that a particular philosophy does not presuppose the existence of a Supreme Being does not exclude it from the reach of the Religion Clauses of the First Amendment. *Id.*

[211] 440 F. Supp. 1284 (D.N.J. 1977).

[212] *Id.* at 1322 n.23.

[213] *Id.* at 1322.

[214] *Id.* at 1323; *see also supra* notes 32-43 and accompanying text (detailing the role of Christianity in the advocation of creationist philosophy).

[215] McGowan v. Maryland, 366 U.S. 420 (1961). In *McGowan*, business owners challenged the state's Sunday Closing Law (known as the Blue Law), claiming that the idea of a day of rest had a religious parallel in the Christian Sunday Sabbath, and, thus, violated the Establishment Clause. *Id.* at 422. The Court upheld the Law, stating that while Sunday was the Christian Sabbath, it is also a day of relaxation for most citizens, even non-Christians. *Id.* at 450-52. Therefore, a state could have a purely secular intent in mandating a uniform day of rest and relaxation, even though some would use the day to attend church. *Id.*

[216] *See, e.g.*, Scopes v. State, 289 S.W. 363 (Tenn. 1927) (upholding a state statute that made educators criminally liable for teaching "any theory that denies the story of the divine creation of man, as taught in the Bible").

Bible in the new curriculum, this alone will not suffice to sever the common link.

Where an issue has roots in a religious controversy, current legislation on that issue can only be considered secular if it negates the original religious purpose. For example, in *McGowan v. Maryland*,[217] the state had enacted Sunday Closing Laws (Blue Laws), which had historically been ruled unconstitutional because they furthered the religious practice of Sabbath rest.[218] The modified Blue Laws, however, contained several sections that negated the religious purpose of the original ones.[219] The law's stated objective was to create a uniform day of rest and relaxation.[220] Although the idea of resting on Sunday was initially a Christian one, the new laws permitted, among other things, "the Sunday sale of tobacco and alcohol, opening of recreational parks, playing of bingo, and slot machines, and various sports and entertainment events, in order to provide an atmosphere of recreation and enjoyment," all of which were inconsistent with Sabbath observance.[221] Thus, the Court could not find that the purpose of the law was simply to encourage church attendance. The religious origins of the issue had been blunted by the inclusion of activities that were not religious.

Rather than neutralize the religious underpinnings of the evolution debate and turn them secular, Kansas keeps them very potent with its new science standards. The Board insists that it has merely allowed schools to teach creation if they were so inclined, just as a Christian in *McGowan* may choose to spend her Sunday either in church or at a ballpark.[222] But the Board has done more than simply offer another alternative. By not merely eliminating, but *discrediting* evolution, the Kansas Board creates a strong possibility that students will learn evidence contradicting Darwin-

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[217] 366 U.S. 420 (1961).

[218] *Id.* at 446.

[219] *McGowan*, 366 U.S. at 447-48 "Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion." *Id.* at 448.

[220] *Id.*

[221] *Id.*

[222] *See id.* at 450.

ism without ever having been fairly exposed to the theory.[223] The Board has created an environment in which a student's faith in the biblical story of creation will not be shaken. Thus, rather than sever the common link, the Kansas Board takes us back to the issues raised in the Scopes trial – issues that are inherently religious.[224]

B. *The Primary Effect Prong*

Assuming the Kansas curriculum could clear the secular purpose prong, it would still falter under the primary effect prong. The second prong of the *Lemon* test requires that the primary effect of a state law or program neither advance nor inhibit religion.[225] A program may, however, have an indirect and incidental effect on religion.[226] The Kansas Board fails the primary effect test in four ways. First, Kansas would provide schools teaching creationist theories facilities in which to do so. Secondly, as the state purchases textbooks for public schools, it would impermissibly use

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[223] *See supra* notes 61-68 and accompanying text (detailing how Kansas students could learn evidence contradicting evolution, without ever learning the theory itself).

[224] *See supra* notes 32-34 and accompanying text (detailing the religious fervor of the Scopes trial, and explaining that the evolution controversy came to be known as the battle between Darwin and God).

[225] *Lemon*, 403 U.S. at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

[226] Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973). In *Nyquist*, the Court struck three of New York's financial aid programs to Catholic schools. *Id.* at 763-64. One program provided funds for the "maintenance and repair" of the buildings, the second constituted a tuition-reimbursement program, and the third gave a tax credit to the parents of children attending non-public schools. *Id.* The Court found that each program had a primary effect that advanced religion, as the State could not guarantee that its funding would not be used for a purely religious purpose. *Id.* at 776. For example, a Catholic school might use government funding to repair its chapel, or to renovate classrooms where students learned religion. *Id.* The Court, however, made a point of distinguishing this kind of direct aid from incidental aid, such as providing secular textbooks to students attending religious schools. *Id.* at 774-75. While the government technically assists religious schools by providing textbooks, it directly helps the school further only a secular purpose, and, thus, passes Establishment Clause scrutiny. *Id* at 775.

state funds on textbooks that advocate such theories. Third, with its compulsory attendance laws, Kansas provides creationist teachers with a captive audience to hear a religious message. Finally, with these practices in place, Kansas provides a direct benefit to Judeo-Christian faiths by removing parts of its science curriculum that conflict with the Bible. Therefore, the curriculum cannot survive the primary effect prong as an incidental accommodation of religion.

1. Provision of Government Sponsored School Buildings for the Creationist Message Impermissibly Aids Religion

The possibility that a publicly financed institution might be used for religious purposes offends the Establishment Clause as the grant might, in part, effectively advance religion.[227] In *Tilton v. Richardson*, the Court addressed the issue of federally financed buildings at sectarian-related universities.[228] The Higher Educational Facilities Act of 1963 (HEFA or "Act") provided federal construction grants to all universities, and did not distinguish between secular and sectarian.[229] The Court upheld those grants that provided sectarian universities with funding for libraries and laboratories, finding that such grants served a secular purpose.[230] The Court struck down, however, a provision allowing the Government to recover the grant money should the institution "violate[] any of the statutory restrictions on the use of a federally financed facility . . . 'within twenty years after completion of construction.'"[231] Because the university would be free from governmental restrictions after twenty years, it might then convert the secular building into one used to promote religious interests,

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[227] *Id.* at 413 U.S. at 783 (citing Tilton v. Richardson, 403 U.S. 672, 683 (1971)).

[228] 403 U.S. 672, 683 (1971) (holding that the government could not grant financial aid to sectarian schools when it would cease monitoring the school to ensure that the money was used for a secular purpose).

[229] Higher Education Facilities Act, 20 U.S.C. §§ 701-746 (1963) (repealed 1972).

[230] *Tilton*, 403 U.S. at 682-83.

[231] *Id.*

such as a chapel. In that case, the government grant would have the effect of advancing religion, even if delayed twenty years.[232]

The Kansas Board may have affected primary education as the HEFA affected secondary education. Both provide so much freedom to individual school districts that they allow the schools to use government funds for religious purposes.[233] Within the Act's twenty-year period, the universities were subject to federal regulations, just as Kansas school districts were subject to the regulations imposed by the statewide curriculum. After the twenty year period had expired and the federal regulations had been removed, the universities became free to use their buildings for any purpose they preferred, even if that purpose introduced religious philosophies.[234] Similarly, after the Kansas Board had removed its statewide regulations on evolution, local school boards became free to adopt whichever theory of origins they preferred, even those that introduced religious philosophies. The issue is the extent of the government's supervision. The government may not make an allowance, either with grant money or by delegation of its decision-making authority, permitting another institution to take action aiding religion.[235] If the Court does not allow the federal government to close its eyes to federally financed structures that offer religious teachings, then it should not allow Kansas to blind itself to the fact that its publicly financed schools are being used to teach a religious message.[236]

Kansas will use its public schools to advance a religious purpose should this curriculum go into effect. While some school

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[232] *Id.*

[233] *Id.* While *Tilton* differs from the present case because it deals with higher education, this is not a relevant distinction. Because courts recognize a greater amount of academic freedom at grade levels above high school, universities find it easier to get around the Religion Clauses. Thus, an Establishment Clause bar at the university level would still bind elementary and secondary schools. *Id.*

[234] *Id.*

[235] *Tilton*, 403 U.S. at 683.

[236] *See supra* note 199 and accompanying text (describing how the Kansas Board is aware that it has left the door open to schools wishing to teach the creationist view that humans were created by God).

districts in Kansas will continue to teach evolution,[237] others have already said they were considering using creationist textbooks that advance the theory of intelligent design.[238] The school board in Pratt County,[239] for example, adopted such standards in June 2000.[240] The local school board plans to use a textbook titled *Of Pandas and People: The Central Question of Biological Origins*.[241] Creationists favor using this textbook because it suggests that the theory of intelligent design may be a better explanation for the order and complexity found in nature.[242] The fact that these school boards may be a small minority is irrelevant. Even these schools are supported by government funds. The Kansas Board cannot remove a secular requirement of evolution and give local school districts the authority to teach a religious account of the origins of humankind, without violating the second prong of *Lemon*, and accordingly, the Establishment Clause.

2. *State Compulsory Attendance Laws Advance Religion by Providing Creationist Teachers With a Captive Audience*

The Establishment Clause prevents states from forcing their children to attend classes where they will hear a religious message,

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[237] *Evolution Vote May Have Little Impact*, CHARLESTON GAZETTE, Aug. 13, 1999, at 11A (stating that some teachers continue to deem evolution fundamental to a complete science education and will continue to teach it).

[238] Pam Belluck, *Evolution in Kansas: Extinct in Schools?; Board Votes to Delete Subject in State Tests*, INT'L HERALD TRIB., Aug.13, 1999, at 3.

[239] Jacques Steinberg, *Evolution Struggle Shifts to Kansas School Districts*, N.Y. TIMES, Aug. 25, 1999, at A1. Pratt is a town in Kansas with a population of 7,000 people. *Id.*

[240] Paul Eakins, *Pratt to Review Biology Standards*, TOPEKA CAP. J., June 30, 2000, at A1.

[241] PERCIVAL DAVIS & DEAN H. KENYON, OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS (1993). The Creation Research Society's web page advertises this book, noting that although the book does not reference the Bible, it does give creationist interpretations of biological evidence. The Creation Research Society, *CRS Books*, *at* http://www.creationresearch.org/-books/pandas.html (last visited Jan. 15, 2001).

[242] *Teachers' Committee Makes 'Intelligent' Choice!*, Answers Online, *at* http://www.answersingenesis.org/docs2/4247news3-17-2000.asp (last visited Jan. 15, 2001).

as this would advance religion. The Court held in *McCollum v. Board of Education*,[243] that the government "affords sectarian groups an invaluable aid . . . [by helping] to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State."[244] The *McCollum* Court struck down a religious education program in public school, despite the fact that students needed their parents' consent in order to participate. The Court held that because the Illinois law required students to attend school, the program "beyond all question [amounted to] a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."[245]

With its compulsory attendance laws,[246] Kansas uses government supported schools to force students, even those who do not believe in creation science or intelligent design, to attend school and possibly hear a government sponsored religious message. The Kansas Board makes no provision for parental consent, nor does it excuse students from science class if they do not wish to hear a religious doctrine. Unlike the sectarian education option in *McCollum*, science is a required subject. The fact that Kansas will not test either creation science or evolution on its statewide exams is irrelevant. The program in *McCollum* still fell, even though Illinois did not test the religious subjects on statewide exams.[247] At issue is simply the fact that Kansas, in addition to its compulsory attendance law, may force students to hear a religious message by promoting it in a required course – one from which students may not be excused. Thus, Kansas schools teaching only creationist theories would commit a more flagrant violation of the Establish-

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[243] 333 U.S. 203 (1948).

[244] *Id.* at 212. The *McCollum* Court held that Illinois schools may not hold religious classes during school hours for those students whose parents consented to such education. *Id.*

[245] *Id.* at 210.

[246] KAN. STAT. ANN §§ 72-1111, 72-1113 (1999). Section 72-1111 requires all children under eighteen years of age to attend school. Section 72-1113 requires schools to report all children under age eighteen who do not attend school to the secretary of social and rehabilitation services, and to notify that child's parents of the school absence.

[247] *McCollum*, 333 U.S. at 211.

ment Clause than Illinois had in *McCollum* by forcing students to hear a viewpoint that favors the sectarian and offends the secular. As the First Amendment prevailed over Illinois in *McCollum*, so must it prevail over Kansas.

3. *Kansas's Benefit to Religion Is Direct, and Therefore Cannot Survive Lemon as an Incidental Accommodation of Religion*

The Establishment Clause does not prevent the government from *ever* becoming involved with religion, only from becoming *directly* involved. In *Kiryas Joel Village v. Grumet*,[248] the Court held that the First Amendment allows government to *accommodate* religion, but may not aid it.[249] The *Kiryas Joel* Court noted that the Religion Clauses "do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[250] The Fifth Circuit recently echoed this concept, holding that a "religious organization's enjoyment of merely incidental benefits does not violate the prohibition against the primary advancement of religion."[251]

It is possible, therefore, for a school program to support a student's belief in the creation myth, so long as such is not the main goal of the program. For example, a course in comparative theology would discuss creation as described in the Bible, and religious students may find validation in the fact that their teachers discuss their held belief.[252] They may even convince the rest of

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[248] 512 U.S. 687 (1994).

[249] *Id.* at 705.

[250] *Id.* (citations and internal quotations omitted).

[251] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 347 (5th Cir. 1999) (citing Widmar v. Vincent, 454 U.S. 263, 273 (1981) (internal quotations omitted)).

[252] *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963) (noting that one's education would not be complete "without a study of comparative religion or the history of religion and its relationship to the advancement of civilization").

the class that this belief is superior to the creation myths of other religions. However, as the main objective of the course is to introduce students to different beliefs, the Establishment Clause is not offended by the secondary benefit afforded to the Judeo-Christian faith.[253]

Kansas, by allowing its facilities and funding to be used for the teaching of creationism, directly benefits the religions that believe in the biblical account of human origins. The Kansas Board cannot argue that its program merely accommodates religion by removing evolution from the curriculum because the Board has not taken a sufficiently neutral stance on the subject.[254] Rather, in addition to removing evolution, the Board also inserted into the curriculum theories supporting creationism.[255]

To supplement the creationist theories in the curriculum, Kansas would provide further direct aid by sponsoring a school's purchase of creationist textbooks.[256] In *Board of Education of Central School District No. 1 v. Allen*, the Court held that a state may loan secular textbooks to parochial schools.[257] The Court reasoned that because one can ascertain the content of a textbook, the state can be assured that it is only providing secular assistance. *Allen*, however, would not permit the state to lend books advocating the theory of intelligent design to public schools, as the content would not be secular. If the Establishment Clause does not permit the state to provide sectarian schools with textbooks teaching religious ideas, then it certainly would not permit the state to provide its

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[253] *See id.* at 224 (stating that instruction is religious only where the "pervading religious character" becomes evident).

[254] *See supra* notes 60-68 and accompanying text (describing how the Kansas science curriculum favors creationism over evolution by omitting standards on macro-evolution but requiring standards that contradict macro-evolution).

[255] *See supra* notes 62-71 and accompanying text (discussing how the new standards include creationist studies).

[256] KAN. STAT. ANN. § 72-4107 (1999). This statute allows local school boards to "provide a revolving fund for the purpose of enabling the purchase, for the use of the students in the schools of the district, the necessary school textbooks." *Id.* § 72-4107.

[257] 392 U.S. 236 (1968).

public schools with the same. To do so would achieve the forbidden effect of directly aiding religion.[258]

By not only persuading teachers to ignore evolution, but also encouraging them to deny it,[259] the Board would, in effect, help creationists spread their religious message that there is no merit to the theory of evolution, and therefore, the world was created by an intelligent designer. Thus, Kansas's new standards amount to a government aid of, rather than an accommodation of religion, and so violate the second prong of *Lemon*.

C. *The Entanglement Prong*

The Kansas science curriculum fails the third prong of the *Lemon* test because the resulting state involvement with religion amounts to an excessive entanglement.[260] The Supreme Court expanded upon the notion of entanglement in *Committee for Public Education and Religious Liberty v. Nyquist*.[261] The government does not "entangle" itself where its services are "'so separate and indisputably marked off from religious function' that they may be fairly viewed as reflections of a neutral posture."[262] The government can act in ways that aid religious organizations, so long as the government itself does not advance religion through its activities.[263] For example, the Supreme Court has held that activities

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[258] Linda Greenhouse, *Church-State Issue Returns to High Court*, N.Y. TIMES, Dec. 2, 1999, at A32. Justice Souter recently commented on the subject of government aid to parochial schools, stating his belief that the Court was moving in the direction of limiting aid according to the "risk that it can be used to inculcate religious belief." *Id.* Justice Scalia disagreed, arguing that anything can be used as a religious lesson. *Id.*

[259] *See supra* notes 61-71 and accompanying text (discussing the way in which the new science standards encourage students to show the weaknesses in the Darwin theories that they have not completely learned).

[260] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

[261] 413 U.S. 756 (1973).

[262] *Id.* at 782 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947)); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) (stating that the degree of entanglement becomes excessive when it calls for official and continuing surveillance).

[263] Corporation of the Presiding Bishop of the Church of Jesus Christ of

such as transporting children to parochial schools on public transportation,[264] and giving tax exemptions to religious organizations[265] do not involve excessive entanglement because those activities themselves are completely secular. On the other end, activities such as maintenance and repair do constitute entanglement, as the government would then be financing facilities to be used for non-secular purposes.[266]

The Kansas Board decision falls under this latter category, because the state government would be providing facilities to be used for the religious purpose of promoting belief detailed in Genesis. The Board has explicitly given local school districts the authority to include creationism in their district curricula.[267] Thus, it is quite possible that devout Christian teachers who do not believe in evolution or who simply prefer the creationist explanation for origins will take advantage of this opportunity to teach their theory of preference, while at the same time, adhering strictly to the statewide guidelines. This is a clear example of government entanglement with religion. A state cannot avoid violating the Establishment Clause merely by assuming that its teachers will segregate "their religious beliefs from their secular educational responsibilities."[268] In fact, Kansas cannot even make such an assumption because it has tailored its curriculum to fuse educational responsibilities with religious beliefs. Thus, teachers holding

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Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987).

[264] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[265] *Walz*, 397 U.S. at 664; *see also Amos*, 483 U.S. at 337 (holding that a law exempting religious organizations from a ban on religious discrimination in employment is not invalid simply because it allows the church to advance religion where the government is not advancing religion through its own activities). *But see* Texas Monthly v. Bullock, 489 U.S. 1 (1989) (striking down a sales tax exemption for religious literature).

[266] *Nyquist*, 413 U.S. at 783 (striking a governmental program to provide aid for maintenance and repair of sectarian buildings since there was no way to guarantee the state funds would be used for a secular purpose).

[267] *See supra*, notes 179, 199 and accompanying text (discussing how Board members believe that evolution should be taught only as a theory, and that school districts are free to decide which account of mankind's origins to teach based on the needs of local communities).

[268] *Nyquist*, 413 U.S. at 778.

strong religious beliefs no longer have a conflict with the science curriculum. Teachers who cannot or will not separate their religious beliefs from their teaching will establish a kind of religious orthodoxy in the classroom, in violation of the Establishment Clause.[269] Thus, as in *Nyquist*, the government would be using its public school facilities to teach non-secular ideas, clearly running afoul of the entanglement prong.

The Court has always permitted some level of entanglement between government and religion. It is only when such entanglements rise to the level of excessiveness that they become forbidden.[270] Kansas has exceeded the permissible level of entanglement. By opening the classroom door to creationism, the Kansas Board offers its publicly financed facilities to advocacy of the Judeo-Christian theory of human existence. Furthermore, the Board permits its teachers to intermingle their personal religious beliefs with the state-mandated science standards. Because this policy cannot, by definition, indisputably separate the religious from the governmental function, courts must find that the curriculum violates the entanglement prong.

D. *Despite Criticism, Lemon Should Still Apply to the Controversy in Kansas*

Because *Lemon* has not yet been overruled, lower courts consider themselves bound by Supreme Court precedent, and continue to apply the three-pronged test.[271] In addition to this main reason, courts should possess no qualms about applying the *Lemon* test to cases such as the one in Kansas because the main criticisms of the test are moot as applied to this situation.

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[269] *Id.* The Court now rejects the presumption that a public employee in a parochial school will indoctrinate religion in the students; mere presence does not create the impermissible "symbolic link." Agostini v. Felton, 521 U.S. 203, 224 (1997). This does not apply here, however, because the issue is not placing public teachers in private schools, but rather, allowing teachers in public schools the opportunity to indoctrinate a religious theory if they so desire.

[270] *Agostini*, 521 U.S. at 233-34.

[271] *See supra* notes 138-41 and accompanying text (discussing lower courts' treatment of *Lemon*).

Justice Scalia offers the strongest opposition to *Lemon*. He would reject the secular purpose prong altogether because (1) multiple motives may exist for a piece of legislation; (2) it may be impossible to determine a legislator's motives; and (3) there is no standard for determining such intent.[272]

The first two objections do not apply to the reasoning behind the Kansas Board's decision. While multiple motives may have existed and a secular purpose may have been stated, the legislative history surrounding the decision to remove evolution demonstrates not only a religious purpose, but one that contradicts any secular purpose stated.[273] Because the religious purpose in this case dominates the secular one, the Establishment Clause is violated. It does not matter how many other motives existed. Thus, the first two objections are not relevant here, and therefore do not warrant further analysis.

This third objection is particularly relevant to the Kansas Board's vote to adopt the science curriculum because the vote was so close – the standards passed by a vote of six to four, after months of deadlock.[274] Thus, the board member who finally broke the tie initially opposed the changes. This suggests that his or her reason for voting may have differed from those who sponsored the changes, and thus may not have shared in the invalid intent. Since this member served as the swing vote, should a court rule that the standards passed based on this member's secular motivation, and so comport with the Establishment Clause? Or should it decide that Abrams's religious motivation in writing the standards in the first place is sufficient to invalidate them?[275] Because the improper motivation in this case is particularly evident,[276] dissection of each member's intent is not necessary.

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[272] *See supra* notes 118-19 and accompanying text (discussing Scalia's objections to the secular purpose prong).

[273] *See supra* notes 159-224 and accompanying text (analyzing the Kansas curriculum under the secular purpose prong).

[274] Belluck, *Evolution Foes*, *supra* note 50; *see also supra* notes 56-71 (detailing Kansas's new science standards).

[275] *See* Clines, *supra* note 47 (describing Abrams's membership in creationist organizations).

[276] *See supra* notes 167-207 and accompanying text (discussing the evidence

Therefore, while Scalia's arguments may be generally valid, his concerns do not present themselves to this particular issue.[277]

Chief Justice Rehnquist also criticizes *Lemon*, arguing that use of the three-pronged test results in unworkable plurality opinions from a fractured Court.[278] This objection seems overstated in a case such as this one, where the Kansas Board admitted that it had no problem with schools teaching a religious theory. This concession could only result in a court finding that Kansas's stated purpose is non-secular. Such a ruling is not likely to divide the deciding court.

The most interesting criticism of the *Lemon* test argues that the analysis is so strict that it proves hostile, rather than neutral toward religion, and forces the government to deny benefits to religion that would otherwise be available.[279] While this criticism is generally valid, it is moot when applied to the issue of teaching evolution instead of creationism in public schools. The latter point fails because attention a science classroom is not the sort of benefit that the government would ordinarily confer on an organization if it were not a religious one. As to the former criticism, while the state may not establish a religion of secularism,[280] such fear is unfounded in the context of teaching evolution in schools for two reasons. First, as a district court noted in *McLean v. Board of Education*, it is impossible for schools to choose between teaching a religious science and a secular science because courts do not view creationism as science.[281] The *McLean* court recognized that the creationists merely attempt to find scientific support for the

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demonstrating a clear religious motivation in developing the science curriculum).

[277] Justice Scalia, however would disapprove of applying *Lemon*, even where violation of the secular purpose prong is clear. Kilroy, *supra* note 120. In his concurrence in *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 389 (1993), Justice Scalia complained that where the Justices wish to strike a program that *Lemon* forbids, they invoke it, but completely ignore the precedent when they want to uphold something that *Lemon* would strike. *Id.* at 399.

[278] *See supra* note 120-21 and accompanying text (discussing Chief Justice Rehnquist's criticisms of *Lemon*).

[279] Kilroy, *supra* note 120; *see also supra* note 122 and accompanying text (discussing the problem with the entanglement prong).

[280] Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

[281] 529 F. Supp. 1255, 1267-68 (E.D. Ark. 1982).

biblical account of life's origins — they do not weigh data against opposing scientific data, as do the evolutionists.[282] Second, "it is clearly established in the case law, and perhaps also in common sense, that evolution is not a religion and that teaching evolution does not violate the Establishment Clause."[283] Teaching evolution in the science classroom does not amount to a secular religion, and therefore, critics cannot argue that this kind of science curriculum is hostile toward religion.

Despite these criticisms, lower courts will continue to apply *Lemon* analysis until the Supreme Court says otherwise.[284] Under such analysis, it is obvious that the Kansas Board has violated the Establishment Clause. The first two *Lemon* prongs pose the greatest challenge to the Kansas science curriculum. The new standards fail the purpose prong because the Kansas Board could have achieved its stated secular purpose without removing the evolution requirement,[285] because the Board inhibits, rather than promotes its stated secular goals,[286] and because the stated secular purpose does not appear legitimate.[287] Assuming that a court could find a secular purpose however, the curriculum would still founder under the primary effect prong because the state would aid religion by providing facilities[288] and textbooks[289] for religious teaching, exceeding the permitted level of religious accommodation.[290] Additionally, the primary effect of deleting evolution from the curriculum would leave the other side of the controversy – the

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[282] *See McLean*, 529 F. Supp at 1268.

[283] *Id.* at 1274; *see also* Epperson v. Arkansas, 393 U.S. 97 (1968) (holding that states cannot ban evolution from the classroom in concert with the First Amendment).

[284] *See supra* notes 138-41 and accompanying text (explaining lower courts current application of *Lemon*).

[285] *See* Wallace v. Jaffree, 472 U.S. 38, 59 (1985) (holding that the legislature did not need to take additional action to achieve its stated secular purpose).

[286] Edwards v. Aguillard, 482 U.S. 578, 586 (1987).

[287] *Id.* at 587.

[288] Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973).

[289] Board of Educ. v. Allen, 392 U.S. 236 (1968).

[290] Kiryas Joel Village v. Grumet, 512 U.S. 687, 704 (1994).

religious side – unchallenged and easily accessible in the classroom. While the new standards would fail under the entanglement prong as well, a court applying *Lemon* would most likely not reach the issue–the primary effect prong would prove so problematic for Kansas that a court would stop its analysis there and deem the edited curriculum unconstitutional.

E. *Endorsement Analysis*

The endorsement test asks whether either the government action has either the purpose or effect of conveying or attempting to convey a message that religion is favored or preferred.[291] The standard to apply under this analysis is whether "an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[292]

Teaching creationist theories in public schools constitutes a sponsorship of a religious message. The Court recently wrote in *Santa Fe* that "[s]chool sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are non-adherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[293] In *Santa Fe*, the Court struck a school program where students elected a student chaplain to deliver a brief, non-sectarian prayer prior to the school's home football games.[294] Justice Stevens, writing for the Court, applied the endorsement test, and noted that "[i]n cases involving state participation in a religious activity, one of the relevant questions is whether an objective observer . . . would perceive [such prayer] as a state endorsement of prayer in public schools," and held that a

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291 Allegheny v. ACLU, 492 U.S. 573, 593 (1989).

292 *Wallace*, 472 U.S. at 76.

293 120 S. Ct. at 2279 (quoting Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring)).

294 *Id.* at 2271.

student would "unquestionably perceive the inevitable pre-game prayer as stamped with her school's seal of approval."[295]

Students in Kansas would likewise perceive the religious message taught in science class as "stamped with [their] school's seal of approval."[296] Creationists believe that there are only two positions regarding the origins of life and of the earth: the Genesis story of creation or evolution.[297] If the creationists on the Kansas Board, an arm of the government, discredit the theory of evolution in the science classroom, then by logical syllogism, they automatically credit the theory of creationism, the story told in the Bible.[298] One cannot imagine a clearer example of a governmental endorsement of religion. Just as in *Santa Fe*, a student hearing her science teacher discuss intelligent design or other creationist theories would perceive these to be "stamped with her school's seal of approval," and thus, endorsed by the government.[299]

Furthermore, the government endorses religion by establishing a mechanism that "turns the school into a forum for religious

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[295] *Id.* at 2278. The coercion test is prevalent in the *Santa Fe* opinion. The Court notes that while no law compels students to attend these games, the social importance of school football games to the high school students renders these games equally as mandatory. *Id.* at 2280. The First Amendment mandates that states cannot require citizens to "forfeit [their] rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* I mention this point only because it is important to the Court's opinion in this case. It is not, however, relevant to the evolution controversy because there is no social pressure to attend science class; state law mandates it. The coercion test is generally used in cases where attendance is not mandatory, but students nevertheless feel compelled to attend due to social pressures or obligations. *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (holding that while students are not required to attend a graduation ceremony, schools cannot force their students to choose between attending a milestone event such as graduation and resisting conformity to the prayers invoked at that ceremony).

[296] *Santa Fe*, 120 S. Ct. at 2278.

[297] McLean v. Bd. of Educ., 529 F. Supp 1255, 1260 (E.D. Ark. 1982). The district court in *McLean* struck an Arkansas law requiring balanced treatment of evolution and creation science, holding that its primary effect advanced particular religious beliefs. *Id.*

[298] *See supra* notes 61-71 and accompanying text (describing how the new science standards discredit or contradict evolution and favor creation science).

[299] *Santa Fe*, 120 S. Ct. at 2277.

debate."[300] The *Santa Fe* Court held the school's policy invalid on its face because its electoral mechanism both invited religious debate, and because it empowered the majority to subject minorities to "constitutionally improper messages."[301] The Kansas Board has accomplished the same end. By opening the door to the teaching of creationism, the Board necessarily opens the door to religious debate – students will discuss whether Darwin's science is correct in light of the fact that it conflicts with the Bible. In addition, the vague science standards empower devout Christian teachers, members of the majority, to impart their religious message to minority children, who have the First Amendment right to be free from unsolicited religious education.[302] Under the principles articulated in *Santa Fe*, the Kansas Board's vote in favor of permitting creationism in public schools violates the Establishment Clause.

In addition to the methods of endorsement described in *Santa Fe*, the government endorses religion and violates the Constitution by "lending official approval to local orthodoxy."[303] For example, in *Moore v. Board of Education*,[304] a school discharged a student teacher because he had given "unorthodox answers" to questions about creation and evolution, namely, that Darwin had presented a valid theory on evolution and that the Bible was not to be read literally.[305] The court held that the school had established a religion by giving "official approval to local orthodoxy," and hence

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[300] *Id.* at 2283.

[301] *Id.*

[302] *See, e.g.*, *id* (holding Santa Fe High School's electoral scheme unconstitutional). A school program that catered to the majority's desire to incorporate religion into school policy would "encourage divisiveness along religious lines and threaten[] the imposition of coercion upon those students not desiring to participate in a religious exercise." *Id.*

[303] West Virginia Bd. of Educ. v. Barnett, 319 U.S. 624, 642 (1943). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, or matters of opinion." *Id.*

[304] Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973).

[305] *Id.* at 1037-38.

had violated the Establishment Clause.[306] While in the case of the Kansas Board evolution falls on the side of unorthodoxy, the holding from *Moore* nevertheless governs. Many citizens of Kansas adhere to the belief that evolution is a mere theory, only one possible explanation of the origin of the world, and therefore, it should not be taught as fact.[307] Thus, Anti-evolution sentiment constitutes local orthodoxy. As citizens, the First Amendment entitles these people to such beliefs. It is only when these citizens sit in power positions on state government and codify such religious beliefs into official policy that the threat to our constitutional principles arises.

Kansas's edited science curriculum, therefore, does not comport with the Establishment Clause. It furthers only a religious purpose, has the primary effect of directly aiding religion, and fosters an excessive government entanglement with religion, thus violating all three prongs of the *Lemon* test. Although the three-pronged test has been heavily criticized, it nevertheless remains relevant where a state has embroiled itself in the evolution – creationism controversy.[308] A court declining to apply *Lemon*, however, would still be

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[306] *Id.* at 1043; *see also* Board of Educ.v. Pico, 457 U.S. 853, 872 (1982) (holding that schools could not "cast a pall of orthodoxy" over the classroom by imposing a content-based ban on certain books from the library for content).

[307] *World News Tonight With Peter Jennings: Kansas School Board Votes Evolution Out* (ABC television broadcast, Aug. 12, 1999). Michael Jackson, a parent from Topeka, Kansas states, "I want my kids not taught the evolution theories because that's what they are, they are theories. I don't believe there's any truth to them." *Id.* Brian Sanders of Holton, moreover, points out that many other scientific ideas have been proven wrong over time. *Letters to the Editor*, TOPEKA CAP. J., Aug. 30, 1999. Other citizens worry about the peer-pressure effect of small communities on their local teachers: "Are we going to expect a teacher in a particularly religious, pro-creationist community to stand up and say that evolution is science and should be taught? I think a lot of teachers are going to take the path of least resistance and bow to the local pressure." Tony Freemantle, *Kansas Teachers Vow to Discuss Evolution Until Ordered to Stop*, HOUSTON CHRON., Aug. 29, 1999, at A1.

[308] *See supra* notes 138-50 (discussing why lower courts must continue to apply the three-pronged test). *Lemon* is particularly relevant to the issue of creationism and the public schools because the two Supreme Court decisions that are most directly on point are *Edwards v. Aguillard*, 482 U.S. 578 (1987), and *Epperson v. Arkansas*, 393 U.S. 97 (1968), both of which rest on the secular

forced to strike the curriculum under the endorsement test. Kansas students would unquestionably perceive a message of endorsement from their schools when their science teachers propagated the philosophies set forth in the Judeo-Christian Bible, and the public schools would become a forum for religious debate.[309] Thus, the long-recognized principles underlying the First Amendment demand that courts strike this school policy, regardless of the rubric chosen to articulate those principles.

IV. CAN TEACHERS CHALLENGE DARWIN'S THEORY WITHOUT OFFENDING THE ESTABLISHMENT CLAUSE?

Science students should not be forced to accept evolution as infallible dogma when the scientific community itself has offered some criticism of the theory.[310] It would be a gross misapplication of the Establishment Clause to hold that schools must suppress the criticisms of the evolution theory in order to avoid advancing the religious viewpoint.[311] The Supreme Court has noted that states can mandate "scientific critiques of prevailing scientific theories," so long as the requirement has the secular intent of enhancing science education.[312]

Thus, there are ways to expose students to the problems in Darwin's theory without creating Establishment Clause problems. The problem with the Kansas curriculum was that the proposed

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purpose prong. *See supra* notes 91-114 (discussing the effect that the Court-delineated tests had on the evolution issue).

[309] *Santa Fe*, 120 S. Ct. at 2277, 2282.

[310] Robert Root-Bernstein, *On Defining a Scientific Theory: Creationism Considered, in* SCIENCE AND CREATIONISM 64, 71 (Ashley Montagu ed., 1984). "Far from denying that evolution has problems, evolutionists have been even more critical than creationists of the theory." *Id.*

[311] *See, e.g., Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online, *at* http://www.answersingenesis.org/docs2/4350news7-26-2000.asp (last visited Jan. 22, 2001) (stating that a Washington school board responded to threats of litigation from the ACLU by stopping a teacher from teaching the theory of intelligent design, and subsequently denied him permission to distribute articles from scientific journals criticizing certain studies offered in support of evolution theory).

[312] Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987).

critiques were religious, rather than scientific. High school teacher Roger DeHart, however, has prepared a lesson plan that would merely supplement his outdated textbooks with more current information that scientifically disproves some evolution studies.[313] This approach would be appropriate for a state-sponsored classroom under either the *Lemon* or the endorsement test, as scientific criticism of a scientific theory does not trigger the Establishment Clause. High school teacher Rodney Levake offers a similar approach, but his proposed lesson plan questions the theory of evolution by offering evidence prepared by creationist organizations.[314] This is essentially the same approach adopted by the Kansas Board, and will therefore not survive analysis under either test.

A. *Two Different Methods of Criticizing Evolution*

Rodney Levake, a Minnesota high school biology teacher, has been transferred to the chemistry department of his school because he wished to teach the flaws in Darwin's theory of evolution.[315] Levake intends to teach Darwin's theory, and insists that he has no interest in teaching creationism.[316] He does not wish to refer to God or to religion in his classroom, claiming that there is a big difference between questioning evolution as a theory and teaching science from a religious standpoint.[317] Levake claims that what he objects to is not the subject itself, but the policy of teaching evolution without its problematic areas.[318]

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[313] *See infra* notes 319-23 and accompanying text (discussing DeHart's lesson plan).

[314] *See infra* notes 315-18 and accompanying text (discussing Levake's lesson plan).

[315] Jon Tevlin, *Evolution vs. Creationism; Christian Teacher Unlikely Soldier in Ongoing Battle*, HOUSTON CHRON., Aug. 20, 2000, at A14. Levake teaches at Faribault High School in Minnesota, and is a devout Christian. *Id.*

[316] *Id.*

[317] *CNN & Time* (CNN television broadcast, July 2, 2000) (quoting Levake as saying that he wishes to teach evolution as a scientific theory complete with its flaws, not as infallible dogma).

[318] *Id.*

Roger DeHart is a biology teacher from Washington who teaches various theories of life's origins.[319] Although he no longer teaches the theory of intelligent design, DeHart discusses the problems with the theory of evolution.[320] While his school permits this instruction, his principal denied DeHart permission to distribute articles from scientific journals that would have corrected the outdated information in the textbook.[321] One such article stated that the famous study on peppered moths had been discredited, and should no longer be used as an argument in favor of evolution.[322] Another stated that Stanley Miller's "life in a test tube" experiment was insignificant because it barely related to the way life might have evolved millions of years ago.[323]

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[319] *Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online, *at* http://www.answersingenesis.org/docs2/4350news7-26-2000.asp (last visited Jan. 22, 2001).

[320] *Id.* at http://www.answersingenesis.org/docs2/4350news7-26-2000.asp. DeHart was forced to stop teaching intelligent design when the ACLU threatened his school board with legal action. He is still permitted to teach the flaws in evolution. *Id.*

[321] *Id.* at http://www.answersingenesis.org/docs2/4350news7-26-2000.asp.

[322] *Id.* at http://www.answersingenesis.org/docs2/4350news7-26-2000.asp; *see also infra* appendix, note 37 (explaining the peppered moth study). Incidentally, this particular example illustrates the concept of survival of the fittest, which falls under the category of micro-evolution, which does not challenge the biblical account of a supreme creator.

[323] *Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online, *at* http://www.answersingenesis.org/docs2/4350news7-26-2000.asp (last visited Jan. 22, 2001). In his 1953 experiment, Stanley Miller placed in a sealed container the gasses that were believed to compose the atmosphere of the primitive earth – hydrogen, methane, ammonia, and water. Stanley Awramik, *Astrobiology and the Origins of Life*, BioForum, *at* http://www.accessexcellence.-org/bioforum/bf02/awramik/bf02a2.html (last visited Jan. 22, 2001). The container lacked free oxygen, which did not exist in the primitive earth's atmosphere. After several days, Miller discovered that amino acids, the building blocks of protein, suddenly existed in the container. *Id.*

B. *DeHart's Program Succeeds Under Lemon Where Levake's Fails*

Until the Supreme Court says otherwise, *Lemon* remains a fixture in Establishment Clause cases, and so the three-pronged analysis continues to be relevant.[324] Teachers wishing to criticize Darwin's theory, therefore, must demonstrate that their reasons for doing so are secular, and do not have the effect of advancing religion.[325] Every program seeking to alter the way in which evolution is taught boasts essentially the same secular purpose: to improve science education and to foster critical thinking.[326] In that respect, Levake and DeHart are no different. They differ significantly, however, when analyzed for a secular purpose. DeHart passes this test easily, while Levake, if he does pass, will do so with great difficulty. Assuming that Levake could demonstrate a secular purpose, he would not clear the primary effect prong. DeHart, on the other hand, would have no trouble under this requirement.

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[324] *See supra* note 150 (analyzing the appropriateness of the *Lemon* test, especially in cases dealing with the evolution – creationism controversy).

[325] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Cases dealing with school prayer and the evolution controversy have traditionally been decided on either the secular purpose or primary effect prongs. *See supra* notes 159-258 and accompanying text (describing school programs that fell under the first two prongs of *Lemon*). Government programs falling under the entanglement prong generally involve some sort of government aid to religious schools or religious programs. *See supra* notes 260-66 (describing the types of government activity that trigger entanglement prong analysis). Because this section deals only with lesson plans devised by individual teachers, analysis under the entanglement prong is not necessary.

[326] *See, e.g.*, *Edwards*, 482 U.S. at 586 (stating that the Louisiana legislature passed the Balanced Treatment Act for the purpose of "protecting academic freedom" by encouraging open-mindedness toward both theories); *see also supra* notes 168-71 and accompanying text (stating that Kansas's stated secular purpose was to "attain high levels of scientific literacy").

1. *Lesson Plans and the Secular Purpose Prong*

The goal of enhancing critical thinking through scientific analysis is unquestionably secular, as is a teacher's concern that presenting the theory of evolution as infallible will leave students with inaccurate information. A teacher can validly challenge Darwin, even if that teacher himself happens to be a creationist.[327] He must be careful, however, that he challenges the scientific theory of evolution with evidence that is also scientific – challenges based on the Word of God will not suffice as a secular purpose.[328] While not terribly obvious at first glance, Levake's program falls into this category – his evidence against evolution is not scientific.

Critics call Levake's program a repackaged version of creationism.[329] The books that Levake cites have been rejected by the national academy of sciences, as well as by most prominent scientific publications.[330] Furthermore, the arguments that Levake plans to teach originate from books and pamphlets circulated by the creationist group Answers in Genesis.[331]

Although creationists do not raise any arguments against evolution that the Darwinists have not already discovered,[332] use of material provided by Answers in Genesis is, in this case, the

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[327] Before the school board stopped him, DeHart taught the theory of intelligent design to his science students. *Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online, *at* http://www.answersingenesis.org/docs2/-4350news7-26-2000.asp (last visited Jan. 22, 2001). This does not conclusively prove that DeHart himself is a creationist, but it does suggest so. This does not really matter though, because even if he were a creationist, such views would not be implicated in the lesson plan that he proposes. *See infra* notes 340-42 and accompanying text (explaining why DeHart's lessons on evolution's problem areas are not religious).

[328] Root-Bernstein, *supra* note 310, at 64. The debate between creationism and evolution is not a scientific one. "It is due to the promulgation of a religious belief as a scientific idea." Root-Bernstein, *supra* note 310, at 64.

[329] Tevlin, *supra* note 315.

[330] Tevlin, *supra* note 315.

[331] Tevlin, *supra* note 315.

[332] Root-Bernstein, *supra* note 310, at 70.

difference between secular and non-secular. While evolutionists criticize their own theory, the flaws exposed are not the sort that require abandonment of the entire theory.[333] In fact, some literature offered against evolution was written to correct an aspect of the theory, rather than argue against it.[334] Such criticism is healthy for science, recognizing that while the ground work is laid, more research is needed.[335] Answers in Genesis, on the other hand, distorts the same evidence, arguing that the entire theory of evolution must be wrong, and consequently, the Bible must be right.[336] Furthermore, creationists do not test their own theory as do the evolutionists; they unquestionably accept the word of the Bible as truth.[337] This is not scientific, but rather, blatantly

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[333] Root-Bernstein, *supra* note 310, at 70.

[334] Root-Bernstein, *supra* note 310, at 87 n.16.

[335] Root-Bernstein, *supra* note 310, at 60-71. Root-Bernstein divides the possible problems of a particular theory into categories, arguing that not all categories of problems require abandonment of the entire theory. For example, if the problem is one of technique, then scientists can solve that problem by developing a better technique. Root-Bernstein, *supra* note 310, at 60-71. Only what Root-Bernstein calls "theory problems" call for forfeiture of the entire theory. These include anomalies, paradoxes, and contradictions. Root-Bernstein, *supra* note 310, at 60-71. The problems with evolution are not theory problems. Root-Bernstein, *supra* note 310, at 60-71. Root-Bernstein argues that even if one accepts all of the problems raised by creationists as valid, the existence of such does not invalidate evolution as a scientific theory. Rather, it "demonstrates just how vibrant the tradition of research in the evolutionary sciences is." Root-Bernstein, *supra* note 310, at 60-71.

[336] *See, e.g.*, Russell Humphreys, *Evidence For a Young World*, Answers Online, *at* http://www.answersingenesis.org/docs/4005.asp (last visited Jan. 22, 2001) (arguing that because the sediment at the bottom of the ocean indicates that the Earth can't be older than twelve million years, the Bible must be correct at estimating the age of the Earth at six thousand years). Creationists make this argument, even when the flaws in evolution theory do not naturally conclude that the Bible's version is the correct one. For example, creationist Russell Humphreys points to evidence suggesting that the galaxy is only a few hundred million years old, rather than 4.3 billion. Although the age suggested in the Bible is only between six and ten thousand years, Humphreys suggests that such evidence voids evolution and proves creation. *Id.* at http://www.answersingenesis.org/docs/4005.asp.

[337] Root-Bernstein, *supra* note 310, at 73. H. M. Morris, the director of the Institute for Creation Research says that advocates of creationism "do not need

religious. Thus, by selecting material that discusses the flaws in evolution theory from a religious standpoint, rather than a scientific one, and by choosing books that have been rejected by the scientific community, Levake demonstrates a purpose that looks less than secular.[338]

Furthermore, Levake's educational approach is so similar to the Kansas curriculum that his program cannot be deemed secular where Kansas's would prove religious. While the Kansas board went a step farther than Levake by openly permitting the teaching of creationism,[339] Levake's program would ultimately reach the same result. By teaching from materials prepared solely by creationist groups, Levake, like Kansas, effectively laces his science lesson with the religious perspective. This does not amount to a secular purpose.

Unlike Levake and the Kansas Board, DeHart has chosen to challenge evolution by using materials that come from scientific journals.[340] By refuting science with science, instead of with religion, DeHart's lesson plan would achieve the secular goal of enhancing science education. If facts stated in a textbook are no longer true, a good science teacher would supplement that book with updated information. This in itself constitutes a secular purpose.[341] That secular purpose is not blunted by its execution. The selection of articles from scientific journals ensures that the supplemental information will not be fused with a religious

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experimental verification; God has recorded it in His Word, and that should be sufficient." Root-Bernstein, *supra* note 310, at 73 (quoting H.M. Morris).

338 Tevlin, *supra* note 315 and accompanying text (discussing criticisms of the material that Levake would like to teach).

339 *See supra* note 199 and accompanying text (reporting that the Board was aware that its standards would allow schools to teach creationism if they so desired).

340 *Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online, *at* http://www.answersingenesis.org/docs2/4350news7-26-2000.asp (last visited Jan. 22, 2001).

341 *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (holding that provision of textbooks for secular subjects to parochial schools amounted to a secular purpose under *Lemon's* predecessor, the two-pronged *Schempp* test). As evolution is a secular subject, it would follow from *Allen* that articles updating textbooks on the same subject would also be secular.

message.[342] Thus, DeHart's proposed lesson would effectively enhance science education by demonstrating criticisms of evolution, yet still comport with the Establishment Clause.

2. *Lesson Plans and the Primary Effect Prong*

It is also possible to criticize evolution without violating the primary effect prong. In the case of DeHart, the primary effect of his lesson would be to replace the outdated theories in his students' textbooks with current information. As this information comes from scientific sources, the primary effect cannot be viewed as advancing religion.[343] Such is not the case with Levake.

By giving credence to creationist theories in order to question the validity of evolution, Levake would effectively use his classroom to advocate those religious theories.[344] This would violate the second prong of *Lemon*.[345] Schools may not question Darwinism in order to influence students' belief in the biblical account of origins.[346] The Supreme Court made this clear when it decided *Edwards v. Aguillard*,[347] and reminded us of it recently by denying *certiorari* in *Freiler v. Tangipahoa Parish Board of Education*.[348] In that case, the Court let stand a Fifth Circuit decision holding that Louisiana breached the First Amendment by requiring teachers to read a disclaimer before teaching evolution.[349] The disclaimer stated that:

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[342] *Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online, *at* http://www.answersingenesis.org/docs2/4350news7-26-2000.asp (last visited Jan. 22, 2001) These journals include *The Scientist* and *Scientific American. Id.*

[343] *See supra* notes 321-23 and accompanying text (discussing the information DeHart wished to disseminate).

[344] *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 348 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 2706 (2000) (holding that use of the classroom to disavow evolutionary principles violates the primary effect prong of *Lemon*).

[345] *Id.*

[346] Edwards v. Aguillard, 482 U.S. 578, 594 (1987).

[347] *Id.*

[348] 120 S. Ct. 2706 (2000).

[349] *Freiler*, 185 F.3d at 348.

> [E]volution should be presented to inform students of the scientific concept and *[is] not intended to influence or dissuade the Biblical version of Creation* or any other concept . . . . [I]t is the basic right and privilege of each student to form his or her own opinion and *maintain beliefs taught by parents on this very important matter of the origin of life and matter*. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion."[350]

The Fifth Circuit rejected the state's contention that the disclaimer was intended to encourage critical thinking.[351] Because students would basically hear that evolution need not affect what they already know, the state failed to create an atmosphere of open minds.[352] The court, applying the *Lemon* test, held that the disclaimer violated the Establishment Clause because its primary effect aided religion.

Levake, however, may not fit within the *Freiler* framework. The *Freiler* court limited its analysis to Louisiana's particular disclaimer, which mentioned "the Biblical version of Creation."[353] Unlike the state of Louisiana, he claims that he does not wish to mention the Bible, or a supreme creator; he merely wishes to evaluate evolution in light of its flaws.[354] While this would appear to have an innocuous effect, Levake's program would suffer the same fatal flaw as Louisiana's disclaimer. If a court found that his evidence against evolution was nothing more than creationism minus the mention of a supreme being because then, the primary effect would be to advance a religious theory.

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[350] *Id.* at 341 (emphasis added).

[351] *Id.* at 345.

[352] *Id.* at 344; *see also Edwards*, 482 U.S. at 592 (holding that Louisiana did not create an atmosphere of open-mindedness with its Balanced Treatment program because where schools taught evolution, they were forced to counter it with information teaching that evolution was a lie).

[353] *Freiler*, 185 F.3d at 346 n.3.

[354] Tevlin, *supra* note 315.

C. DeHart's Program Would Survive Endorsement Analysis; Levake's Would Not

Although less demanding than the rigid *Lemon* test, the endorsement test would nevertheless prove Levake's lesson plan to be in violation of the Establishment Clause. Endorsement analysis voids science instruction under the Establishment Clause if it has either the purpose or effect of "conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[355] The Kansas curriculum met this criterion by permitting its teachers to bring religious theories into the classroom,[356] which is essentially what Levake plans to do. Because he plans to refute evolution with creationist material, material that has been rejected by the scientific community, this portion of Levake's lesson would convey the message that the non-scientific, religious material is preferred to the scientific.[357] Thus, his students, like the students of Kansas schools, might legitimately perceive a message of endorsement.

Rather than refute evolution with religious material, DeHart wishes to teach the theory in light of recent scientific developments, challenging it with more science.[358] His students say that he never mentioned God or religion in the classroom.[359] Moreover, they claim that they were not sure what their teacher believed about life's origins.[360] If this is true, then it can hardly be said that DeHart was conveying the message that he preferred the religious viewpoint. Furthermore, if the students did not discern such a message, then they would be unable to perceive it as

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[355] Allegheny v. ACLU, 492 U.S. 573, 593 (1989) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

[356] *See supra* notes 291-309 and accompanying text (discussing how the Kansas curriculum would fall under the endorsement test).

[357] Tevlin, *supra* note 315.

[358] *Anti-Creationists Threaten Another Teacher's Liberty*, Answers Online *at* http://www.answersingenesis.org/docs2/4350news7-26-2000.asp (last visited Jan. 22, 2001).

[359] *Id.* at http://www.answersingenesis.org/docs2/4350news7-26-2000.asp.

[360] *Id.* at http://www.answersingenesis.org/docs2/4350news7-26-2000.asp.

"stamped with [their] school's seal of approval."[361] All of this makes it more likely that DeHart wishes to endorse scientific theories rather than religious ones.

Evolution is a scientific theory that continues to develop and change as new evidence is discovered. Schools, therefore, should not teach the subject as infallible dogma – this would render it vulnerable to some of the same criticism that applies to creation science.[362] Additionally, it would make bad educational policy to teach evidence that has been outdated only because administrators choose to tip toe around the First Amendment, trying to avoid litigation.[363] It is possible to expose the flaws in evolution without violating the Establishment Clause, and without appearing defeated by the creationist movement. All that is required is a legitimate showing that such policy is secular, and does not advance religious theories.[364] Or, at the very least, a showing that the policy serves to endorse science, and not religion.[365] DeHart's program accomplishes this, while Levake's does not.

Nevertheless, Levake brought a discrimination suit against his school district, and his appeal of the district judge's dismissal is pending.[366] In addition to the fact that Levake's lesson plans violate both the *Lemon* and endorsement tests, policy reasons demand that the court rule against him. Should the appellate court

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[361] Santa Fe Ind. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2278 (2000).

[362] *See, e.g.*, Root-Bernstein, *supra* note 310, at 67 (explaining the criteria for a science). Creation science is not a valid science because it is based on faith and has not been tested. Root-Bernstein, *supra* note 310, at 67. "An idea that does not resolve any recognized scientific problems cannot be called a scientific theory." Root-Bernstein, *supra* note 310, at 67.

[363] *See, e.g.*, *supra* note 320 (reporting that DeHart was ordered to stop teaching intelligent design due to threats of litigation from the ACLU). If DeHart had been permitted to teach intelligent design prior to the ACLU's involvement, it is possible that he was not permitted to supplement his textbook for the same reason.

[364] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[365] *See, e.g.*, *Santa Fe*, 120 S. Ct. at 2279 (discussing endorsement criteria).

[366] Tevlin, *supra* note 315. The district court held that Levake neglected his responsibilities by rushing through the chapter on evolution, and that the school district had the right to limit the speech of their teachers to the designated curriculum. Tevlin, *supra* note 315.

rule in favor of Levake, it would give creationists a tremendous opportunity to bring the Bible into public schools. For instance, National Heritage Academies, which is seeking a charter for a school in Rochester, New York, has a plan to make students aware of, but not teach, alternatives to evolutionary theory including creationism.[367] Across the country, states such as Alabama insist that biology textbooks bear a disclaimer that raises questions about the certainty of evolution.[368] Should the Court of Appeals of Minnesota find that Levake's program meets the legitimate goal of inspiring critical thinking, it would give these states and many others a way to effectively disguise creationism to get it through the school house door.

CONCLUSION

While the Supreme Court has forbidden public schools from teaching religious theory as science, it has not mandated that schools must teach evolution. Thus, it is possible for a state to develop a science curriculum that opens the door to alternative theories of origins, so long as the state was promoting a purely secular goal and did not endorse religion. The science curricula of other states demonstrate that a mere mention of the dominance of Darwin in the scientific world goes a long way in demonstrating a

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[367] Edward Wyatt, *City Receives 14 Proposals to Privatize Its Failing Schools*, N.Y. TIMES, Aug. 19, 2000, at B2.

[368] Pam Belluck, *The Nation: Necessary Knowledge; Science Expands, Religion Contracts*, N.Y. TIMES, Aug. 13, 2000, at D1. This warning states that the texts discuss evolution, "a controversial theory some scientists present as a scientific explanation for the origin of living things. Evolution is a theory, not a fact, but it is so widely endorsed that no competing scientific theory rivals it." *Debate Over Teaching Origin of Life Has Not Evolved*, USA TODAY, Aug. 3, 2000, at 18A. Oklahoma adopted similar labeling on its textbooks in November 1999, but within a few months the state attorney general repealed the requirement. Thomas Fields-Meyer, *Monkey Business; The Scopes Trial Made Teaching Evolution Front Page News. In Some States, 75 Years Later, The Jury Is Still Out*, PEOPLE, Aug. 7, 2000, at 105.

secular purpose.[369] Kansas, however, has crossed the line of separation between church and state.

Kansas has not found a way to separate the evolution controversy from its religious roots. Therefore, when analyzing its decision not to teach evolution, courts must apply Establishment Clause analysis – either the *Lemon* test or the more current Endorsement test. While Kansas states that its secular goal is to stimulate critical thinking and attain scientific literacy, the fact that it downplays the importance of evolution distinctly undermines that goal, as this will effectively set Kansas students behind the rest of the country in science. In addition, its desire to teach only "sound science" does not justify its decision to include creationist theories, which have much less scientific support than evolution, and are just as unrepeatable in a laboratory. This has a direct effect that aids, rather than accommodates religion. Thus, the curriculum fails the first two prongs of *Lemon*. In addition, because the state would use its schools to facilitate the religious theory of creation, it fails the entanglement prong as well. Even under the less stringent Endorsement Test, the curriculum would still violate the Establishment Clause because a student learning religious theories from her science teacher would assume that her school board approved of such religious instruction. This is a blatant violation of the First Amendment.

Regardless, the desire to teach alternatives to Darwin is sweeping the nation. When the evolution-creation controversy does finally return to the Supreme Court, the new issue will be whether schools offering such alternatives present them scientifically, such as DeHart's method, or whether they follow the approaches adopted by Levake and the Kansas Board, which present little more than Genesis in scientific clothing. With so many different states passing curricula that are seemingly neutral and yet would allow creationism to be taught, and the ease of the weakened *Lemon* framework, one has to assume that the Court's analysis would be done on a case by case basis. Anything else might allow creationists to squeeze their Bibles through the schoolhouse door, as they have

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[369] *See infra* appendix, notes 1-80 (discussing the science curricula of other states).

been trying to do since the end of the *Scopes* trial. The Court should not allow inside our nation's schools all the sectarian ideas that the Establishment Clause has fought to keep on the outside.