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Unnatural Selection: The Fundamentalist Crusade Against Evolution and the New Strategies to Discredit Darwin

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NOTE

UNNATURAL SELECTION: THE FUNDAMENTALIST CRUSADE AGAINST EVOLUTION AND THE NEW STRATEGIES TO DISCREDIT DARWIN*

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** J.D., 2005, University of Florida Levin College of Law; B.A., 2003, Vanderbilt University. I would like to thank Professors Robert Moffat and Leanne Pflaum for their inspiration and instruction. I would also like to thank my parents, Bob and Janet, for their unwavering support and encouragement. Finally, this Note is dedicated to Jessica for her love, kindness, and uncanny ability to pick interesting note topics.

I. INTRODUCTION

A. *Is Evolution Heading Towards Extinction?*

Recently, the superintendent of Georgia's public schools responded to an inquiry concerning the disappearance of evolution from state high school curricula by stating that evolution is "a buzz word that causes a lot of negative reaction."[1] Earlier, when the Georgia Education Department had released the state's science curricula they had noticeably excised this controversial "buzz word" in favor of the phrase "changes over time."[2] Georgia's decision to omit the "e-word" is not unique. Several other states, under political and cultural pressure from fundamentalists, are currently in the midst of re-examining public school science curricula and contemplating changes that either omit evolution altogether or pair the theory with the teaching of an alternative explanation for the world's creation.[3] In Kansas, Missouri, Ohio, Pennsylvania, and South Carolina, proposals have been submitted to modify the states' existing science curricula to include alternatives to Darwinian evolution, like Intelligent Design, and are in some cases likely to succeed.[4] Finally, in Louisiana and Georgia, state officials have recently attempted to introduce evolution "disclaimers," either in the form of orations read by a teacher to the class

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1. Andrew Jacobs, *Georgia Takes on 'Evolution' as 'Monkeys to Man' Idea*, N.Y. TIMES, Jan. 30, 2004, at A13.

2. *Id.* The Georgia Education Department also changed the phrase "long history of the Earth" to "history of the Earth" to appease fundamentalists who claim that the Earth was created thousands of years ago, rather than billions of years ago as many scientists attest. *Id.* An associate professor of biology at Georgia State University, Sarah Pallas, lamented that "[t]he point of these benchmarks is to prepare the American work force to be scientifically competitive" and stated that "[b]y removing the benchmarks that deal with evolutionary life, we don't have a chance of catching up the rest of the world." *Id.*

3. Neela Banerjee, *Christian Conservatives Press Issues in Statehouses*, N.Y. TIMES, Dec. 13, 2004, at A1.

4. Susan Jacoby, *Caught Between Church and State,* N.Y. TIMES, Jan. 19, 2005, at A19. In 1999, the Kansas Board of Education passed a measure to ban the teaching of evolution in order to open the door for creation-science instruction. Banerjee, *supra* note 3, at A1. However, after three board members lost primaries, the decision was reversed. *Id.* The theory known as Intelligent Design maintains that an omniscient creator was responsible for the origin of man and that Darwinian evolution, if it did in fact occur, was guided by the hand of this being. *Id.* Many of its proponents believe instruction of Intelligent Design theory to be constitutional since it does not directly espouse religious theory. Jacoby, *supra* note 4, at A1.

or in a brief text affixed to the covers of textbooks, which cast doubt on the evolutionary theory.[5]

B. *The Rise of Fundamentalism in America*

Fundamentalism emerged in nineteenth century America among evangelical Protestants as a movement to defend the Bible against the growing secularism which fundamentalists felt would lower society's values.[6] Fundamentalists embrace a strict, literal interpretation of the Bible and believe that the Scriptures are the word of God and are completely error-free.[7] The fundamentalists blamed evolution for what they saw as a new wave of social immorality sweeping across America after the beginning of the Industrial Revolution.[8]

In the first half of the twentieth century, the fundamentalists influenced the material discussed in local science classrooms.[9] However, after the Soviet Union became the first nation to launch a satellite into space, the National Science Foundation sought to modernize American science education and funded programs that introduced evolution into public school curricula.[10]

The term "creationism" first emerged in the 1960s when fundamentalists organized to promote the strict, literal interpretation of the Bible as scientific fact.[11] A leading creationist organization, the Institute for Creation Research (ICR), was created during this period to promote the Biblical account of the creation of life found in the book of Genesis.[12]

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5. Cornelia Dean, *Evolution Takes a Backseat in U.S. Classrooms*, N.Y. TIMES, Feb. 1, 2005, at F1.

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

7. *Id.* at 1259.

8. *See id.*

9. *Id.* Social pressure from the fundamentalist community led to the omission of the theory from textbooks and deterred teachers from discussing the theory in class. *Id.*

10. *Id.* After the launch of Sputnik in 1957, the Biological Sciences Curriculum Study (BSCS) developed the first biology textbooks that introduced evolution as a major scientific theory. *Id.*

11. *McLean*, 529 F. Supp. at 1259. Testimony before the district court in *McLean* established that the release of the BSCS textbooks most likely led to the origination of the theory of creation-science. *Id.* Creation-scientists argue that (1) natural selection is an insufficient theory regarding the origin of man; (2) man and apes have separate, distinct ancestry; (3) the Earth's geology was created by "catastrophism," including a worldwide flood; (4) the Earth was recently created; and (5) the universe and life were created from nothing. *Id.* at 1264. The district court in *McLean* found that creation-science was not a true science because the theory had no basis in natural law, could not be tested empirically, and held itself out as fact rather than scientific theory. *Id.* at 1267.

12. *Id.* at 1259. The ICR has released several pamphlets that instruct creationists how to convince local school boards that creationism should be taught in public schools. *Id.* at 1260.

Creationism continues to inspire many fundamentalists today and dozens of organizations exist to advocate for the advancement of the theory and the placement of its teachings in American public school classrooms.[13]

C. *Support for Evolution in America*

According to a 2001 survey administered by the National Science Foundation (NSF), 53% of Americans believe that human beings developed from earlier species of animals.[14] Although this statistic would seem disheartening to the American scientific community, it represents the first time a survey showed a majority of Americans accepted evolution.[15] However, this statistic fails in comparison to other industrialized nations where it is estimated that at least 80% of individuals accept evolution.[16]

Furthermore, disbelief concerning the theory of evolution is not characteristically an aspect found in most Christians worldwide.[17] In fact, Pope Pius XII and Pope John Paul II have both stated that evolution and religion are not mutually exclusive.[18] Rather, the opposition to the theory of evolution emerges from the small sector of fundamentalist Christians in America who argue that the Biblical account of creation found in the book of Genesis is the only correct origin story.[19] This Note neither seeks to prove nor disprove either creationism or evolution.

D. *Organization*

The remainder of this Note is divided into five parts. Part II examines the current legitimacy of the *Lemon* test applied by courts in cases alleging a violation of the Establishment Clause. Part III gives a detailed description of the history of evolution in the courts. Part IV discusses whether advocates of evolution can be considered worshipers of a "religion" of science. Part V examines the recent controversy over disclaimers and whether disclaimers could ever be found constitutional. The final part of this Note discusses the future of evolution in America and

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13. *Id.* at 1259-60.

14. Dean, *supra* note 5, at F1.

15. *Id.* According to the NSF, "polls consistently show that a plurality of Americans believe that God created humans in their present form about 10,000 years ago, and about two-thirds believe that this belief should be taught along with evolution in public schools." *Id.*

16. *Id.* For example, Dr. Miller conjectures that "something like 96%" of Japanese citizens believe in evolution. *Id.*

17. *Id.*

18. Dean, *supra* note 5, at F1.

19. *McLean*, 529 F. Supp. at 1259.

examines how the changing social and political landscape may lead to new gains for fundamentalists.

II. SQUEEZING *LEMON*: THE FUTURE OF ESTABLISHMENT CLAUSE JURISPRUDENCE AND ITS CONSEQUENCES FOR EVOLUTION

A. *The* Lemon *Test*

The Establishment Clause of the First Amendment guarantees citizens the separation of church and state.[20] The basic purpose of the Establishment Clause is to prevent state action that sponsors or financially supports a religion or religious entity.[21] The *Lemon* test, set forth by the U.S. Supreme Court in *Lemon v. Kurtzman*,[22] remains the favored mechanism for analyzing whether statutes violate the Establishment Clause.[23]

The *Lemon* test contains three prongs for analyzing whether a state action has violated the Establishment Clause.[24] First, the government's action must have a secular purpose.[25] Second, the government's action must not have the primary effect of either advancing or inhibiting religion.[26] Third, the government's action must not result in an "excessive government entanglement with religion."[27]

The first prong of the *Lemon* test is commonly referred to as the "purpose" prong.[28] Courts have stated that the first prong does not mean that the challenged statute must have been enacted for solely a secular purpose; a single, sincere purpose "in a sea of religious purposes" could still pass constitutional muster.[29] Courts grant a great deal of deference to

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20. U.S. CONST. amend. I, cl. 1. The First Amendment states, in relevant part: "Congress shall make no law respecting an establishment of religion." *Id.*

21. 403 U.S. 602, 612 (1971).

22. 403 U.S. 602 (1971).

23. Freiler v. Tangipahoa Parish Bd. Of Educ., 185 F.3d 337, 334 (5th Cir. 1999). In *Lemon*, the Court examined statutes in Pennsylvania and Rhode Island that provided a supplemental salary to teachers at private, religiously-affiliated schools. *Lemon*, 185 F.3d at 606-07. The Court held that although the statute had a clear, secular purpose, the supplemental salaries impermissibly benefited the schools and foster religion in violation of the Establishment Clause. *Id.* at 613-14.

24. *Id.* at 612-13.

25. *Id.* at 612.

26. *Id.*

27. *Id.* at 613 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

28. *See, e.g.*, McCreary County v. ACLU, 125 S. Ct. 2722, 2758 (2005).

29. *See* Freiler v. Tangipohoa Sch. Bd., 185 F.3d 337, 344 (5th Cir. 1999).

the state's asserted secular purpose, but courts also examine whether the stated purpose is actually promoted by the state action.[30] A purpose that is contravened by the application of the statute will be deemed a "sham" purpose and will not satisfy the test's first prong.[31]

The second prong of the *Lemon* test is known as the "effect" prong.[32] A court's analysis under the second prong seeks to answer whether "the practice under review in fact conveys a message of endorsement or disapproval" of a religious sect.[33] However, in order to violate the second prong, the challenged government practice must benefit religion directly; "indirect, remote, or incidental"[34] benefits do not violate the second prong since a reasonable observer would not view such benefits as the product of government endorsement.[35]

The third prong of the *Lemon* test has been largely intertwined with the second "effect" prong and many courts in fact treat the second and third prongs as one.[36] Generally, the third prong, much like the second, asserts that any state action granting a direct benefit to a religious sect or even simply creating a close affiliation between religion and government shall contravene the nations' historic church-state division.[37]

In recent years the *Lemon* test has come under attack and in some instances been completely ignored by courts when examining alleged violations of the Establishment Clause.[38] Although the U.S. Supreme Court still considers the *Lemon* test to be the controlling mechanism for evaluating Establishment Clause violation claims, a majority of the Justices have hinted at its future demise in various opinions.[39]

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30. *See id.* (citing Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 816 (5th Cir. 1999)).

31. *Id.* (citing Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987)).

32. *Id.* at 2707.

33. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 817 (5th Cir. 1999) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984)).

34. Comm. For Pub. Ed. & Religious Liberty, 413 U.S. 756, 771 (1973).

35. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

36. *See* Agnosti v. Felton, 521 U.S. 203, 232-33 (1997).

37. *Id.*

38. *Freiler*, 185 F.3d at 344.

39. *Lamb's Chapel*, 508 U.S. at 398-99 (Scalia J., dissenting). Justice Scalia claims that "no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart, and a sixth has joined an opinion doing so." *Id.* at 398 (Scalia, J., dissenting); *but see Freiler*, 185 F.3d at 344 (stating that "the Supreme Court laid to rest rumors of the *Lemon* test's demise when it exclusively applied it in *Agostini v. Felton*.").

B. *Is* Lemon *Dead?*

In *Lamb's Chapel v. Center Moriches Union Free School District*,[40] Justice Scalia stated that the *Lemon* test had outlived its usefulness due to its intermittent and contradictory uses.[41] Justice Scalia lamented that the test had become a "ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried. . . ."[42] However, Justice Scalia's characterization of the *Lemon* test is unfounded. Since its adoption nearly thirty-five years ago, the *Lemon* test has been consistently applied in Establishment Clause cases with only one major exception.[43] Furthermore, in that single major exception, *Marsh v. Chambers*,[44] the Court did not apply *Lemon* when it held that the practice of opening sessions to the Nebraska Legislature with prayer did not violate the Establishment Clause because of the "historical acceptance" of the tradition.[45]

The *Lemon* test is only one of three mechanisms courts may use when evaluating Establishment Clause challenges.[46] The other two tests, both of which were created in the last two decades, are the "endorsement test" and the "coercion test."[47] The "endorsement test," set forth in *County of Allegheny v. ACLU*, states that the government endorses religion when it "convey[s] a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs."[48] The "coercion test," favored by Justice Scalia, would only invalidate state-sponsored religious activities when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."[49]

However, the *Lemon* test, although occasionally disregarded, remains the predominant test for analyzing alleged violations of the Establishment

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40. 508 U.S. 384 (1993).

41. *Id.* at 399 (Scalia, J., dissenting).

42. *Id.*

43. Edwards v. Aguillard, 482 U.S 578, 583 n.4 (1987).

44. 463 U.S. 783 (1983).

45. *Id.* at 792.

46. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 814-15 (5th Cir. 1999).

47. *See* Freiler v. Tangipohoa Sch. Bd., 185 F.3d 337, 343 (5th Cir. 1999).

48. County of Allegheny v. ACLU, 492 U.S. 573, 593 (1989). The U.S. Supreme Court used the "endorsement test" to declare that the placement of a nativity crèche inside the Allegheny County Courthouse was unconstitutional. *See id.* at 599-600.

49. Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963, 970 (5th Cir. 1992). The U.S. Supreme Court used the "coercion test" to declare a school district's practice of allowing principals to invite clergymen to give nonreligious benedictions before graduation ceremonies unconstitutional. *See* Lee v. Weisman, 505 U.S. 577 (1992).

Clause. This is especially true in the context of evolution.[50] First, *Lemon* largely encompasses the "endorsement test" in its second "primary effect" prong and third "excessive entanglement" prong. The two tests are similar because the endorsement test looks to the message that a state action emits and then examines the benefit that message accrues to religious believers, while the second and third prongs of the *Lemon* test likewise examine the effect the government's action has on the church-state relationship and ward against too close a companionship between the secular and sectarian realms. Second, the "coercion test" remains insufficient because it can only be applied when students are forced to participate directly in a formal religious service.[51] Thus, advocates of the exclusive use of the strict "coercion test" seek to deny students the right to challenge informal religious practices that openly endorse one religion over others.

Whether a state practice establishes religion in violation of the First Amendment should not be determined by analyzing whether or not the practice rose to a high level of coercion. If the "coercion test" became the sole mechanism for Establishment Clause cases, creation-science could replace evolution in the classroom. Courts, which had earlier declared legislation mandating the teaching of creationism an impermissible endorsement of religion, could not attack such legislation with the "coercion test" unless students were formally obligated to declare their acceptance of the Biblical story of creation.

Thus, the *Lemon* test still represents the most thorough apparatus for examining Establishment Clause violations. Although its prongs have been occasionally imaginatively applied and in some cases the test has been disregarded in favor of other mechanisms, the *Lemon* test's ability to look beyond the government's stated purpose and examine that purpose in action makes it absolutely necessary to combat religiously-motivated legislation cloaked in neutral, secular language.

III. EVOLUTION AND CREATIONISM IN THE COURTS

A. Scopes v. State

In 1926, the historic case of *Scopes v. State* pitted evolution's advocates against fundamentalists in a courtroom setting for the first time.[52] John Thomas Scopes was convicted of violating the Tennessee

50. *See Freiler*, 185 F.3d at 344.

51. *See id.*

52. Scopes v. State, 289 S.W. 363 (Tenn. 1926).

Anti-Evolution Act of 1925,[53] which outlawed the teaching of the descent of man from a lower order of animals.[54] Scopes was penalized $100 for his denial of the divine creation of man.[55] After appealing to the Supreme Court of Tennessee, Scopes sought to have the Tennessee Anti-Evolution Act declared unconstitutional as a violation of his due process rights as guaranteed by the Fourteenth Amendment.[56] The Court held that the prohibition of the teaching of evolution did not give "preference to any religious establishment or mode of worship."[57] Thus, the Court refused to consider the motives of the legislature in enacting the law.[58] The Court, however, reversed the trial court's decision to penalize Scopes for his "misconduct," finding that the trial judge erred in his fixing of the fine.[59] Although the Court refused to declare the statute unconstitutional, the Court retreated from enforcing its penalty, leaving all spectators to surmise that although no side had emerged with the clear legal victory, the advocates of evolution had won a victory in the court of public opinion.[60]

B. Epperson v. Arkansas

The U.S. Supreme Court first considered the issue of evolution in *Epperson v. Arkansas*.[61] In *Epperson*, the Court examined Arkansas's

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53. Section One of the Act stated:

> Be it enacted by the General Assembly of the State of Tennessee, that it shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state which are supported in whole or in part by the public school funds of the state, to teach any theory that denies the story of 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. at 363 n.1.

54. *Id.*

55. *See id.* at 363.

56. *Id.* at 364.

57. *Id.* at 367.

58. *See id.* The Court argued that "the validity of a statute must be determined by its natural and legal effect, rather than proclaimed motives." *Id.*

59. *Scopes*, 289 S.W. at 367. The Court declared that "[s]ince a jury alone can impose the penalty this act requires, and as a matter of course no different penalty can be inflicted, the trial judge exceeded his jurisdiction in levying this fine." *Id.*

60. *See* Jacoby, *supra* note 4. Many historians, including Fredrick Lewis Allen, believed that the *Scopes* trial signaled a shift away from fundamentalism in American political and religious thought, when in fact the decision probably strengthened anti-evolutionists' hatred for the theory and increased the voracity with which they attacked it. *Id.*

61. 393 U.S. 97 (1968).

"anti-evolution" statute which outlawed the teaching of Darwin's theory in public educational institutions.[62] The controversy originated when a Little Rock high school biology teacher sought clarification of the statute when she was given a textbook containing a chapter on the unlawful theory.[63] After the trial court found that the statute violated the First Amendment because it "tends to hinder the quest for knowledge, restrict the freedom to learn, and restrain the freedom to teach;"[64] the Supreme Court of Arkansas reversed, citing the state's power to choose any curriculum it desires.[65]

On appeal, the Supreme Court reversed the decision of the Arkansas Supreme Court and held that the Arkansas statute violated the First and Fourteenth Amendments to the Constitution.[66] The Court's holding was reinforced by the established rule that "[g]overnment in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice."[67] Thus, the Court announced that although public education is traditionally the domain of local and state governments, any violation of guaranteed constitutional rights will be met with federal judicial intervention.[68]

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62. *Id.* at 98. The statute made it illegal for a teacher to either "teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or "to adopt or use in any such institution a textbook that teaches this theory." *Id.* at 98-99 (quoting Ark. Stat. Ann. §§ 80-1627-80-1628 (1960)).

63. *Id.* at 100.

64. *Id.* at 100-01.

65. *Id.* at 101. The Supreme Court of Arkansas revealed its disdain for the trial court's ruling by issuing an opinion of only two sentences in length which read:

> Per Curiam. Upon the principal issue, that of constitutionality, the court holds that Initiated Measure No. 1 of 1928 . . . is a valid exercise of the state's power to specify the curriculum in its public schools. The court expresses no opinion on the question whether the Act prohibits any explanation of the theory of evolution or merely prohibits teaching that theory is true; the answer not being necessary to a decision in the case, and the issue not having been raised.

Id. at 101 n.7. The second sentence of the decision suggests that the statute may be void due to vagueness. *Id.* at 102.

66. *Id.* at 109.

67. *Epperson*, 393 U.S. at 103-04.

68. *Id.* at 104-05. The Court stated:

> By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the

The Court reasoned that the statute failed to pass constitutional muster because it required educational institutions to cater to "principles or prohibitions of [a] religious sect. . . ."[69] The Court examined the underlying political and religious motivations for the adoption of the statute and came to the conclusion that Arkansas sought to stifle the teaching of Darwin's theory "because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man."[70] The Court cited to an advertisement that was circulated prior to the adoption of the statute titled "The Bible or Atheism" as evidence supporting its finding that the adoption of the statute favored fundamentalist Christians and sought to advance their interests in violation of the First Amendment.[71]

Thus, the Court reasoned that any state action that served to "aid, foster, or promote one religion or religious theory against another or even against the militant opposite" would violate the guarantee of religious neutrality given to all citizens by the First Amendment.[72] Evolution now had constitutional clout, but its opponents would soon find subtler methods to aid them in their crusade against Darwin's theory.

> community of American schools." . . . [T]he First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."

Id. at 104-05 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960) & Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

69. *Id.* at 106.

70. *Id.* at 107. The Court used the test stated in *Schempp* to discern what were the purposes and primary effects of the legislation. *See id.* at 107; Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963). This test obviously laid the groundwork for the factors that would become the *Lemon* test. *See supra* notes 24-36 and accompanying text.

71. *See Epperson*, 393 U.S. at 108-09 n.16. The advertisement stated:

> All atheists favor evolution. If you agree with the Bible vote for Act No. 1 . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of their children? The Gazette said Russian Bolsheviks laughed at Tennessee. True, and that sort will laugh at Arkansas. Who cares? Vote FOR ACT NO. 1.

Id. n.16 (citing ARK. GAZETTE, Nov. 4, 1928, at 12).

72. *Id.* at 109 n.16.

C. McLean v. Arkansas Board of Education

Evolution opponents suffered yet another setback in *McLean v. Arkansas*[73] in 1982 when "Balanced Treatment" legislation, the favored rule of the day of fundamentalists, was dealt a blow.[74] In 1981, Arkansas passed Act 590, entitled the "Balanced Treatment for Creation-Science and Evolution-Science Act."[75] The statute mandated that public educational institutions give equal treatment to the two competing theories.[76] A diverse collection of plaintiffs challenged the constitutionality of Act 590, contending that the Act violated the Establishment Clause of the First Amendment,[77] the Due Process Clause of the Fourteenth Amendment, and the academic freedom of individual teachers via the Free Speech Clause of the First Amendment.[78]

Unlike the *Scopes* court, the Eastern District Court of Arkansas examined not only the express statements of the statute's purpose crafted by the legislature, but also "evidence of the historical context of the Act, the specific sequence of events leading up to the passage of the Act, departures from normal procedural sequences, substantive departures from the normal, and contemporaneous statements of the legislative sponsor."[79] The *McLean* court discerned from these additional sources that the passage of the act was "for purely a sectarian purpose" and that the adoption of the

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73. 529 F. Supp. 1255 (E.D. Ark. 1982).

74. *See id.* at 1256, 1272-73.

75. *Id.* at 1256.

76. *Id.* The Act defined "creation-science" as:

> [t]he scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds.

Id. at 1264. The *McLean* court declared that the definition of creation-science had the book of Genesis as its "unmentioned reference." *Id.* at 1264-65.

77. *Id.* at 1257. The unusual alliance of plaintiffs included bishops of the United Methodist, Episcopal, Roman Catholic, and African Methodist Episcopal Churches, as well as representatives from the American Jewish Congress, the National Association of Biology Teachers, a high school biology teacher, and several others. *See id.*

78. *McLean*, 529 F. Supp. at 1257.

79. *Id.* at 1263.

act was committed without consideration for the Act's educational value.[80] The *McLean* court stated that the Act violated the first prong of the *Lemon* test because it had no secular purpose, but rather was "simply and purely an effort to introduce the Biblical version of creation into the public school curricula."[81] Thus, the *McLean* court refused to assist in the advancement of creationism in the absence of scientific support for the doctrine.[82]

D. Edwards v. Aguillard

Five years after the *McLean* ruling, the U.S. Supreme Court considered Louisiana's version of "Balanced Treatment" legislation in *Edwards v. Aguillard*.[83] Justice Brennan, delivering the opinion for the Court, stated that the "Creationism Act" was facially invalid because it violated the Establishment Clause of the First Amendment.[84]

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80. *Id.* at 1264. Abundant evidence was produced that established that creation-science was nothing more than the story of creation found in Genesis cloaked in nonreligious words. *See id.* at 1265. For instance, the idea that the Earth and all life were suddenly created from nothing appears in the book of Genesis:

> In the beginning God created the heavens and the earth. Now the earth was formless and empty, darkness was over the surface of the deep . . . And God said, "Let there be an expanse between the waters to separate water from water." . . . And God said, "Let the water under the sky be gathered to one place, and let dry ground appear." . . . And God said, "Let the water teem with living creatures, and let birds fly above the earth across the expanse of the sky." Then God said, "Let us make man in our image, in our likeness, and let them rule over the fish of the sea and the birds of the air, over the livestock, over all the earth, and over all the creatures that move along the ground." So God created man in his own image, in the image of God he created him; male and female he created them.

Genesis 1:1-27 (New International Version). Furthermore, the explanation of the Earth's geology by catastrophic flood obviously refers to the story of Noah found in Genesis chapters seven and eight. *See McLean*, 529 F. Supp. at 1265 n.19.

81. *Id.* at 1264.

82. *See id.*

83. *See* Edwards v. Aguillard, 482 U.S. 578, 580 (1987). The action was brought by a diverse group of appellees, including parents of children enrolled in Louisiana public schools, who sought to enjoin the enforcement of the Act. *Id.* at 581. The district court granted the appellees summary judgment after finding that the Act violated the Establishment Clause because it prohibited instruction in evolution and demanded advancement of fundamentalist religious doctrine. *Id.* at 582. The court of appeals affirmed on the grounds that the Act furthered fundamentalist belief, in violation of the U.S. Constitution. *Id.*

84. *Id.* at 596-97.

The Louisiana Act forbade the teaching of evolution unless coupled with instruction concerning "creation science."[85] Thus, schools could escape the controversy by refusing to teach either theory.[86] However, this decision denied children the ability to be competitive in higher education.[87] The Court advanced the *Lemon* test as the determining apparatus when considering whether legislation violates the Establishment Clause.[88]

The Court argued that although deference to a legislature's stated secular purpose has had a long tradition, "the statement of such purpose [must] be sincere and not a sham."[89] The Court found that the legislature's stated purpose, the advancement of academic freedom, was one such insincere "sham" purpose because the Act granted preferences to those wishing to teach creation-science over those wishing to teach evolution or other theories.[90] The Court determined that the legislature's actual purpose was to discredit evolution while simultaneously advancing the fundamentalist theory of creation.[91]

Justice Scalia dissented and argued that the Court had inferred unconstitutional motives from the legislature's actions when no information was available to make such a decision.[92] Justice Scalia also lamented the use of the *Lemon* test and argued that any attempt to determine the motives of legislatures, rather than relying on their stated purpose for the Act, could have "perilous" results.[93]

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85. *Id.* at 581.

86. *See id.*

87. *Id.*

88. *Aguillard*, 482 U.S. at 583.

89. *Id.* at 586-87.

90. *See id.* at 587-88.

91. *Id.* at 591. The Court stated that "[t]he preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." *Id.* at 591. Furthermore, the Court articulated an argument supporting invalidation of the Balanced Treatment legislation which would be valuable years later to the opposition of disclaimers: "[o]ut of [the] many science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." *Id.* at 593. Thus, the courts are more likely to negate an anti-evolution law if they perceive the law to operate selectively.

92. *Id.* at 619 (Scalia, J., dissenting). Curiously, a bulk of evidence existed revealing the Louisiana legislature's impermissible motives, including statements by the bill's sponsor Senator Keith that "his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs." *Id.* at 592. Furthermore, Senator Keith "repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own." *Id.*

93. *Id.* at 638-39 (Scalia, J., dissenting).

IV. SCIENCE AS GOD: A NEW SECULAR RELIGION?

Fundamentalists have also sought to stifle the teaching of evolution by arguing that belief in evolution constitutes religion.[94] In *Crowley v. Smithsonian Institute*,[95] creationists argued that the use of public funds to inform citizens about evolution violated the Establishment Clause.[96] The plaintiffs claimed that the state was impermissibly establishing a "religion of secular humanism."[97] The *Crowley* court disagreed and stated that the institute's "solid secular purpose of 'increasing and diffusing knowledge among men'" did not equate to the establishment of a religion of secular humanism.[98]

However, some scholars have suggested that an irrational acceptance of science as truth may in fact rise to the level of a religion. In his essay "Cloning Hysteria," Robert Moffat examines the polarized feelings that society holds toward science and attempts to understand the forces behind the two extremely different versions of the future of mankind.[99] One view is irrationally based on science as evil, the other view illogically based on science as infallible.[100]

By ignoring the possibility that science, as a human endeavor, may in fact not be capable of creating a perfect world, individuals irrationally place their faith in the "highly perilous" idea that no "new Dark Ages" may befall mankind.[101] Assuming religion constitutes a belief in the unknown, those who advocate the idea that science will prevail over all the

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94. *See* Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972) (contending that the teaching of the evolutionary theory constitutes an establishment of religion).

95. 462 F. Supp 725 (D.C. 1978).

96. *Id.* at 726. The case arose when fundamentalists challenged the Smithsonian for planning an exhibit based on the theory of evolution. *Id.* The exhibit emphasized both the diversity of all living things and different species' abilities to adapt to their environment, and made no claim that no other theory existed for the origin of life. *Id.*

97. *Id.*

98. *Id.* at 727.

99. *See generally* ROBERT C.L. MOFFAT, *Cloning Hysteria*, *in* REVOLUTIONS, INSTITUTIONS, LAW 127 (Levin & Kevelson eds., 1998).

100. *Id.* Moffat begins his analysis by examining the paranoia many individuals experience when dealing with new scientific ideas and argues that public hysteria often forces politicians to make unfounded policy decisions which deter scientific inquiry that may be beneficial to society. *Id.* at 127-29. Moffat balances the paranoia of those fearful of science with the "utter idolatry" of science by many individuals who equally irrationally believe that science can solve every one of the Earth's present and future problems. *Id.* at 134-35.

101. *Id.* at 134.

Earth's problems certainly can be understood to be believers in a religion of science.[102]

However, although some individuals who blindly worship science could be understood as engaging in a religion of science, the belief in evolution does not constitute a religion, but merely a tentative acceptance of a scientific theory. This conclusion can be reached by examining the essential characteristics of what constitutes a science,[103] as opposed to a religion.[104] Because evolution is guided by natural law and is testable against the empirical world, it differs from religious beliefs, which exist in the absence of empirical support.[105] Furthermore, evolution, unlike religion, is falsifiable; advocates admit that the scientific theory of evolution is only exploratory and by no means infallible.[106]

Thus, although some individuals' beliefs in the infallibility of science may rise to the level of religious worship, the belief in evolution does not constitute religion because it can be tested against the empirical world and it makes no claim of infallibility. Therefore, attempts by fundamentalists to classify a belief in evolution as religion will fail so long as evolutionists continue to approach the subject with academic curiosity rather than uncompromising blind faith.

V. THE NEW STRATEGY: DISCLAIMING DARWIN

The most recent strategy that evolution's opponents have advocated is the placement of disclaimers in science classes and textbooks which comment on the scientific validity of the theory of evolution.[107] Recent

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102. *Id.* Moffat gives the example of the Heaven's Gate Cult as one group that allowed their "idolatry of science" to extend too far. *Id.*

103. The "essential characteristics" of a science are:

> (1) guidance by natural law;
> (2) explanation by reference to natural law;
> (3) empirical experimentation;
> (4) tentative conclusions; and
> (5) falsifiability.

McLean v. Arkansas, 529 F. Supp. 1255, 1267 (E.D. Ark. 1982).

104. *See McLean*, 529 F. Supp. at 1267-68.

105. *See id.*

106. *Id.*

107. *See The Crafty Attacks on Evolution*, N.Y. TIMES, Jan. 23, 2005, at A16.

controversies over disclaimers have erupted in Tangipahoa Parish, Louisiana and Cobb County, Georgia.[108]

A. Freiler v. Tangipahoa Board of Education

In *Freiler v. Tangipahoa Board of Education*,[109] plaintiffs brought suit against the school board to enjoin the board from requiring teachers to read a disclaimer before teaching evolution in public education institutions.[110] The disclaimer read as follows:

> 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.[111]

The District Court found that the disclaimer violated the Establishment Clause of the First Amendment because it lacked a secular purpose.[112] The District Court found no merit in the board's contention that the disclaimer's purpose was to encourage critical thinking.[113] Instead the court found that the actual purpose of the disclaimer was to "satisfy the religious concerns of the majority that the teaching of evolution in public school contradicted lessons taught in Sunday School."[114] The school board appealed to the Fifth Circuit.[115]

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108. *Id.*
109. 185 F.3d 337, 341 (5th Cir. 1999).
110. *See id.* at 341.
111. *Id.*
112. *Id.* at 342.
113. *Id.*
114. *Freiler*, 185 F.3d at 342.
115. *Id.*

The Fifth Circuit cited three tests for evaluating state actions challenged under the Establishment Clause:[116] (1) the *Lemon* test;[117] (2) the "endorsement test";[118] and (3) the "coercion test." The circuit court's *Lemon* test analysis began with an examination of the board's stated purposes for the disclaimer which were "(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offence to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution."[119] Although the circuit court initially gave deference to the school board's stated purposes for the disclaimer, the circuit court held that the first purpose was a "sham" while the second two, although sincere, were not permissible secular purposes.[120]

Furthermore, the disclaimer violated the second "effects" prong of the *Lemon* test because the primary effect of the disclaimer was to "encourage students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular."[121] Finally, the circuit court stated that the disclaimer also violated the endorsement test because the benefit to religion granted by the disclaimer was "more than indirect, remote, or incidental."[122]

The School Board appealed to the U.S. Supreme Court which denied its petition for writ.[123] However, Justice Scalia dissented to the denial and lamented that he would not have a chance to "inter" the *Lemon* test.[124] Justice Scalia also opined that the Court allowed "a Court of Appeals to push the much beloved secular legend of the Monkey Trial one step further."[125]

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116. *Id.* at 343. Although the *Freiler* court cited the three tests, it mentioned that nothing required it to apply all three and actually applied only the *Lemon* test to the facts. *Id.* at 343.

117. *See supra* text accompanying notes 22-36.

118. *See supra* text accompanying note 48.

119. *Freiler*, 185 F.3d at 344.

120. *Id.* at 344-46.

121. *Id.* at 346.

122. *Id.* at 348.

123. Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251 (2000).

124. *Id.* at 1253.

125. *Id.* at 1255.

B. Selman v. Cobb County School District

In *Selman v. Cobb County School District*,[126] plaintiffs[127] challenged the constitutionality of a sticker appearing on textbooks which sought to disclaim evolution.[128] The sticker stated that "[e]volution is a theory, not a fact, regarding the origin of living things."[129] Furthermore, the sticker claimed that "[t]his material should be approached with an open mind, studied carefully, and critically considered."[130] No other theory or topic covered in the public education system was considered for disclaiming.[131]

Although several school board members opined that the purpose of the sticker was neither to promote nor benefit any religious sect, the *Selman* court held that the disclaimer violated the Establishment Clause of the First Amendment by attempting to "accommodate or reduce offense to those persons who hold beliefs that might be deemed inconsistent with the scientific theory of evolution."[132] Although a law that merely accommodates religion cannot be found to violate the First Amendment, any potential endorsement of religion, as ascertained by a disinterested, reasonable observer, can result in a violation of the Establishment Clause.[133] Thus, even though the purpose of the sticker did not violate the First Amendment, because the law conveys an endorsement of religion, the law fails to pass constitutional muster.[134]

Furthermore, the *Selman* court found that the sticker's prominent placement in the front of the textbook coupled with the fact that evolution is the only theory in the entire text being disclaimed creates an "overwhelming presence" for the message which serves to denigrate evolution while simultaneously advancing creation-science.[135] The Court held that the disclaimer operated in violation of the Establishment Clause by telling creation-science advocates that they were politically favored over their opponents.[136] The *Selman* court thus permanently enjoined the

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126. Selman v. Cobb County Sch. Dist., No. Civ. A. 2:02-CV-2325-C, 2005 WL 83829 (N.D. Ga. Jan. 13, 2005).

127. The five plaintiffs were the parents of children of various ages, each of whom attended Cobb County schools. *Id.* at *1.

128. *Id.*

129. *Id.* at *4.

130. *Id.*

131. *See Selman*, 2005 WL 83829, at *4.

132. *Id.* at *16.

133. *Id.* at *19.

134. *Id.*

135. *Id.* at *24.

136. *See Selman*, 2005 WL 83829, at *25.

placement of the stickers in texts and called for removal of all previously placed stickers.[137]

C. *Can a Disclaimer Satisfy the* Lemon *Test?*

Although disclaimers have twice been found to violate the Establishment Clause of the First Amendment, could a local school board or state board of education draft a disclaimer that would withstand a constitutional attack? The answer is probably yes. However, the drafters would have to be sure to avoid the mistakes of their predecessors in choosing the language of the disclaimer in order to ensure that no endorsement of religion could be found within its confines.

One disclaimer which could potentially satisfy *Lemon* was proposed to the school board in Cobb County, Georgia.[138] The disclaimer, proposed by Dr. Wes McCoy[139] read:

> This textbook contains material on evolution, a scientific theory, or explanation, for the nature and diversity of living things. Evolution is accepted by the majority of scientists, but questioned by some. All scientific theories should be approached with an open mind, studied carefully and critically considered.[140]

Although the high school administration favored this language, the School Board rejected it, favoring the stronger wording of the previously proposed disclaimer and generally feeling that the counsel-suggested language would survive a constitutional attack.[141]

McCoy's language is less likely to violate *Lemon*'s second effect prong because it appears to state the nature of the controversy neutrally while refusing to denigrate the evolutionary theory with the negativity the adopted disclaimer contained.[142] Furthermore, McCoy's disclaimer clearly states that "a majority of scientists" accept evolution; language which the school board would likely have demanded be struck since it gives further credence to the theory. Moreover, the McCoy language avoids the pitfall encountered by the school board in *Freiler* by making no mention of the Bible or alternative theories to evolution. Thus, no one could argue that a

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137. *Id.* at *26.

138. *See Selman*, 2005 WL 83829, at *7-8.

139. Dr. McCoy was a high school science teacher in Cobb County who also served on the school board's textbook adoption committee. *Id.* at *7.

140. *Id.*

141. *Id.* at *8.

142. *See generally id.*

particular group is receiving a direct benefit from the disclaimer.[143] Although many evolutionists may take issue with the description of the theory as "an explanation," if that short phrase was excised the disclaimer could hypothetically have been considered constitutionally sound.

However, one could argue that so long as evolution is singled out for disclaiming, certain members of the community will be political favorites receiving the endorsement of the local or state government.[144] Thus, although fundamentalists may not favor the idea, the best path towards success for disclaimers may be to remove the "e-word" from the disclaimer completely. Certainly no court could find an impermissible endorsement of religion in a disclaimer that reads: "The scientific concepts contained in this book are set forth to inform students about the current theories widely accepted in the scientific community. Students are encouraged to exercise critical thinking and approach each issue presented with an open mind." The evolutionists could not find fault with a disclaimer such as this because its purpose, to encourage critical thinking about all scientific theories, is noble and its effect is not tinged by invidious endorsement. The anti-evolutionists may yearn for stronger language, but it appears as if this form of the disclaimer may be the best they can hope for.

VI. CONCLUSION: THE FUTURE OF EVOLUTION

President George W. Bush stated in a 2002 interview that the nation needs "common-sense judges who understand our rights were derived from God" and that "those are the kind of judges I intend to put on the bench."[145] Apparently, the "faith-based" Commander-in-Chief seeks to integrate religion and state to an extent beyond that which former presidents have been willing to tread.[146]

One such indication of the President's willingness to bridge the gap between church and state is evidenced by his recent successful nominations of John Roberts and Samuel Alito, both ardent Roman Catholics and judicial conservatives, as well as his failed nomination of

143. *See generally* Freiler v. Tangipohoa Sch. Bd., 185 F.3d 337, 341 (5th Cir. 1999).

144. *See generally Selman*, 2005 WL 83829, at *19.

145. Alessandra Stanley, *Television Review: Understanding the President and his God*, N.Y. TIMES, Apr. 29, 2004, at E1.

146. *See id.*

Harriet Miers, to fill the vacancies on the Supreme Court left by Justices Sandra Day O'Connor and William Rehnquist.[147]

Many members of the "religious right" who elected Bush for his second term are now relishing the spending of his new "political capital" on volatile issues which they previously lacked the political clout to attack.[148] In local and state governments around the nation, evangelicals and fundamentalists are pushing not only for new anti-evolution legislation, but also for stricter anti-abortion bills, anti-gay marriage amendments, and anti-stem cell research laws.[149] Thus, the future of the evolution-creationism debate appears to be heading into even more polarized waters.[150]

Although efforts to ban teaching the theory of evolution have failed, and attempts to achieve balanced treatment for creationism have been found unconstitutional, the fundamentalists have adopted new strategies, including the use of disclaimers, in order to push their version of science and history into American classrooms. Fundamentalists now cloak their disgust for evolution in theories such as Intelligent Design,[151] and have taken to adopting the old arguments proffered by evolution's advocates as their own, such as the need for the advancement of "academic freedom."

However, the thrusting of religiously-motivated origin theories into science classrooms hinders both academic and religious freedom. It unnaturally forces empirical work to compete with the spiritual world and pits a child's intellect against his faith in what is intended to be a religiously-neutral forum. Such religiously-motivated manipulation cannot comply with the U.S. Constitution and can only create controversy among parents and confusion in the minds of their children.

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147. Bush's nomination of Justice John Roberts was applauded by Christian conservatives, many of whom participated in a well-organized multi-church telecast known as "Justice Sunday" to intimidate Democrats from questioning Roberts on legal issues related to religious faith such as abortion. David D. Kirkpatrick, *For Conservative Christians, Game Plan on the Nominee*, N.Y. TIMES, Aug. 12, 2005, at A14. Justice Samuel Alito, the former federal appeals court judge, has a strong conservative record; his own mother stated prior to his confirmation hearings that "of course he's against abortion," a sentiment which no doubt excited the religious-right. Elizabeth Bomiller & Carl Hulse, *Court in Transition: The Overview; Bush Picks U.S. Appeals Court Judge to Take O'Connors' Court Seat*, N.Y. TIMES, Nov. 1, 2005, at A1. Finally, Harriet Miers, although she withdrew her nomination after much scrutiny by Republicans and Democrats alike, belonged to an evangelical Christian church which was reputedly "almost universally pro-life." Elizabeth Bumiller, *Bush Criticized After Emphasis on Religion of Nominee*, N.Y. TIMES, Oct. 12, 2005, at 23.

148. *See* Banjeree, *supra* note 3.

149. *Id.*

150. *Id.*

151. Laurie Goodstein, *Issuing Rebuke, Judge Rejects Teaching of Intelligent Design*, N.Y. TIMES, Dec. 21, 2005, at A1.

Researchers suggest that the controversy actually quells any competition between the theories since teachers are already widely omitting the topic of evolution because they fear protests from angry parents.[152] By avoiding the topic completely, teachers and school boards deprive children of the necessary educational tools needed to excel in the modern scientific fields. Thus, the debate over evolution has spawned a culture of confusion in American classrooms, the consequences of which will leave a generation of American children unprepared to compete with their peers around the world.

152. *See* Dean, *supra* note 5, at F1.