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COMMENT

QUIET MONKEYS: HOW SILENCE SPEAKS TO THE CONSTITUTIONALITY OF THE ACADEMIC FREEDOM ACTS

E. Scott Copeland[†]

I. INTRODUCTION

In 2008, the Louisiana legislature enacted the Louisiana Science Education Act, designed to allow public school teachers the opportunity to objectively critique scientific controversies.¹ Tennessee followed with a similar statute in 2012.² Those critiques include the origins of life, global warming, and human cloning, but the one critique that has generated the most controversy is the critique of evolution, or more specifically, neo-Darwinism.³

The statutes have not been challenged in court as of yet, but should be found to be constitutional. Specifically, the history of the evolution debate and the opposition to the academic freedom acts suggest that the challenge will be phrased as an Establishment Clause violation. Critics of the statute erroneously connect the statutes to the evolution/creationism debate and decry the statutes as the next attempt to get religious views of science into the classroom.⁴ Consequently, it is helpful to understand the progression of evolution's status from a minor theory of human origins to the zealously guarded "king of the hill," whose defenders strive to ensure that *any* critique on evolution is painted with a religious motive.

The statutes are, at best, tangentially connected to the evolution cases. In *Edwards v. Aguillard*,⁵ the U.S. Supreme Court admitted that scientific

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1. LA. REV. STAT. ANN. § 17:285.1 (2008).

2. TENN. CODE ANN. § 49-6-1030 (West 2012).

3. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

4. Barbara Forrest, *Talking Points Opposing HB 1168*,

CREATIONISMTROJANHORSE.COM, http://www.creationismstrojanhorse.com/HB_1168_Talking_Points.pdf (last visited Jan. 18, 2014).

5. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

critiques of evolution could be allowed—the Court simultaneously disallowed creationism in the classroom.⁶ It is incorrect and misleading to impute a religious motive to the academic freedom acts. Religion might have been a purpose in the cases involving creationism, but it was not a purpose of either legislature when passing the recent academic freedom acts. Both statutes specifically prohibit *any* use of the critiques as a religious exercise and limit the discussion to objective, scientific facts.⁷ The statutes are only an attempt to allow students to develop critical thinking skills and improve scientific understanding.

The moment of silence cases present a strong parallel to the academic freedom acts. The Circuit Courts (and the Supreme Court) have overwhelmingly held that a statute that has a secular purpose but also accommodates religion does not run afoul of the Establishment Clause.⁸ The moment of silence cases show that a school can implement a statute that is facially neutral as to religion—but allows for incidental religious effects—and stay within the confines of the Constitution.⁹ The academic freedom acts do not even go that far. While there might be some incidental effects to religion (akin to a silent prayer left to the individual student) from a scientific critique, religion *cannot* be advanced by the school.¹⁰ If the Court found that the moment of silence statutes do not violate the Constitution, it is likely to find that the academic freedom acts also do not offend the First Amendment. The similarities between the moment of silence statutes and academic freedom acts show that the academic freedom acts are constitutional, both on their face and in application as enacted.

To determine the constitutionality of the academic freedom acts, the court will likely measure the statutes against the *Lemon* test, and possibly the endorsement test, in ascertaining their constitutionality. The court will probably also inquire into the statutes' legislative histories to ascertain the legislatures' purposes in passing the Acts. An examination of the legislative history of both academic freedom acts shows that neither legislature had a religious purpose for enacting the statutes, even if the purpose coincided with the religious intent of individual legislators.¹¹ The statutes also pass muster against the three prongs of the *Lemon* test: they have a clear secular purpose in fostering critical thinking, they do not have a primary effect of

6. *Id.* at 593, 596-97.

7. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

8. *See, e.g.,* *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001).

9. *Id.*

10. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

11. *See* discussion *infra* Part III.A.

advancing or inhibiting religion and they do not require any excessive government entanglement with religion.¹²

Each of the moment of silence statutes was examined under the same test.¹³ The one outlier, which leaves large discretion to the individual courts, is the endorsement test. Although none of the courts examined the moment of silence statutes with the endorsement test, the courts have utilized the endorsement test in other Establishment challenges.¹⁴

When considered in light of the moment of silence cases, the academic freedom acts should be found to be constitutional. They do not coerce a student into any belief. Instead, they allow the student to form his own conclusions about the critiques and they advance the clear secular purpose of fostering the critical thinking and scientific understanding of the individual students.¹⁵ Consequently, the academic freedom acts do not violate the Establishment Clause.

II. BACKGROUND

A. *History of the Creation/Evolution Debate*

The teaching of human origins in the public schools looks entirely different than it did one hundred years ago.¹⁶ The teaching of evolution has completely eroded and replaced the Biblical worldview of teaching human origins. In a series of contentious cases, the courts first famously allowed a statute that prohibited the teaching of human evolution,¹⁷ then held that evolution could not be kept out of the classroom, allowing it to be taught alongside Biblical origins,¹⁸ and finally threw out any creationist view of origins entirely.¹⁹ Evolution became firmly entrenched as the only court-approved origins theory and evolution supporters vehemently opposed any viable alternatives, keeping the alternative theories at bay by labeling them as creationism.²⁰ The court decisions subsequently supported evolution,

12. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

13. See discussion *infra* Part II.B–F.

14. See, e.g., *Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573 (1989).

15. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

16. Robert E. Morelli, *Survival of the Fittest: An Examination of the Louisiana Science Education Act*, 84 ST. JOHN'S L. REV. 797, 800-17 (2010).

17. See *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

18. See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

19. See *Edwards v. Aguillard*, 482 U.S. 578 (1987).

20. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 717 (M.D. Pa. 2005).

going as far as to wade into the waters of determining the criteria of a scientific theory,²¹ well outside of the proper scope of the judiciary.

The modern controversy surrounding the teaching of the origin of humans in public schools began with the famous *Scopes* trial in 1927.²² John Scopes was charged with violating Chapter 27 of the Acts of 1925, known as the Tennessee Anti-Evolution Act, which made it unlawful to teach that “man has descended from a lower order of animals.”²³ The American Civil Liberties Union (“ACLU”) decided to challenge the constitutionality of Tennessee’s laws and tested the anti-evolution laws.²⁴ That test was not successful and the court did not allow evolution in the classroom,²⁵ but the camel’s nose of evolution was under the proverbial tent.

Scopes was subsequently convicted and fined one hundred dollars, but the Tennessee Supreme Court overturned the fine on a technicality.²⁶ The court likened the statute banning evolution to the act of the State as a corporation, which allowed the corporation to dictate the “character of work the master’s servant shall, or rather shall not, perform.”²⁷ The court held that the statute did not violate the Tennessee Constitution or the Fourteenth Amendment to the Constitution of the United States and allowed the continued ban on teaching evolution in public schools.²⁸ In contradiction to modern jurisprudence, the court also dismissed the argument concerning the intent of the legislature in passing the act.²⁹ The court indicated that a statute should be judged by the effects that follow its enforcement, not the motives that precede its enactment.³⁰ While *Scopes* did not represent a victory for the supporters of evolution, it did represent the first challenge to the then dominant theory of human origins.³¹

21. *Id.* at 735-46.

22. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

23. *Id.* at 364 (internal quotation marks omitted).

24. *ACLU History: The Scopes ‘Monkey Trial,’* ACLU, <https://www.aclu.org/religion-belief/aclu-history-scopes-monkey-trial> (last visited Dec. 16, 2014).

25. *Scopes*, 289 S.W. at 367. The court held that the trial judge exceeded his jurisdiction in levying the fine, as only a jury could impose the penalty, and subsequently reversed the trial court’s decision. *Id.*

26. *Id.*

27. *Id.* at 365.

28. *Id.*

29. *Id.*

30. *Id.* at 367.

31. Morelli, *supra* note 16, at 800.

1. Creationism *and* Evolution in the Classroom

Evolution took its next major step to dominance when the Supreme Court held in *Epperson v. Arkansas*³² that a state could not ban the teaching of evolution in the public school classroom.³³ Evolution found its way into the classroom and existed alongside Biblical origins in a tenuous relationship. The forty-year absence of a challenge to the teaching of human origins ended in 1968 when a newly hired science teacher in Little Rock, Arkansas challenged a 1928 state statute that forbade the teaching of the “theory or doctrine that mankind ascended or descended from a lower order of animals” in any state-supported school or university.³⁴ The teacher sought a declaration that the statute was void and asked the court to enjoin the State and the school system officials from dismissing her for a violation of the statute.³⁵

In *Epperson*, the Court analyzed the statute under the First Amendment of the Constitution and concluded that “the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.”³⁶ The Court refused to view the statute as an act of religious neutrality.³⁷ Instead, it characterized the act as an attempt to block a particular theory that was in conflict with the Biblical account of the origin of man.³⁸ Accordingly, the Court determined that the Arkansas statute was unconstitutional because it was “contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.”³⁹ The Court concluded that the State could not adopt practices that lend *direct* aid to any religion.⁴⁰ In the Court’s view, the State had no legitimate interest in protecting any or all religions from views that are distasteful to them.⁴¹ As a result of *Epperson*, the State was unable to restrict the teaching of evolution in the public school classroom and evolution moved alongside Biblical origins as alternative theories in the classroom.⁴²

32. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

33. *Id.* at 109.

34. *Id.* at 98-99.

35. *Id.* at 100.

36. *Id.* at 106.

37. *Id.* at 109.

38. *Id.*

39. *Id.*

40. *Id.* at 107.

41. *Id.*

42. *Id.* at 109.

Shortly thereafter, the Court initiated the modern jurisprudence in regard to Establishment Clause analysis. In *Lemon v. Kurtzman*,⁴³ challengers to Pennsylvania and Rhode Island statutes contended that the statutes provided aid to church-related elementary and secondary schools.⁴⁴ In determining that both statutes violated the Establishment Clause, the Court first articulated the *Lemon* test that has become the standard for Establishment Clause analysis.⁴⁵ The *Lemon* test consists of three prongs: (1) the legislature must have adopted the law with a secular purpose, (2) the statute's principal or primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not result in an excessive entanglement of government with religion.⁴⁶

The Court applied the first prong of the test and concluded that the legislatures did not intend to advance religion.⁴⁷ In fact, both statutes clearly stated that the purpose of the statutes was to enhance secular education.⁴⁸ The Court did not address the second prong, but it found a violation of the third prong, since the statute created an excessive entanglement between the government and religion.⁴⁹ Although commentators have criticized the *Lemon* test for its questionable effectiveness,⁵⁰ the test continues to be the controlling standard for the Court's approach to Establishment Clause cases.⁵¹

The *Lemon* test was subsequently applied in *Edwards v. Aguillard*,⁵² which involved a Louisiana statute⁵³ ("Louisiana Creationism Act") that forbade the teaching of the theory of evolution in public and secondary schools *unless* it was accompanied by instruction in the theory of "creation

43. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

44. *Id.* at 606.

45. *Id.* at 625; Louis J. Virelli III, *Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 435 (2006).

46. *Lemon*, 403 U.S. at 612-13.

47. *Id.* at 613.

48. *Id.*

49. *Id.* at 613-14.

50. Virelli, *supra* note 45, at 434-37. Virelli criticizes the under-inclusiveness of the *Lemon* test by arguing that a statute is deemed unconstitutional only if it is found to have no secular purpose. *Id.* at 436-37. He also argues that the test is under-inclusive because it applies only where the primary consequence of a statute is to advance or inhibit religion and does not account for the difficulty in measuring or the ease of disguising the primacy of a particular statute. *Id.* at 436.

51. *Id.* at 435.

52. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

53. LA. REV. STAT. ANN. §§ 17:286.1-17:286.7 (1982).

science.⁵⁴ The United States Supreme Court affirmed the Court of Appeals' decision, holding that this statute violated the Establishment Clause.⁵⁵

The Court applied the *Lemon* test, focusing primarily on the first prong and the motivations of the legislators in enacting the legislation.⁵⁶ The Court concluded that the purpose of the Creationism Act was to promote a particular religious viewpoint.⁵⁷ Ironically, in a foreshadowing of the academic freedom acts, the Court stated that its holding did not imply "that a legislature could never require that scientific critiques of prevailing scientific theories be taught."⁵⁸ Thus, evolution moved from being the outsider attempting to win acceptance in the classroom to pushing aside any alternative theory that could be construed to "achieve a religious purpose."⁵⁹

2. Evolution Disclaimers

Interestingly, scientific critiques were the subject of three more cases involving alternatives to evolution through the use of disclaimers. Evolution disclaimers are statements that encourage students to consider scientific critiques to evolution.⁶⁰ They are initiated by the local school boards that mandate the disclaimers to be delivered to the district's students.⁶¹ The disclaimers have two basic varieties in the presentation of critiques of evolutionary theory: statements read before a discussion of evolution in the classroom⁶² or textbook stickers that remind students that evolution is only a theory.⁶³

In *Freiler v. Tangipahoa Parish Board of Education*,⁶⁴ a group of parents brought a challenge to the local school board's resolution calling for the reading of a prepared statement that encouraged students to use critical thinking and "examine each alternative toward forming an opinion."⁶⁵ The

54. *Edwards*, 482 U.S. at 581.

55. *Id.* at 596-97.

56. *Id.* at 587.

57. *Id.* at 593.

58. *Id.*

59. *Id.* at 597.

60. *Virelli*, *supra* note 45, at 431.

61. *Id.*

62. *Freilier v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

63. *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006).

64. *Freilier*, 185 F.3d 337.

65. *Id.* at 341.

resolution mandated that the statement be read prior to any discussion of evolution in elementary or high school.⁶⁶

Applying the first prong of the *Lemon* test, the Fifth Circuit held that the school board's statement fulfilled two secular purposes in disclaiming orthodoxy of belief and reducing offense to students and parents.⁶⁷ Nonetheless, the court held that the statement violated the second prong of the test by impermissibly advancing religion.⁶⁸ The court stated, "[T]he primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical view of creation."⁶⁹ Consequently, the court held that the statute authorizing the disclaimers impermissibly advanced religion.⁷⁰

The controversy centered on the inclusion of the phrase "Biblical version of Creation" in the statement.⁷¹ The court found that the "benefit to religion conferred by the reading of the Tangipahoa disclaimer is more than indirect, remote or incidental."⁷² In looking to the effect of the disclaimer, the court did not consider the relative weight of those effects or whether they were even intended or foreseen by the legislature.⁷³ Instead of looking to whether the *primary* effect of the disclaimer was to advance or inhibit religion, the court simply concluded that religious effects were sufficient to invalidate the disclaimer.⁷⁴ Thus, the court's decision did not speak to the constitutionality of scientific critiques of evolution, but whether the resolution gave some type of advantage to religion.

Critiques of evolution encountered another hurdle with the introduction of the endorsement test.⁷⁵ In *Selman v. Cobb County School District*,⁷⁶ a case involving a textbook disclaimer, the district court came to a similar

66. *Id.*

67. *Id.* at 345-46.

68. *Id.* at 348.

69. *Id.* at 346.

70. *Id.* at 348.

71. *Id.* at 341.

72. *Id.* at 348.

73. Virelli, *supra* note 45, at 440-41. Virelli argues that the approach of the court is overbroad because legislation cannot be held to be unconstitutional because it has a single, non-negligible religious effect. *Id.* The over-inclusiveness may lead to a chilling on the legislative process. *Id.* at 441.

74. *Id.*

75. *Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573 (1989). The "reasonable observer" is imbued with the "history and ubiquity" of a practice. The Court states that the "history and ubiquity" provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. *Id.* at 630.

76. *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006).

conclusion as the court in *Freiler*, concluding that the disclaimers impermissibly entangled the school board with religion.⁷⁷ The school board in Cobb County, Georgia determined that a disclaimer sticker would be placed on the inside of the new science textbooks that read, “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.”⁷⁸

While the district court found that the disclaimer had a secular purpose, in line with the first prong of the *Lemon* test, it bypassed the second prong.⁷⁹ Instead of looking at the effects of the disclaimer, the court looked to the “events that led to the sticker’s adoption,” and concluded that the sticker made those that endorse evolution feel like political outsiders.⁸⁰ The court applied the endorsement test and found that the “reasonable observer” knew the history of the events that led to the adoption of the disclaimer sticker.⁸¹ Hence, the reasonable observer would therefore interpret the sticker to convey a message of government endorsement of religion.⁸²

The district court reasoned that, because there had been historical opposition to evolution by “Christian fundamentalists . . . throughout the nation,” the reasonable observer would “infer that the School Board’s problem with evolution to be that evolution does not acknowledge a creator.”⁸³ Such an analysis is a non sequitur and provides no framework for any type of future analysis of disclaimers.⁸⁴ The fact that religious groups supported a statute in another setting, or at another time, is not indicative that the statute at hand is similarly supported, if that fact should even be dispositive at all. Such a test simply leaves the court with the ability to choose how much knowledge the “reasonable observer” possesses, which may, as seen in *Selman*, turn the case.

On appeal, the Eleventh Circuit found the record to be incomplete and vacated the district court’s decision, remanding the case for additional proceedings.⁸⁵ Faced with the expense of re-litigating, the School Board agreed to a settlement and removed the stickers.⁸⁶

77. *Id.* at 1328.

78. *Id.* at 1324.

79. *Id.* at 1327.

80. *Id.* at 1327-28.

81. *Id.* at 1328.

82. *Id.*

83. *Id.*

84. Virelli, *supra* note 45, at 442.

85. *Selman*, 449 F.3d at 1338.

86. Press Release, Cobb County School District, Agreement Ends Textbook Sticker Case (Dec. 19, 2006) (on file with author) *available at*

3. Intelligent Design and Disclaimers

Finally, in *Kitzmiller v. Dover Area School District*,⁸⁷ a case that occurred simultaneously with *Selman*, the District Court for the Middle District of Pennsylvania determined that no disclaimer could be read before the teaching of evolution.⁸⁸ The court held that the disclaimer pointed to Intelligent Design (“ID”)⁸⁹ and therefore violated the Establishment Clause.⁹⁰ The disclaimer alerted students that evolution is a theory and not a fact.⁹¹ The disclaimer pointed out that there is no evidence for some of the gaps in evolution, and it mentioned ID as an alternative explanation for the origin of life.⁹² The disclaimer also pointed students to a textbook that referenced ID.⁹³

The court in *Kitzmiller* began its exhaustive analysis of the Dover School Board disclaimer by applying the endorsement test.⁹⁴ It concluded that a reasonable objective observer, either student or adult, would consider the disclaimer to be an endorsement of religion.⁹⁵ As part of the endorsement test analysis, the court then laid out a lengthy explanation for the basis of ID, predominantly to attribute a religious motive to ID.⁹⁶ ID is no more religious than evolution,⁹⁷ but the court attributed a religious motive to ID because ID posits a Designer⁹⁸ despite the fact that ID makes no attempt to identify any Designer.⁹⁹ Having thus burdened the reasonable observer with

http://ncse.com/files/pub/legal/selman/retrial2006/20061219_Sticker_Agreement_Cobb_website.pdf.

87. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

88. *Id.* at 766.

89. Stephen C. Meyer, *A Scientific History—and Philosophical Defense—of the Theory of Intelligent Design*, 7 Religion - Staat - Gesellschaft (Oct. 7, 2008), available at <http://www.discovery.org/a/7471>. Intelligent Design is an “evidence-based scientific theory about life’s origins that challenges strictly materialistic views of evolution.” *Id.* “[I]ntelligent design holds that there are tell-tale features of living systems and the universe . . . that are best explained by an intelligent cause rather than an undirected material process.” *Id.*

90. *Kitzmiller*, 400 F. Supp. 2d at 709.

91. *Id.* at 708.

92. *Id.*

93. *Id.* at 709.

94. *Id.* at 714-34.

95. *Id.* at 723-24, 731.

96. *Id.* at 716-23.

97. Johnny Rex Buckles, *The Constitutionality of the Monkey Wrench: Exploring the Case for Intelligent Design*, 3 LIBERTY U. L. REV. 329, 370-73 (2009).

98. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 720 (M.D. Pa. 2005).

99. David K. DeWolf, John G. West & Casey Luskin, *Intelligent Design Will Survive Kitzmiller v. Dover*, 68 MONT. L. REV. 7, 28-29 (2007).

the “history” of the evolution debate, the court had little problem in holding that the disclaimer violated the Establishment Clause.¹⁰⁰

In an unprecedented and controversial step,¹⁰¹ the court also took upon itself the task of defining “science,”¹⁰² concluding that Intelligent Design is not science.¹⁰³ It interpreted a definition of “science” from the National Academy of Sciences,¹⁰⁴ and concluded that ID cannot be a credible alternative to evolution.¹⁰⁵ The determination by the court of a question that has vexed scientists for centuries represented uncharted territory in the dance between science and religion. One commentator noted that “[t]he part of *Kitzmiller* that finds ID not to be science is unnecessary, unconvincing, not particularly suited to the judicial role, and even perhaps dangerous both to science and to freedom of religion.”¹⁰⁶

Finally, the court applied the first and second prongs of the *Lemon* test to the disclaimer.¹⁰⁷ It found that the legislative history and motives of the school board were a pretext to the board’s real purpose, which belied any secular purpose of the disclaimer.¹⁰⁸ The court also stated that the effect of the disclaimer was to “impose a religious view of biological origins” on the classroom.¹⁰⁹ There are, however, multiple questions as to the validity of the court’s determination.¹¹⁰ The uncertainty of the endorsement test was clearly seen in *Kitzmiller*, with the “reasonable observer” given “knowledge” that was falsely attributed to ID, incorrectly linking ID to creationism, and creating an Establishment Clause violation.

The progression of evolution from the outlier to the dominant theory of origins in the public school classroom has been slow but steady.¹¹¹ As a result of the removal of religious origins from the classroom, even a critique of evolution with legitimate secular purposes that is supported by religious

100. *Kitzmiller*, 400 F. Supp. 2d at 746.

101. DeWolf, *supra* note 99, at 27-42.

102. *Kitzmiller*, 400 F. Supp. 2d at 735.

103. *Id.* at 745-46.

104. *Id.* at 735-36.

105. *Id.* at 736.

106. Jay D. Wexler, *Kitzmiller and the “Is It Science?” Question*, 5 FIRST AMEND. L. REV. 90, 93 (2006).

107. *Kitzmiller*, 400 F. Supp. 2d at 763-64.

108. *Id.* at 763.

109. *Id.* at 764.

110. DeWolf, *supra* note 99, at 54-55. “[Judge Jones’s] decision relies upon a highly selective recitation of the facts, an obviously inadequate understanding of the scientific issues involved, and a distorted understanding of the principle of religious neutrality. As a result, Judge Jones’s opinion will serve future judges only with an example of how not to analyze the issues that were presented to him.” *Id.* at 55.

111. Morelli, *supra* note 16, at 800-17.

persons can be rejected.¹¹² A critique or alternative theory is attributed to a religious motive, as seen in *Kitzmiller*, and linked to the creationism cases, with which the critique may have absolutely no connection.¹¹³ Hence, critiques must overcome the label of being “unscientific” because they question the current dominant theory, but must also bear the burden of the false imputation of motives that are leveled at such accusations.

B. *Moment of Silence Cases*

Another series of Establishment Clause cases that occurred over the last few decades involved statutes that resemble the academic freedom acts. Such cases give a strong indication of how a court may hold in analyzing the constitutionality of the academic freedom acts.¹¹⁴ These cases involve the statutory allowance of a “moment of silence” in public schools, which simply allows for a prescribed moment of silence, usually at the beginning of the school day.¹¹⁵ A student can use the moment for whatever purpose he or she decides, as long as the student remains silent.¹¹⁶ The moment of silence statutes do not prescribe any religious activity and allow the student to choose how to use that time.¹¹⁷ There may be incidental effects to religion if a student chooses to pray silently, but the decision of how to use the time is left to the individual student and not the school or the teacher.¹¹⁸ Similarly, the academic freedom acts do not mandate how students utilize the scientific critiques of evolution.¹¹⁹ The academic freedom acts are inherently neutral as to religion.¹²⁰ In fact, the academic freedom acts go even further than the moment of silence statutes in disallowing any

112. Casey Luskin, *Does Challenging Darwin Create Constitutional Jeopardy? A Comprehensive Survey of Case Law Regarding the Teaching of Biological Origins*, 32 *HAMLIN L. REV.* 1, 56 (2009).

113. Morelli, *supra* note 16, at 799.

114. *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010); *Croft v. Governor of Tex.*, 562 F.3d 735 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001); *Bown v. Gwinnett Cnty. Sch. Bd.*, 112 F.3d 1464 (11th Cir. 1997); *May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985).

115. *See, e.g., Cooperman*, 780 F.2d at 241.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See, e.g., LA. REV. STAT. ANN.* § 17:285.1 (2008). The statute does not mention what inferences the student should draw from the critiques of evolution. *Id.*

120. *Id.* The statute expressly notes that it cannot be used for any religious purpose. *Id.*

religious use of the critiques while the moment of silence cases often expressly allow prayer at the student's discretion.¹²¹

Federal courts have heard six major cases that examined moment of silence statutes and, in the overwhelming majority of the cases, the courts found that the statutes violated neither the *Lemon* test nor consequently, the Establishment Clause.¹²² The two cases in which the statutes were struck down turned on: (1) the fact that the bill's sponsor refused to offer any secular purpose for the statute in *Wallace v. Jaffree*,¹²³ and (2) the fact that the Third Circuit could not find the district court's fact-finding of a pretext to be clearly erroneous in *May v. Cooperman*.¹²⁴ Both cases clearly suggest that a clear secular purpose under the first *Lemon* prong would have led the courts to find that the statutes did not violate the Establishment Clause. Hence, the Establishment Clause analysis of these statutes under the *Lemon* test is instructive as to how a court might hold in reviewing the academic freedom acts.

1. *Wallace v. Jaffree*

The only Supreme Court case that examined a moment of silence statute was *Wallace v. Jaffree*.¹²⁵ In *Wallace*, the Court considered whether an Alabama statute mandating a moment of silence in public school was constitutional.¹²⁶ The appellee filed a claim on behalf of his minor children, challenging the constitutionality of three statutes.¹²⁷ The three statutes authorized a period of silence for "meditation," "for meditation or voluntary prayer," and for teachers to lead willing students in prayer.¹²⁸ Each statute was passed in sequential order.¹²⁹ The court of appeals had found the first and third statutes to be constitutional and unconstitutional, respectively.¹³⁰ The second statute, authorizing "meditation or voluntary prayer" was the only remaining statute considered by the Court.¹³¹

121. See, e.g., *Croft v. Governor of Tex.*, 562 F.3d 735, 738 (5th Cir. 2009). The statute in *Croft* expressly allows for prayer. *Id.*

122. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 520 (7th Cir. 2010); *Croft v. Governor of Tex.*, 562 F.3d 735, 750-51 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265, 282 (4th Cir. 2001); *Bown v. Gwinnett Cnty. Sch. Bd.*, 112 F.3d 1464, 1474 (11th Cir. 1997).

123. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

124. *May v. Cooperman*, 780 F.2d 240, 252 (3rd Cir. 1985).

125. *Wallace*, 472 U.S. 38.

126. *Id.* at 41-42.

127. *Id.* at 42-43.

128. *Id.* at 40.

129. *Id.*

130. *Id.* at 41.

131. *Id.* at 41-42.

The Court applied the *Lemon* test to the statute and looked specifically at the first prong to determine if the statute had any secular purpose.¹³² The analysis required the Court to look at both the language of the statute and the “legislative intent of those responsible for its enactment.”¹³³ In its analysis of the text of the statute, the Court noted that the only significant difference between the statute and its predecessor was the inclusion of the phrase “or voluntary prayer.”¹³⁴ It concluded that the addition of the text was to “characterize prayer as a favored practice.”¹³⁵

The Court also found that there was no secular purpose behind the enactment of the statute.¹³⁶ The State Senator that introduced the bill expressly admitted that the bill “was an effort to return voluntary prayer to the public schools.”¹³⁷ Although the Court noted that a statute was not required to have “exclusively secular objectives,”¹³⁸ the Senator confirmed the lack of *any* secular purpose when he stated: “No, I did not have any other purpose in mind.”¹³⁹ Subsequently, the Court determined that the purpose behind the text of the statute and the intent of the legislator was religious in nature—in violation of the First Amendment¹⁴⁰—and declined to address the second or third prongs of the *Lemon* test.¹⁴¹

The relevant issue in *Wallace* was not that the statute was found to be unconstitutional, but that the Court seemed ready to accept a secular purpose for the statute if one had been offered. The State presented absolutely no evidence of a secular purpose and left the Court no other alternative.¹⁴² Justice Powell, in his concurrence noted that he would have voted to uphold the statute if “it also had a clear secular purpose.”¹⁴³ Hence, the holding in *Wallace* made it clear that a statute must have a clear secular purpose, even if there may be a religious component to the statute.

132. *Id.* at 56.

133. Ralph D. Mawdsley, *One Minute of Required Silence in Texas Classrooms: The Fifth Circuit Upholds the State’s Moment of Silence Amendments*, 246 EDUC. L. REP. 589, 592 (2009).

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

135. *Id.* at 60.

136. *Id.* at 59-60.

137. *Id.* at 56-57.

138. *Id.* at 64 (Powell, J., concurring); see *Edwards v. Aguillard*, 482 U.S. 578, 610-11(1987) (Scalia, J., dissenting); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 296-303 (1963).

139. *Wallace*, 472 U.S. at 57.

140. *Id.* at 61.

141. *Id.* at 60-61.

142. *Id.* at 57.

143. *Id.* at 66.

2. *May v. Cooperman*

Shortly after *Wallace*, the Third Circuit considered a challenge to a New Jersey statute mandating that teachers in public schools allow students one minute for “quiet and private contemplation or introspection.”¹⁴⁴ The statute did not mention prayer in any form; however, several public school pupils, parents of pupils, and a teacher challenged the statute.¹⁴⁵ The plaintiffs filed a verified complaint seeking a declaratory judgment that the statute was unconstitutional and the district court issued a temporary restraining order enjoining the enforcement of the statute prior to it being implemented.¹⁴⁶

Relying on the recent *Wallace* decision, the court applied the *Lemon* test to analyze the statute.¹⁴⁷ Because the Third Circuit disagreed with the reasoning of the district court’s *Lemon* test analysis, the Third Circuit reversed the order and began with the question of whether the statute allowed for excessive entanglement of the government and religion. The district court had decided that the possible divisiveness of the statute equaled entanglement,¹⁴⁸ but the Third Circuit disagreed, noting that divisiveness was allowed when government accommodated religion, and found that there was no excessive entanglement.¹⁴⁹

The Third Circuit also disagreed with the district court’s finding that the primary purpose of the statute was to inhibit or advance religion.¹⁵⁰ The district court read the statute as mandatory in that it required students to either pray or to accommodate those students who chose to pray.¹⁵¹ The district court concluded that the State had consequently advanced religion.¹⁵² The Third Circuit made an interesting admission by noting that the district court had determined that “[a] short period of group silence at the commencement of the day” was a form of prayer for one of the major religious bodies in New Jersey.¹⁵³ The district court then made the assumption that silence was equal to prayer for most students.¹⁵⁴ The Third

144. *May v. Cooperman*, 780 F.2d 240, 241 (3d Cir. 1985).

145. *Id.*

146. *Id.*

147. *Id.* at 250.

148. *Id.* at 247.

149. *Id.*

150. *Id.* at 250.

151. *Id.* at 248.

152. *Id.*

153. *Id.*

154. *Id.*

Circuit, nonetheless, disagreed and determined that accommodation of a time for silent, voluntary prayer did not inhibit or advance religion.¹⁵⁵

Finally, the Third Circuit considered the first *Lemon* prong and noted the difficulty of the legislative purpose inquiry.¹⁵⁶ The Third Circuit compared the statute to the statutes in *Wallace* and determined that it was most like the statute that was not contested in *Wallace* since prayer was not mentioned.¹⁵⁷ The Third Circuit also noted that, in the abstract, the statute at bar would *not* be invalid based on the Supreme Court's reasoning in *Wallace*.¹⁵⁸ Nonetheless, the Third Circuit considered the finding of the district court, in which the district court determined that the only stated secular purpose of the statute—to provide a transition from non-school life to school—was a pretext.¹⁵⁹ The district court relied on the history of other legislation in the New Jersey legislature and the previous activities of one co-sponsor of the legislation to reach its conclusion.¹⁶⁰

Subsequently, because the Third Circuit could not say that the finding was clearly erroneous, it accepted the district court's determination of the purpose of the legislation.¹⁶¹ The Third Circuit noted that the Supreme Court in *Wallace* specifically required a secular purpose when upholding the constitutionality of a statute.¹⁶² Since there was no secular purpose that was not rejected by the district court, the Third Circuit held the New Jersey Statute to be unconstitutional under the First Amendment.¹⁶³

The *Cooperman* analysis, coming so quickly on the heels of the *Wallace* decision, has been attacked as too narrowly defining the secular purpose prong:

The problem with the *Cooperman* analysis . . . is the erroneous assumption that a literal secular purpose is required. The first prong of the *Lemon* test requiring a secular legislative purpose is an unfortunate shorthand reformulation of the principle that the statute violates the establishment clause if its purpose is either the advancement or inhibition of religion. A statute having no specifically articulated secular purpose, however, does not necessarily promote or inhibit religion as its purpose. A statute

155. *Id.* at 250.

156. *Id.*

157. *Id.*

158. *Id.* at 251.

159. *Id.*

160. *Id.* at 251-52.

161. *Id.*

162. *Id.* at 251.

163. *Id.* at 253.

such as the one at issue in *Cooperman* provides those students who so desire an opportunity to pray. The statute does not in that respect have a purely secular purpose. The Supreme Court, however, has acknowledged that even a silence statute “motivated in part by a religious purpose may satisfy the first criterion” of the *Lemon* test.¹⁶⁴

Had the court in *Cooperman* considered that a statute can have a purpose that is not purely secular and still not violate the purpose prong, the court may have found that the statute did not violate the First Amendment. The Third Circuit, however, felt that it was bound by the language in *Wallace* mandating a secular purpose.¹⁶⁵ The Third Circuit did not discuss the explanation by the Court in *Wallace* that a statute can be motivated—at least in part—by a religious purpose and not violate the First Amendment.¹⁶⁶ Had the Third Circuit done so, it is reasonable to think that the court would have upheld the statute, having found no excessive entanglement or primary effect of advancing or inhibiting religion. The message of the court’s holding is that a clear secular purpose for a statute is a necessity, regardless of whether any other religious purposes for the statute exist.¹⁶⁷

3. *Bown v. Gwinnett County School Board*

In *Bown v. Gwinnett County School Board*,¹⁶⁸ the Federal Circuits began to move away from the strict interpretation of *Wallace* by the Third Circuit in *Cooperman*.¹⁶⁹ The Georgia State Legislature passed the “Moment of Quiet Reflection in Schools Act,” which mandated that, at the beginning of each public school day, the teacher shall conduct a “brief period of quiet reflection for not more than 60 seconds.”¹⁷⁰ The Act also specified that the period of quiet reflection was not to be used as a religious exercise and that student-led voluntary prayers at school events were not to be prevented as a result of the Act.¹⁷¹ The plaintiff, a teacher in the school system, was

164. Mary Ellen Quinn Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1036 (1989).

165. *Cooperman*, 780 F.2d at 253.

166. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985); see Johnson, *supra* note 164, at 1036 n.102.

167. *Cooperman*, 780 F.2d at 253.

168. *Bown v. Gwinnett Cnty. Sch. Bd.*, 112 F.3d 1464 (11th Cir. 1997).

169. *Id.* at 1469. The court acknowledged that a legislative purpose does not have to be exclusively secular. *Id.*

170. *Id.* at 1466.

171. *Id.* The legislature added the language about student-led prayer out of concern that the clause disallowing the moment of silence to be used as a religious exercise might be construed to deny voluntary, student-led prayer at any other time of the day. *Id.* at 1471.

opposed to the Act and refused to comply.¹⁷² He was terminated and subsequently filed a complaint, alleging that the Act was unconstitutional.¹⁷³

The court looked to the *Lemon* test in its analysis of the Act's constitutionality.¹⁷⁴ In determining the secular purpose of the Act, the court noted that the express language of the statute demonstrated the secular purpose.¹⁷⁵ The text in one subsection expressly stated that the "moment of quiet reflection . . . is not intended to be and shall not be conducted as a religious service or exercise."¹⁷⁶ The court also looked to the purpose of the Act's primary sponsor when he stated that he introduced the bill "as one way of addressing the problems of violence which Georgia's children face."¹⁷⁷ In looking to the text of the Act and the legislative history, the court found that the Act had a clearly secular purpose and satisfied the first prong of the *Lemon* test.¹⁷⁸

The court continued its analysis and determined that there was no violation of the second prong: the primary effect of the Act was not to advance or inhibit religion.¹⁷⁹ It pointed out that the Act "mandates a moment of *quiet reflection* not a moment of silent prayer."¹⁸⁰ The court also noted that there was no government coercion of students to engage in religious activity,¹⁸¹ and that the State did not create a situation in which students were pressured, publicly or by peers, to participate.¹⁸²

Finally, the court determined that there was no excessive entanglement with religion.¹⁸³ The teachers and students were to remain silent during the moment of quiet reflection.¹⁸⁴ Since the teachers neither participated in nor monitored the content of any prayers, there could be no excessive entanglement.¹⁸⁵ In *Bown*, the court reaffirmed that the clear secular purpose of a statute is usually the key to its constitutionality.¹⁸⁶ Both *Wallace* and *Cooperman* turned on the clear secular purpose of the statutes

172. *Id.* at 1467-68.

173. *Id.* at 1468.

174. *Id.*

175. *Id.* at 1469.

176. *Id.*

177. *Id.* at 1471.

178. *Id.* at 1472.

179. *Id.* at 1473.

180. *Id.* at 1472.

181. *Id.* at 1473.

182. *Id.*

183. *Id.* at 1474.

184. *Id.*

185. *Id.*

186. *Id.*

and the court in *Bown* held the statute to be constitutional since it had a secular purpose, even if individual legislators had spoken to a religious purpose.¹⁸⁷

4. *Brown v. Gilmore*

In *Brown v. Gilmore*,¹⁸⁸ the Fourth Circuit reaffirmed the constitutionality of moment of silence statutes, even if the statute expressly allows silent prayer as one option among others for the prescribed time limit.¹⁸⁹ The court considered the challenge to a Virginia statute amendment, which mandated that each school division in the state establish a “minute of silence.”¹⁹⁰ Each student was permitted, “in the exercise of his or her individual choice, [to] meditate, pray or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.”¹⁹¹ The court, in the facial challenge to the statute, looked to the “text, context and legislative history” to determine if the statute violated the three prongs of the *Lemon* test.¹⁹²

The court initially turned to the first prong of the *Lemon* test to determine whether the statute had a secular purpose, noting that the purpose did not have to be “exclusively secular.”¹⁹³ Opponents attacked the statute for expressly allowing a student to pray during the moment of silence, but the court noted that the text also allowed for any other non-distracting purpose.¹⁹⁴ The simple allowance of a voluntary silent prayer was an accommodation of religion that had a secular purpose.¹⁹⁵ The Fourth Circuit found that the statute had dual legitimate purposes—one that was clearly secular and one that was an accommodation of religion—and could not “run afoul of the first *Lemon* prong.”¹⁹⁶

The court considered the final two prongs of the *Lemon* test and quickly found that the statute violated neither prong.¹⁹⁷ The court specifically noted that the statute, on its face, was neutral “between religious and nonreligious modes of introspection.”¹⁹⁸ In allaying accusations that the statute would

187. *Id.* at 1471-72.

188. *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001).

189. *Id.* at 281-82.

190. *Id.* at 270.

191. *Id.*

192. *Id.* at 275.

193. *Id.* at 276 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984)).

194. *Id.*

195. *Id.*

196. *Id.* at 277.

197. *Id.* at 277-78.

198. *Id.*

lead students to believe that the State was endorsing prayer, the court dismissed those fears as speculative at best.¹⁹⁹ The court did not allow speculative fears to strike down a statute that was facially neutral between religious and nonreligious activity.²⁰⁰ The court also found that the statute did not violate the third prong of the *Lemon* test—causing state entanglement with religion.²⁰¹ Any involvement of the State in religion was negligible and only involved the State in informing students that prayer was a permissible option during the moment of silence.²⁰² The Fourth Circuit concluded that the statute permissibly accommodated religion under the *Lemon* test,²⁰³ and subsequently found that the statute did not run afoul of the Establishment Clause.²⁰⁴ Upon appeal to the United States Supreme Court, the Court allowed the Fourth Circuit's decision to stand, refusing to issue an injunction and denying certiorari.²⁰⁵

Two interesting factors came out of the decision in *Brown*. First, the court held that a statute *can* expressly state that prayer is an allowable option during the moment of silence and still be held to be constitutional.²⁰⁶ Second, a statute can also have a dual purpose of a secular purpose and an accommodation of religion and not be in violation of the Establishment Clause.²⁰⁷ Both of these decisions are informative as to the academic freedom acts. The academic freedom acts expressly disallow any religious use, so if a statute that does accommodate a religious purpose (among other purposes) is constitutional, one would expect the academic freedom acts to follow suit.²⁰⁸ The academic freedom acts also accommodate religion in that the individual students are free to determine for themselves what to do with the information from a scientific critique.²⁰⁹ The key is that, just as in *Brown*, there is no coercion from a teacher as to what the student is to do

199. *Id.*

200. *Id.* at 278 (“[S]peculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity.”).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 282.

205. *Brown v. Gilmore*, 533 U.S. 1301 (2001) (refusing to issue injunction), *cert. denied*, *Brown v. Gilmore*, 534 U.S. 996 (2001).

206. *Brown*, 258 F.3d at 276.

207. *Id.*

208. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

209. *See, e.g.*, LA. REV. STAT. ANN. § 17:285.1 (2008). The statute does not mention what inferences the student should draw from the critiques of evolution. *Id.*

with the time.²¹⁰ The school can do nothing to make the activity one that is religious.²¹¹

5. *Croft v. Governor of Texas*

In 2009, the Fifth Circuit considered a similar challenge to an amendment to a Texas Statute that mandated a moment of silence in public schools.²¹² The statute allowed that students, as they chose, could “reflect, pray, meditate, or engage in any other silent activity that is not likely to interfere with or distract another student.”²¹³ The sponsor of the bill modeled the amendment after the statute in *Brown* and noted that the Supreme Court had upheld the *Brown* statute.²¹⁴ Nevertheless, the challengers alleged that the statute was an unconstitutional establishment of religion, appealing after the district court held that the statute had a secular purpose and was not an establishment of religion.²¹⁵

The court made relatively short work of the analysis of the statute in determining that the statute did not violate any prong of the *Lemon* test. The court reviewed the history of the moment of silence jurisprudence to that point, noting that the courts had not found that the challenged statutes had the primary effect of advancing or inhibiting religion or fostering excessive government entanglement with religion in any of the prior cases.²¹⁶ The court in *Croft* also noted that only two of the cases had found a lack of a secular purpose,²¹⁷ and all of the courts focused on the legislative purposes of the statute.²¹⁸

The court examined the three secular purposes that the Governor put forth for the amendments: fostering patriotism, providing a period for thoughtful contemplation, and protecting religious freedom.²¹⁹ The court

210. *Brown*, 258 F.3d at 281.

211. *Id.*

212. *Croft v. Governor of Tex.*, 562 F.3d 735, 738 (5th Cir. 2009); TEX. EDUC. CODE ANN. § 25.082(d) (West Supp. 2013).

213. *Croft*, 562 F.3d at 738.

214. *Id.* at 739.

215. *Id.* at 738.

216. *Id.* at 745.

217. *Id.* The Court in *Wallace* overturned the Alabama statute because the state did not put forth any secular purpose. *Id.* The court in *Cooperman* overturned the New Jersey statute because the district court held that the proffered secular purpose was pretextual, and the Third Circuit was “compelled to find the statute unconstitutional.” *Id.*; see *Wallace v. Jaffree*, 472 U.S. 38, 57 (1985) (finding no secular purpose for statute); *May v. Cooperman*, 780 F.2d 240, 253 (3d Cir. 1985) (affirming district court’s finding that the statute lacked a secular purpose).

218. *Croft*, 562 F.3d at 745.

219. *Id.* at 746.

determined that religious freedom protection was not a valid purpose since that purpose was accomplished by an earlier statute,²²⁰ but the court held that the other two secular purposes were permissible.²²¹ In reviewing the legislative history, the court found that the purposes offered for the statute were consistent with the legislative record, and, even if the purposes of some individual legislators had been religious, the secular purposes were still present.²²² Consequently, the court concluded that the statute did not violate the first prong of the *Lemon* test.²²³ The court also concluded that the statute did not violate the second and third prongs of the *Lemon* test, noting that the statute neither advanced nor inhibited religion or excessively entangled the government with religion.²²⁴ As a result, the Fifth Circuit held that the statute was not an unconstitutional establishment of religion.²²⁵ *Croft* reaffirmed that a statute that has a clear secular purpose, even if there is some non-primary religious motivations, does not violate the Establishment Clause.²²⁶

6. *Sherman ex rel. Sherman v. Koch*

In *Sherman ex rel. Sherman v. Koch*,²²⁷ the plaintiffs brought a Section 1983 challenge against the Illinois Silent Reflection and Student Prayer Act, which mandated a period of silence in public schools.²²⁸ The Seventh Circuit reversed and remanded the district court's decision, holding that Section 1 of the statute did have a secular purpose and did not have the primary effect of promoting religion.²²⁹ The Seventh Circuit also distinguished *Wallace*, as relied upon by the challengers, noting that there was no evidence of a secular purpose in *Wallace* and that *Wallace* involved a suspect historical context, with one statute being passed directly after another to mandate an increasingly religious purpose.²³⁰

220. *Id.* at 746-47.

221. *Id.* at 747-48.

222. *Id.* at 748.

223. *Id.* at 749.

224. *Id.* at 749-50.

225. *Id.* at 750-51.

226. *Id.* at 750.

227. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501 (2010).

228. *Id.* at 504.

229. *Id.*

230. *Id.* at 508-09. The court distinguished *Wallace* by noting that the facts were significantly different than the case at hand, because *Wallace* had no evidence of a statute with a secular purpose. *Id.* at 508. The court also pointed out that the statute in *Wallace* had a unique history because of the context in which it was passed. *Id.* at 509. The quick succession in enacting the statutes supported the claim that the purpose of the statute in question was "to return voluntary prayer to [Alabama's] schools." *Id.*

The court found that the statute did not violate the first prong of the *Lemon* test, as the State's offered secular purpose—establishing a period of silence for schoolchildren to calm the students and prepare them for a day of learning—was supported by the plain language of the statute.²³¹ The statute expressly forbade the use of the period as any type of religious exercise and disavowed any religious purpose.²³² Statements by the statute's principal sponsor further supported the finding that the period of silence was not to be used for religious purposes.²³³ The court found no violation of the first *Lemon* prong due to the clear secular purpose, no evidence of a sham purpose, and nothing impermissible about the clarification that students could pray during the moment of silence.²³⁴

The court also found that statute did not violate either the second or third prongs of the *Lemon* test.²³⁵ In examining the statute, the court noted that the statute did not limit a student's thoughts during the moment of silence, and therefore, could neither advance nor inhibit religion.²³⁶ The court pointed out that the statute mandated nothing more than a "period of silence."²³⁷ There was no need for schools, teachers, or the students to become entangled with any questions of religion.²³⁸ Consequently, the court held that none of the prongs of the *Lemon* test were violated by the statute and that the statute was constitutional.²³⁹

Not surprisingly, these decisions have been attacked by those who believe that the religious motivations of individual legislators in enacting a moment of silence statute equates to an Establishment Clause violation.²⁴⁰ The fact that legislators wanted to return prayer to school and expressed that desire during legislative hearings does not negate the fact that other legislators did not want to use the act for such purposes.²⁴¹ Even if that were the case, it still does not negate the secular purpose of the act. The "statute's purpose need

231. *Id.* at 509.

232. *Id.*

233. *Id.*

234. *Id.* at 520.

235. *Id.*

236. *Id.* at 517.

237. *Id.* at 519.

238. *Id.*

239. *Id.* at 520.

240. See Debbie Kaminer, *Bringing Organized Prayer In Through the Back Door: How Moment-of-Silence Legislation for the Public Schools Violates the Establishment Clause*, 13 STAN. L. & POL'Y REV. 267, 296-98 (2002); Larry R. Thaxton, *Silence Begets Religion: Bown v. Gwinnett County School District and the Unconstitutionality of Moments of Silence in Public Schools*, 57 OHIO ST. L.J. 1399, 1424 (1996).

241. *Bown v. Gwinnett Cnty. Sch. Bd.*, 112 F.3d 1464, 1471-72 (11th Cir. 1997).

not be exclusively secular.”²⁴² A statute is in violation of the Establishment Clause if it is “*entirely* motivated by a purpose to advance religion.”²⁴³ Finally, the entire argument is based on the presumption that silence is the same as organized religion. By its very nature, a voluntary moment of silence is not organized in the context of the thoughts of the students. The students are free to consider any thought that they want. Being quiet by no means puts the students in any type of religious setting or exercise.

A clear pattern can be seen through the moment of silence cases. None of the courts in the six cases found that the statutes at issue violated the second or third prongs of the *Lemon* test.²⁴⁴ There was no advancement or inhibition of religion and no excessive entanglement of the state with religion.²⁴⁵ In four of the cases—*Bown*, *Brown*, *Croft*, and *Sherman*—the courts held that the statutes did not violate the Establishment Clause, as there were clear secular purposes for the statutes.²⁴⁶ The court in *Cooperman* reversed the lower court’s ruling on the second and third prong, and held the statute to be unconstitutional *solely* on the basis of the lower court’s finding that there was no secular purpose.²⁴⁷ The *Wallace* Court found no secular purpose only because the prime sponsor of the bill did not offer one.²⁴⁸

A statute that is facially neutral to religion and that allows students to form their own thoughts, with no direction by a teacher as to the contents of those thoughts, will consistently be held constitutional. It can accommodate religion, but it cannot mandate it. As long as there is a secular purpose behind the statute, even an incidental effect on religion or the religious motive of an individual legislator will not affect the constitutionality of the statute. The purpose of the statute is determined by the purpose of the *legislative body* in enacting that statute. This Establishment Clause analysis was evident in the moment of silence cases, and speaks directly to how a court might rule on the academic freedom acts.

242. *Id.* at 1469 (citing *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984)).

243. *Id.* (emphasis added) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)).

244. See discussion *supra* Part II.B.

245. See discussion *supra* Part II.B.2-6. In all six cases, the courts did not find a violation of the second or third prongs of the *Lemon* test.

246. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 520 (7th Cir. 2010); *Croft v. Governor of Tex.*, 562 F.3d 735, 750-51 (5th Cir. 2009); *Brown v. Gilmore*, 258 F.3d 265, 282 (4th Cir. 2001); *Bown v. Gwinnett Cnty. Sch. Bd.*, 112 F.3d 1464, 1474 (11th Cir. 1997).

247. *May v. Cooperman*, 780 F.2d 240, 253 (1985).

248. *Wallace v. Jaffree*, 472 U.S. 38, 43 (1985).

III. ACADEMIC FREEDOM ACTS

As a result of the reversal of educational philosophy from the *Scopes* trial to *Edwards*, teaching evolution became the norm, leaving little allowance for disagreement with orthodox evolutionary theory.²⁴⁹ A number of teachers, both at the secondary and post-secondary level, have faced repercussions for teaching critiques of neo-Darwinism.²⁵⁰ Subsequently, multiple state legislatures proposed bills to protect teachers' academic freedom from any reprisal that might occur as the result of teaching scientific critiques to evolution.²⁵¹ Louisiana and Tennessee have passed such bills, which have both become law.²⁵²

In 2008, the Louisiana State Legislature passed a bill to allow public school students to learn about and consider scientific critiques to scientific controversies.²⁵³ Designed specifically to allow teachers and students to objectively discuss such controversies as "evolution, the origins of life, global warming, and human cloning,"²⁵⁴ the Louisiana Science Education Act ("LSEA") became the first such statute to explicitly protect the scientific critique of evolution.²⁵⁵ In relevant part, the statute reads as follows:

B. (1) The State Board of Elementary and Secondary Education, upon request of a city, parish, or other local public school board shall allow and assist teachers, principals, and other school administrators to create and foster an environment within public elementary and secondary schools that promotes critical thinking skills, logical analysis, and open and objective discussion of scientific theories being studied including, but not limited to, evolution, the origins of life, global warming, and human cloning.

....

C. A teacher shall teach the material presented in the standard textbook supplied by the school system and thereafter may use supplemental textbooks and other instructional materials to help students understand, analyze, critique, and review scientific theories in an objective manner, as permitted by the city, parish,

249. See discussion *supra* Part II.A.

250. Casey Luskin, *The Constitutionality and Pedagogical Benefits of Teaching Evolution Scientifically*, 4 U. ST. THOMAS J.L. & PUB. POL'Y 204, 232 (2009).

251. *Id.* at 230.

252. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

253. Luskin, *supra* note 250, at 245-46.

254. LA. REV. STAT. ANN. § 17: 285.1 (2008).

255. Morelli, *supra* note 16, at 799-800.

or other local public school board unless otherwise prohibited by the State Board of Elementary and Secondary Education.

D. This Section shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion.²⁵⁶

The LSEA does four particular things that allow for academic freedom without introducing unconstitutional material into the classroom. First, the LSEA mandates, upon request by a local school board, that the State Board of Elementary and Secondary Education (“SBESE”) assist the school district to “create and foster an environment” that promotes critical thinking.²⁵⁷ Secondly, the LSEA also states that the discussion must be done in an “objective manner” that remains under the control of the local school board.²⁵⁸ Thirdly, any discussion that concerns the scientific critiques must be done *after* the standard material in the textbook is taught. Nothing is being replaced and students are still taught the same school board-approved scientific material.²⁵⁹ Finally, the statute specifically disallows any alternative theories that are based on religion.²⁶⁰ At no point are the critiques to allow for religious discussions concerning the origins of life. The statute is designed to simply allow for critiques of controversial topics in science.

The legislature in the State of Tennessee passed a similar statute in 2012.²⁶¹ Although the basic framework is similar to the LSEA, there are a few minor variations that do not impact the purpose of the bill, which is also to allow exploration of scientific controversies. The relevant portions state:

(a) The state board of education, public elementary and secondary school governing authorities, directors of schools, school system administrators, and public elementary and secondary school principals and administrators shall endeavor to create an environment within public elementary and secondary schools that encourages students to explore scientific questions, learn about scientific evidence, develop critical thinking skills and respond appropriately and respectfully to differences of opinion about scientific subjects required to be taught under the

256. LA. REV. STAT. ANN. § 17: 285.1 (2008).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. TENN. CODE ANN. § 49-6-1030 (West 2012).

curriculum framework developed by the state board of education.

....

(c) Neither the state board of education nor any public elementary or secondary school governing authority, director of schools, school system administrators, or any public elementary or secondary school principal or administrators shall prohibit any teacher in a public school system of this state from helping students understand, analyze, critique, and review in an objective manner the scientific strengths and scientific weaknesses of existing scientific theories covered in the course being taught within the curriculum framework developed by the state board of education.

(d) This section only protects the teaching of scientific information, and shall not be construed to promote any religious or nonreligious doctrine, promote discrimination for or against a particular set of religious beliefs or nonbeliefs, or promote discrimination for or against religion.²⁶²

The Tennessee statute is similar to the LSEA in most ways, but does vary in some minor points. It is similar in that it seeks to foster “an environment . . . to explore scientific questions” and “develop critical thinking skills” in relation to controversies over scientific subjects.²⁶³ Nevertheless, it does not require the request of the local school board and mandates that the State Board of Education take the step of fostering the environment.²⁶⁴ The teaching of the controversies must be done within the framework of the curriculum developed by the State Board, meaning that the standard information will continue to be taught and that critiques are limited to existing theories being taught under the framework.²⁶⁵ Because the statute is limited to discussing the strengths and weaknesses of “existing scientific theories covered in the course,” no alternative theories can be introduced.²⁶⁶ Finally, the statute also contains a prohibition against religious discussions of scientific controversies into the classroom.²⁶⁷ As in the LSEA, the discussions are limited to “scientific questions” based on “scientific evidence” concerning the controversies.²⁶⁸ The one notable difference is that

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

section (c) in the Tennessee statute specifically protects educators from interference by administrators when teaching the controversies,²⁶⁹ where the LSEA implies the protection.²⁷⁰

A. Legislative History

1. Louisiana Science Education Act

The examination of the moment of silence cases showed that the court is very interested in the purpose of the legislature in enacting a statute. Consequently, in an analysis of the first prong of the *Lemon* test, the court will usually inquire into the legislative history to determine whether an improper motive drove the enactment of the legislation.²⁷¹ In the case of both academic freedom acts, the actual purpose and history behind the bills may be significantly different than what has been asserted, as the media often portrayed the facts in a manner that implies a particular purpose. That is certainly the case with the LSEA. The opponents of the LSEA use the facts to imply a religious motive and intent behind the bill, even though support from religious groups or legislators would not cause the invalidation of a secular purpose behind the bill.²⁷²

What is known about the LSEA is that Ben Nevers, a prominent Democrat in the Senate, sponsored Louisiana Senate Bill 733 ("SB 733") in early 2008.²⁷³ The Louisiana Family Forum ("LFF"),²⁷⁴ a Christian, pro-family organization in Louisiana, "committed to defending faith, freedom and the traditional family" also supported SB 733.²⁷⁵ Among its other supporters, SB 733 also counted former Baton Rouge City Court Judge Darrell White, who openly shared his Christian views on his personal

269. *Id.*

270. *Id.* The Tennessee statute states that no authority over a teacher "shall prohibit" the teaching of the controversies. *Id.* The Louisiana statute simply states that a teacher "may use" supplemental materials to teach the controversies. LA. REV. STAT. ANN. § 17: 285.1 (2008). Hence, the Tennessee statute specifically addresses prohibition by the school authorities while the Louisiana statute does not.

271. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

272. *See, e.g., Forrest, supra* note 4; *Edwards v. Aguillard*, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting) ("[W]e do not presume that the sole purpose of a law is to advance religion merely because it was supported strongly by organized religions or by adherents of particular faiths.").

273. S.B. 733, LA. STATE LEG., available at <http://www.legis.la.gov/Legis/BillInfo.aspx?i=211183> (last visited Jan. 6, 2014).

274. Morelli, *supra* note 16, at 819.

275. LA. FAMILY FORUM, <http://www.lafamilyforum.org/about/> (last visited Jan. 6, 2014); Edward J. Larson, *Teaching Creation, Evolution, and the New Atheism in 21st Century America: Window on an Evolving Establishment Clause*, 82 MISS. L.J. 997, 1032 (2013).

website and was involved with the LFF.²⁷⁶ Notwithstanding the religious viewpoints of the supporters, the support of these groups did not inherently impart any religious purpose to the bill. In fact, Senator Nevers specifically stated the purpose behind the bill when he explained that SB 733 was “strictly about teaching science in the classroom It has nothing to do with religion.”²⁷⁷

Finally, another major fact that is not in contention, but has been severely misconstrued, is that the LSEA was originally based on a model Academic Freedom Bill from the Discovery Institute (“DI”),²⁷⁸ with “some of [the statute’s] language” coming from DI’s Model Bill.²⁷⁹ What most opponents attempt to accomplish with statements implying a religious motive is to manufacture a connection with an alleged “creationist” organization.²⁸⁰ That false allegation is a severe misunderstanding of the function and purpose of the DI, because intelligent design is not in any way based on the “creationism” movement.²⁸¹

The fact that the LSEA was based on a model bill is itself non-noteworthy. Legislatures may craft legislation from a uniform or model bill.²⁸² What is more important is that the LSEA underwent multiple

276. Morelli, *supra* note 16, at 819-20.

277. Marcelle Hanemann, *Nevers: Science Bill Not About Religion*, DAILY NEWS (June 23, 2008, 12:00 AM), http://www.gobogalusa.com/news/article_a195594c-19e5-517e-9b28-e9d848d93eda.html.

278. Morelli, *supra* note 16, at 821; *About Discovery*, DISCOVERY INST., <http://www.discovery.org/about.php> (last visited Jan. 6, 2014) (“Discovery Institute is an inter-disciplinary community of scholars and policy advocates dedicated to the reinvigoration of traditional Western principles and institutions and the worldview from which they issued. Discovery Institute has a special concern for the role that science and technology play in our culture and how they can advance free markets, illuminate public policy and support the theistic foundations of the West. . . .”). The Model Act, from which the LSEA is significantly altered, can be viewed at <http://www.academicfreedompetition.com/freedom.php> (last visited Jan. 8, 2014).

279. Morelli, *supra* note 16, at 821.

280. *See, e.g.*, Forrest, *supra* note 4.

281. DeWolf, *supra* note 99, at 19-24. In *Kitzmiller*, Judge Jones wrongly equated Intelligent Design (“ID”) (of which DI is a proponent) with creationism simply because some of the supporters of ID held private religious beliefs in God. *Id.* at 19.

282. UNIF. LAW COMM’N, <http://www.uniformlaws.org/Narrative.aspx?title=Frequently%20Asked%20Questions> (last visited Jan. 7, 2014). The Uniform Law Commission also has a Model Act pertaining to Human Trafficking at <http://www.uniformlaws.org/Act.aspx?title=Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking>. It is interesting to note that many religious groups are involved in the battle against human trafficking. *See, e.g.*, FAITH ALLIANCE AGAINST SLAVERY & TRAFFICKING, <http://www.faastinternational.org/#/about-us/faast-members> (last visited Dec. 17, 2014). It is hard to imagine that the use of a model act in the

revisions, such that the language of the LSEA differed significantly from the DI's Model Bill.²⁸³ The revisions alone are strong evidence that the bill that became the LSEA shows the purpose behind the legislature in its passage and not the intent of any one particular legislator. The very fact that particular terms were added or removed spoke directly to the intent of the legislature, a common rule of statutory interpretation.²⁸⁴ After the revision process, the bill was approved 93-4 in the House and 35-0 in the Senate, becoming law when enacted by Governor Bobby Jindal on June 25, 2008.²⁸⁵

2. Tennessee Academic Freedom Act

The Tennessee statute is even less controversial in its enactment than the LSEA. Tennessee Senator Bo Watson introduced SB 0893 in the State Senate and Representative Bill Dunn introduced HB 0368 in the State House.²⁸⁶ Both bills were eventually combined into HB 0368 and ultimately enacted after Governor Bill Haslam opted neither to sign nor veto it.²⁸⁷ The bill became law on April 10, 2012, enjoying bipartisan support after passing the Senate 25-8²⁸⁸ and the House 72-23.²⁸⁹

As was the case with the LSEA, opponents and proponents of the bills both voiced their opinions of the bill to the legislature. A few Tennessee members of the National Academy of Science signed a letter in opposition to the bill.²⁹⁰ Other opponents included a local high school teacher²⁹¹ and a

enactment of human trafficking legislation would engender the same level of opposition as a result of support by religious organizations.

283. Larson, *supra* note 275, at 1032 (noting that there was significant revision to the bill during the committee phase and prior to enactment).

284. Booth v. Churner, 532 U.S. 731, 740 (2001) (noting that a particular term was omitted by Congress in a statute and the "fair inference" was that Congress intentionally left that term out).

285. S.B. 733, LA. STATE LEG., <http://www.legis.la.gov/Legis/BillInfo.aspx?i=211183> (last visited Jan. 7, 2014).

286. TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/Billinfo/default.aspx?BillNumber=SB0893&ga=107> (last visited Dec. 17, 2014).

287. Larson, *supra* note 275, at 1035.

288. TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/Billinfo/BillVotesArchive.aspx?ChamberVoting=S&BillNumber=SB0893&ga=107> (last visited Jan. 8, 2014).

289. TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/Billinfo/BillVotesArchive.aspx?ChamberVoting=H&BillNumber=HB0368&ga=107> (last visited Jan. 8, 2014).

290. Chas Sisk, *Debate Over Evolution Now Allowed in Tenn. Schools*, USA TODAY (Apr. 11, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-04-11/evolution-creationism-debate-tennessee-law/54174242/1>.

geology professor from Vanderbilt.²⁹² Proponents of the bill were equally credentialed, including a local high school biology teacher,²⁹³ a Ph.D. from Rutgers,²⁹⁴ and a number of Ph.D.'s that signed a letter in support of the bill.²⁹⁵

Despite the lack of a substantial link to religious groups, the opposition to the bill centered the attacks on mischaracterizations of the purpose of the bill. The media routinely referred to the bill as allowing "creationism" in the classroom,²⁹⁶ which the bill specifically did not allow.²⁹⁷ The purpose of the bill, as stated by Representative Dunn, was about "objective scientific facts."²⁹⁸ The lack of a direct connection to any religious group left opponents with misrepresentations of the bill and attempts to discern religious intent from the demeanor of the bill's sponsor while answering questions.²⁹⁹ As with the LSEA, the opponents of the Tennessee bill argued

291. See *Senate-Education*, TENN. GEN. ASSEMBLY (Mar. 30, 2011, 01:16:39), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3912&meta_id=71412 (video clip of Wesley H. Roberts, local high school teacher, speaking against Senate Bill 0893. Mr. Roberts, however, conceded that "scientific evidence against evolution" should be "heard.").

292. See *House-Education*, TENN. GEN. ASSEMBLY (Mar. 29, 2011, 00:43:15), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3899 (video clip of Molly Miller, geology professor speaking against House Bill 0368).

293. *Senate-Education*, *supra* note 291, (Mar. 30, 2011, 01:09:00) (video clip of Harold Morrison, a local high school biology teacher, discussing the need to allow questioning of evolution).

294. *Id.* at 01:04:45 (Robin Zimmer, a PhD from Rutgers, notes that the bill will improve science education).

295. Letter to Governor Bill Haslam, http://www.evolutionnews.org/TN_Letter_2012.pdf (last visited July 22, 2014).

296. See Sisk, *supra* note 290; see also David Zucchini, *Creationism Discussions Are Now OK in TN Schools*, L.A. TIMES (Apr. 11, 2012), <http://articles.latimes.com/2012/apr/11/nation/la-na-nn-tennessee-creationism-classroom-20120411>.

297. TENN. CODE ANN. § 49-6-1030 (West 2012) (specifically limiting the discussion to the curriculum "taught under the curriculum framework."). The author of the bill in the Senate also specifically stated that no subject matter outside the curriculum can be brought in. *Senate-Education*, TENN. GEN. ASSEMBLY (Mar. 14, 2012 00:53:30), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=5146&meta_id=95335 (video clip of Senator Watson discussing the purpose of the bill).

298. Kari Huus, *Activists Cry Foul as Tenn. Science Education Bill Hits Governor's Desk*, NBC NEWS, (Apr. 5, 2012, 2:30 PM), http://usnews.nbcnews.com/_news/2012/04/05/11040270-activists-cry-foul-as-tenn-science-education-bill-hits-governors-desk?lite.

299. Charles Cowan, *Creationism's Public and Private Fronts: The Protection and Restriction of Religious Freedom*, 82 MISS. L.J. 223, 238-39 (2013) (referring to Rep. Dunn's

that the true purpose of the bill was not facially recognizable.³⁰⁰ Nonetheless, the correct inquiry is the intent of the legislature, which passed the bill with strong majorities. There is nothing to indicate that the legislature had a religious purpose in passing the bill.

B. *Opponents' Arguments Against the Louisiana and Tennessee Statutes*

Although the purpose of this Comment is to show that both of the academic freedom acts are constitutionally sound, it is also instructive to note the criticisms surrounding both statutes. The arguments from the opposition in both states were essentially the same, except for a claim that the Tennessee bill would hurt the economy.³⁰¹ During the enactment of the LSEA one opponent went as far as issuing talking points,³⁰² which contained the other major arguments used in opposition to the LSEA: (1) there is no need for such a bill since teachers already have academic freedom, (2) there is no existing controversy over evolution in the scientific field, and (3) the Academic Freedom Act is nothing but an attempt to teach creationism in the classroom.³⁰³

1. Teachers Already Have Academic Freedom

Opponents of the Acts made the argument that teachers already have the academic freedom to teach scientific critiques in both Tennessee and Louisiana as a reason to not pass the bills. That argument simply understated the problem. While school educational standards may facially allow the scientific critique of controversies, that is not always the case in practice.³⁰⁴ Teachers in public schools have been removed from teaching biology simply by introducing evidence of controversies with neo-Darwinism.³⁰⁵ The lack of protection has also caused problems on a public university campus, where a professor was asked to step down simply for giving a lecture on evolution and critical thinking.³⁰⁶

answers to questions about whether the bill would allow the teaching of "creationism" to show a possibility of that occurrence).

300. Sisk, *supra* note 290 (Barry Lynn states that the bill was presented as giving flexibility to teachers, but that the bill is actually about evolution).

301. See *House-Education*, TENN. GEN. ASSEMBLY (Mar. 29, 2011, 00:43:15), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3899. (video of Molly Miller arguing that the proposed bill would hurt Tennessee's economy).

302. Forrest, *supra* note 4.

303. *Id.*

304. Luskin, *supra* note 250, at 232.

305. *Id.*

306. *Id.*

2. There is No Existing Controversy Over Evolution

The next argument asserts that all scientists are in agreement concerning evolution and, therefore, there is nothing to critique. It leaves no room for dissent among the members of the scientific community. Nevertheless, the argument fails from a lack of attention to the number of equally credentialed scientists that differ on the validity of neo-Darwinism. A group of eighty-five scientists submitted an amicus brief during the *Kitzmiller* trial urging the court not to “usurp the laboratory or scientific journals as the venue where scientific disputes are resolved.”³⁰⁷ Among that group were both a Professor of Biology and Molecular Biology at the University of Georgia and a Professor of Biology at San Francisco State University.³⁰⁸

In addition, numerous Ph.D.’s have signed their names to a list stating their dissent from neo-Darwinism.³⁰⁹ To be included on the list, the signer must agree to the statement: “We are skeptical of claims for the ability of random mutation and natural selection to account for the complexity of life”³¹⁰ The signers must also “hold a Ph.D. in a scientific field such as biology, chemistry, mathematics, engineering, computer science, or one of the other natural sciences; or they must hold an M.D. and serve as a professor of medicine.”³¹¹ To argue that there are no equally credentialed and qualified scientists that disagree with evolution is willful ignorance of the facts. A legitimate controversy concerning evolution exists regardless of the current dominance of Darwinian evolution as the leading theory of human origins.

3. The Academic Freedom Acts Are an Attempt to Teach Creationism

The argument that proponents of the bill are simply attempting to introduce creationism into the classroom is a severe mischaracterization of the language of the statutes. The opponents use this argument to find ties to religion and make the issue an Establishment Clause question.³¹² Neither

307. Brief for Amici Curiae Biologists & Other Scientists in Support of Defendants, *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), 2005 WL 3136712 (see “Selected List of Amici Curiae”).

308. *Id.* at 3.

309. *A Scientific Dissent from Darwinism*, DISSENTFROMDARWIN.ORG, <http://www.dissentfromdarwin.org> (follow “Download The List” hyperlink) (last visited Jan. 18, 2014).

310. *FAQ-Dissent from Darwin*, DISSENTFROMDARWIN.ORG, <http://www.dissentfromdarwin.org/faq.php> (last visited Jan. 18, 2014).

311. *Id.*

312. Forrest, *supra* note 4. The author’s “talking points” use the term “creationism” (or some derivation) fourteen times in the two page document. *Id.* The author also claims that “[t]his bill will allow the teaching of creationism, which is a religious belief.” *Id.*

statute is about religion (or creationism). In fact, both statutes explicitly deny protection to any teacher who may attempt to bring in a religious belief under the statutes.³¹³

It is a large assumption to equate the critique of scientific controversies with religion. It is true that there may be some teachers that wish to teach creationism. These statutes, however, will not allow any religious doctrine to be taught. DeWolf points this out when he states:

[A teacher attempting to teach creationism] does not mean that *scientific critique* of neo-Darwinism necessarily conceals a religious motive, if indeed motive is even germane to deciding the scientific legitimacy of this critique. In any case, the pedagogical issue is not the motive of the critics, but the existence of specifically empirical critique of neo-Darwinian and chemical evolutionary theory that textbooks do not report to students. . . . This hardly seems to constitute either 'religious' or 'unscientific' activity.³¹⁴

Turning the scientific critique of neo-Darwinism into religion is simply an attempt to use the Establishment Clause to bully teachers into silence.³¹⁵

No critique is tantamount to religion, especially in light of the fact that there is no agreed upon definition or test for what constitutes religion. The courts have generally recognized that "religion" is a "term [that] is found in the history of the human race and is incapable of compression into a few words."³¹⁶ There is no agreed upon definition of what constitutes religion,

313. LA. REV. STAT. ANN. § 17: 285.1(D) (2008); TENN. CODE ANN. § 49-6-1030 (West 2012). Both statutes have a clause that specifically states that the statute does not permit the promotion of any religious doctrine. The Louisiana statute states: "This Section shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion." LA. REV. STAT. ANN. § 17: 285.1(D) (2008). The Tennessee statute states: "This section only protects the teaching of scientific information, and shall not be construed to promote any religious or nonreligious doctrine, promote discrimination for or against a particular set of religious beliefs or nonbeliefs, or promote discrimination for or against religion or nonreligion." TENN. CODE ANN. § 49-6-1030 (West 2012).

314. David K. DeWolf, Stephen C. Meyer & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, or Religion or Speech?*, 2000 UTAH L. REV. 39, 57 (emphasis added).

315. *Id.* The authors also note that "[b]y stigmatizing critique as either 'unscientific' or 'religious,' advocates for the exclusive presentation of neo-Darwinism discourage teachers from teaching students what scientists actually know and report in their technical journals, and encourage instead the presentation of a simplistic caricature of scientific method and the origins controversy." *Id.*

316. *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943).

which makes an Establishment Clause violation difficult to ascertain. Notwithstanding the lack of consensus, the Ninth Circuit did employ a three-part test to determine if a religion existed in *Alvarado v. City of San Jose*.³¹⁷ The court relied on the tripartite test to determine that a publicly funded statue of the Aztec religious figure Quetzalcoatl did not violate the Establishment Clause.³¹⁸ The test stated:

First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.³¹⁹

By the Ninth Circuit's test, the critique of neo-Darwinism cannot be a religion. First, while a critique may deal with "fundamental and ultimate questions,"³²⁰ it does not any more so than evolutionary theory. Both evolution and any subsequent critiques speak to the issue of how life originated. Second, there is no belief system espoused in scientifically critiquing evolution. Finally, there are no "formal and external signs,"³²¹ which the court defined as "formal services, ceremonial functions, the existence of clergy, structure and organization, efforts at propagation, observance of holidays and other similar manifestations associated with the traditional religions."³²²

Scientific critique of evolution is not religion, despite how vociferous the opponents of the statute may be in attempting to conflate the two. The statute explicitly prohibits the advocacy of religion and therefore cannot be used to sneak creationism into the classroom. The academic freedom acts simply and expressly prohibit religious doctrines and would therefore not allow creationism.³²³

317. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996).

318. *Id.* at 1230; DeWolf, *supra* note 314, at 85.

319. *Alvarado*, 94 F.3d at 1229.

320. *Id.*

321. *Id.*

322. *Id.*

323. *See supra* note 313 and accompanying text.

4. The Academic Freedom Act Will Hurt the Economy

The final argument was made during the hearing for the Tennessee statute.³²⁴ The professor from Vanderbilt claimed that the passage of the bill would hurt Tennessee's economy because scientific groups and organizations would either leave the state or refuse to come.³²⁵ The professor referred to a scientific group that opted not to have its conference in Louisiana after the passage of the LSEA and claimed that the group's decision was based on a protest of the LSEA's enactment.³²⁶

The truth, however, is that there is no evidence that the passage of the LSEA has negatively affected the science and technology sector in Louisiana.³²⁷ In fact, the fields have actually grown.³²⁸ Louisiana, after multiple disasters, has discovered that "[b]ioscience is thriving in New Orleans."³²⁹ That was in 2009, which was a year after the LSEA was enacted. While there is evidence that one group refused to come to Louisiana—simply out of protest against a law—the state has seen growth in the scientific sector, hardly a hit to the economy.³³⁰

All four of the major arguments against the statutes do not hold up in light of scrutiny of the actual text of the statute. Nevertheless, the ultimate test of the statute is not whether mischaracterizations of the statutes are easily rebutted, but how a court would determine the constitutionality of the statutes.

IV. CONSTITUTIONALITY OF THE ACADEMIC FREEDOM ACTS

The ultimate question of whether the academic freedom acts pass constitutional muster lies in the Establishment Clause analysis by the court if such a claim were brought against them. As is generally the rule with Establishment Clause analysis, the court would analyze the statute under

324. See *House Education*, TENN. GEN. ASSEMBLY (Mar. 29, 2011, 00:43:15), http://tnga.granicus.com/MediaPlayer.php?view_id=196&clip_id=3899. (video of Miller arguing that the proposed bill would hurt Tennessee's economy).

325. *Id.*

326. *Id.*

327. Amanda Mascarelli, *All Jazzed Up*, 486 NATURE MAG. 429, 429 (June 21, 2012), available at <http://www.nature.com/naturejobs/science/articles/10.1038/nj7403-429a>.

328. *Id.*

329. Mascarelli, *supra* note 327; Casey Luskin, *Nature Admits "Bioscience Is Thriving" in Louisiana, Blows Up Darwin Lobby Talking Point*, WWW.EVOLUTIONNEWS.ORG, (June 25, 2012 6:17 PM), http://www.evolutionnews.org/2012/06/nature_admits_b_1061351.html.

330. Mascarelli, *supra* note 327, at 429.

the *Lemon* test and perhaps the endorsement test.³³¹ Both the academic freedom acts and the moment of silence statutes contain multiple similarities.³³² A comparison of the academic freedom acts to the moment of silence statutes, and their constitutionality, shows that the academic freedom acts should survive an Establishment Clause challenge.

A. *Similarities Between Moment of Silence Statutes and Academic Freedom Acts*

There are numerous similarities between both statutes that are instructive as to how the courts would examine the academic freedom acts in light of the *Lemon* test and/or the endorsement test. The courts held that four of the six moment of silence statutes were constitutional,³³³ and the statute in *Wallace* failed the first prong of the *Lemon* test solely because the State would offer no secular purpose for the statute.³³⁴ The court in *Wallace* even noted that “merely protecting every student’s right to engage in voluntary prayer during an appropriate moment of silence” was quite different than the statute at hand.³³⁵ The statute in *Cooperman* failed the first prong of the *Lemon* test, not due to a determination by the Third Circuit, but because the Third Circuit could not find that a finding by the district court of the lack of secular purpose for the statute was clearly erroneous.³³⁶ Hence, courts strongly supported the moment of silence statutes that have a clear secular purpose and those statutes are instructive in regard to the academic freedom acts.

The first and arguably most important similarity is that both statutes are neutral as to religion, on their face and as applied.³³⁷ The moment of silence statutes do not promote any activity during the period of silence other than being silent.³³⁸ Although some of the statutes expressly include prayer in the lists of allowed activities, the inclusion is simply an accommodation of

331. See *Allegheny v. Am. Civil Liberties Union Greater Pittsburg Chapter*, 492 U.S. 573, 630 (1989); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

332. See discussion *supra* Part III.A.

333. See discussion *supra* Part II.B.

334. *Id.*

335. *Wallace v. Jaffree*, 472 U.S. 38, 59 (1985).

336. *May v. Cooperman*, 780 F.2d 240, 252 (3rd Cir. 1985).

337. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012); see, e.g., *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 505 (7th Cir. 2010) (“This period shall not be conducted as a religious exercise.”).

338. See, e.g., *Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464, 1473 (11th Cir. 1997) (“All students may use the moment of quiet reflection as they wish, so long as they remain silent.”).

religion and not a mandate.³³⁹ The moment of silence statutes do not advocate for, nor discourage, any type of religious activity during the period, as long as the activity is silent.³⁴⁰ The same is true for the academic freedom acts, which do not advocate for, nor discourage, religion.³⁴¹ Nothing in the text of the statutes, or in the method in which a teacher is to apply the statutes, allows for approval or disapproval of a religious result.³⁴² In fact, both academic freedom acts expressly prohibit a religious exercise.³⁴³

Secondly, neither statute mandates any particular conclusion or thought on the part of the student.³⁴⁴ The moment of silence statutes do not require any particular thought from the student just as the academic freedom acts do not direct what the student is to conclude from the scientific critiques.³⁴⁵ Thirdly, both statutes have no more than incidental effects on religion.³⁴⁶ Any effects that might be construed as religious are not because of the text of the statutes or their application, but because both statutes may happen to “coincide or harmonize with the tenets of some or all religions.”³⁴⁷

Finally, the statutes in *Bown*, *Brown*, and *Sherman* each have religious disclaimers expressly prohibiting the moment of silence from being used as a religious exercise.³⁴⁸ Both of the academic freedom acts contain a similar

339. *Sherman*, 623 F.3d at 504 (“the Silent Reflection and Student Prayer Act.”); *Croft v. Governor of Tex.*, 562 F.3d 735, 738 (5th Cir. 2009) (allowing a student to “reflect, pray, meditate, or engage in any other silent activity.”); *Brown v. Gilmore*, 258 F.3d 265, 270 (4th Cir. 2001) (allowing students to “meditate, pray, or engage in any other silent activity.”).

340. *May v. Cooperman*, 780 F.2d 240, 243-44 (3d Cir. 1985).

341. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012).

342. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030; *see supra* note 313.

343. *See* discussion *supra* Part III.

344. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012). Neither statute mandates what conclusions the students are to draw from the critiques that are taught.

345. *See supra* text accompanying note 344; *see, e.g., Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464, 1466 (11th Cir. 1997). There is no indication in the statute of what effect the student should experience from the moment of silence. *Id.*

346. *Bown*, 112 F.3d at 1473. The court acknowledges that any effects on religion would only be secondary and not primary. *Id.*; LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012). Because both statutes expressly prohibit a religious use, any effect on religion can only be incidental.

347. *McGowan v. Maryland*, 366 U.S. 420, 442 (1961) (holding that a statute is not unconstitutional simply because it may line up with the tenets of any or all religions).

348. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 505 (7th Cir. 2010) (“This period shall not be conducted as a religious exercise.”); *Brown v. Gilmore*, 258 F.3d 265, 270 (4th Cir. 2001) (“This time is not intended to be and shall not be conducted as a religious service or exercise.”); *Bown*, 112 F.3d at 1469 (“[A] moment of quiet reflection . . . is not intended to

religious disclaimer.³⁴⁹ The academic freedom acts expressly forbid religious use and do not protect any attempt by a teacher to use the statute for a religious purpose.³⁵⁰

One of the obvious differences lends even greater support for the constitutionality of the academic freedom acts. The moment of silence statutes all allow for prayer in some manner or another. The statutes in *Brown*, *Croft*, and *Sherman* each expressly allow for prayer while the others accommodate it.³⁵¹ The academic freedom acts, on the other hand, specifically do not allow *any* religious activity as a result of the scientific critiques.³⁵² If the courts held that the moment of silence statutes were constitutional, while expressly or implicitly allowing for prayer, then the specific prohibition of any religious activity in the academic freedom acts should place those statutes in even less danger of running afoul of the Establishment Clause.

B. *Lemon Test Analysis of the Academic Freedom Acts*

The touchstone test for a challenge to the Establishment Clause is the *Lemon* test.³⁵³ The court will look to the three prongs to determine if the statute: (1) has a secular purpose, (2) has a principal or primary purpose that neither advances nor inhibits religion, and (3) does not result in an excessive entanglement of government with religion.³⁵⁴ Any examination of the academic freedom acts will necessitate a *Lemon* test analysis.

be and shall not be conducted as a religious service or exercise.” (internal quotation marks omitted)).

349. LA. REV. STAT. ANN. § 17: 285.1 (2008) (“This Section shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion.”); TENN. CODE ANN. § 49-6-1030 (West 2012) (“The section only protects the teaching of scientific information, and shall not be construed to promote any religious or nonreligious doctrine, promote discrimination for or against a particular set of religious beliefs or nonbeliefs, or promote discrimination for or against religion or nonreligion.”).

350. LA. REV. STAT. ANN. § 17:285.1 (2008); TENN. CODE ANN. § 49-6-1030 (West 2012). Both statues contain clauses that expressly disallow religious use of the critiques.

351. *Sherman*, 623 F.3d at 504 (“the Silent Reflection and Student Prayer Act.”); *Croft v. Governor of Tex.*, 562 F.3d 735, 738 (5th Cir. 2009) (allowing a student to “reflect, pray, meditate, or engage in any other silent activity.”); *Brown*, 258 F.3d at 270 (allowing students to “meditate, pray, or engage in any other silent activity.”).

352. See discussion *supra* Part III.

353. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); see *Wallace v. Jaffree*, 472 U.S. 38, 38 (1985). The *Lemon* test contains “well-established” criteria for determining the constitutionality of a statute. *Id.*

354. *Lemon*, 403 U.S. at 612-13.

1. The Academic Freedom Acts Have a Secular Purpose

The purpose of the statute is the main focus of the first *Lemon* prong in an Establishment Clause challenge.³⁵⁵ Both of the moment of silence statutes that the courts found to be unconstitutional were overturned for failure to evince a clear secular purpose.³⁵⁶ Hence, the secular purpose of the academic freedom acts is essential to its constitutionality according to the *Lemon* test. The statutes must have a secular purpose, but that purpose does not have to be exclusively secular.³⁵⁷ The Constitution allows for a religious purpose behind a statute as long as there is a predominantly secular purpose.³⁵⁸ In addition, the court presumes that the legislature is not acting with a religious purpose.³⁵⁹ Even if the legislative purpose behind the academic freedom acts had a religious component, that component would not necessarily disqualify the statute.³⁶⁰ The state can still show that there is a secular purpose.³⁶¹ Like some of the moment of silence statutes, the academic freedom acts expressly state that the statute does not have a religious purpose.³⁶² The court in *Bown* found that particular disclaimer to be sufficient evidence that the moment of silence statute did not have a religious purpose.³⁶³

Even if the individual legislators had any type of religious motive, the purpose of any one individual legislator is not imputed to the entire legislature.³⁶⁴ The court in *Bown* noted that during hearings on the bill, there were several legislators that wanted to revive school prayer through the bill.³⁶⁵ The court stated that “what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.”³⁶⁶ The same is true for the academic freedom acts. There have been accusations that the purposes of the groups supporting the bill were

355. *Id.* at 612.

356. *Wallace*, 472 U.S. at 56; *May v. Cooperman*, 780 F.2d 240, 253 (3rd Cir. 1985).

357. *Wallace*, 472 U.S. at 56; *Lynch v. Donnelly*, 465 U.S. 668, 681 n.6 (1984); *Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464, 1469 (11th Cir. 1997).

358. *Edwards v. Aguillard*, 482 U.S. 578, 599 (1987) (Powell, J., concurring).

359. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 507 (7th Cir. 2010).

360. *Wallace*, 472 U.S. at 56.

361. *Id.* at 55-56.

362. *See supra* note 313 and accompanying text.

363. *Bown*, 112 F.3d at 1469.

364. *Wallace*, 472 U.S. at 86-87 (Burger, J., dissenting) (explaining that the “sole relevance of the sponsor’s statements . . . is that they reflect the personal, subjective motives of a single legislator.”).

365. *Bown*, 112 F.3d at 1467.

366. *Id.* at 1471-72.

religious in nature.³⁶⁷ Even if these accusations are true, the motives of individual legislators are secondary at most. The court must look to the purpose of the entire legislature in the enactment of the statute.

The court needs to look no farther than the text of the academic freedom acts. The court should be “reluctant to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state’s program may be discerned from the face of the statute.”³⁶⁸ The court also has “no license to psychoanalyze the legislators.”³⁶⁹ Both academic freedom acts specifically disavow any religious purpose,³⁷⁰ and that non-religious purpose is supported by the respective legislative histories.³⁷¹ In both *Brown* and *Sherman*, the bills’ sponsors specifically disavowed any religious purpose for the bills.³⁷² The same is true for both of the academic freedom acts. In Louisiana, Senator Nevers stated that the bill was not about religion.³⁷³ In Tennessee, Representative Dunn noted that the bill was about “objective scientific facts,”³⁷⁴ with no support for any “religious faiths or dogmas.”³⁷⁵

Finally, there is a strong secular pedagogical purpose for the Academic Freedom Acts—to foster critical thinking. Justice O’Connor noted in *Wallace* that if there is a secular pedagogical purpose to a moment of silence statute, then the statute should be found unconstitutional only if the text of the statute, its legislative history, or its application suggests that the statute has a *primary* purpose of endorsing prayer.³⁷⁶ The moment of silence statutes each provided the student with a secular pedagogical purpose.³⁷⁷ Similarly, the legislatures of Tennessee and Louisiana enacted the academic

367. See *supra* Part III.A.

368. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 510 (7th Cir. 2010) (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983) (internal quotation marks omitted)).

369. *Wallace*, 472 U.S. at 74 (O’Connor, J., concurring).

370. See *supra* note 350.

371. See *supra* Part III.A.

372. *Sherman*, 623 F.3d at 508-09; *Brown v. Gilmore*, 258 F.3d 265, 272 (4th Cir. 2001).

373. See *supra* note 277 and accompanying text.

374. See *supra* note 298 and accompanying text.

375. *Cowan*, *supra* note 299, at 238.

376. *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985).

377. *Sherman*, 623 F.3d at 509 (noting that the pedagogical purpose was to “calm the students and prepare them for a day of learning.”); *Croft v. Governor of Texas*, 562 F.3d 735, 741 (5th Cir. 2009) (noting that the pedagogical purpose was to “establish a contemplative period that underscores the seriousness of the education endeavor.”); *Brown*, 258 F.3d at 277 (noting that the pedagogical purpose was to allow students “to pause, settle down, compose themselves and focus on the day ahead.”); *Bown v. Gwinnett Cnty. Sch. Dist.*, 112 F.3d 1464, 1469 (11th Cir. 1997) (noting that the pedagogical purpose was to allow a “brief period of quiet reflection.”).

freedom acts for the purpose of fostering critical thinking skills in students. The LSEA states that the purpose of the Act is to “promote critical thinking skills, logical analysis, and open and objective discussion of scientific theories.”³⁷⁸ The Tennessee Act encourages “students to explore scientific questions, learn about scientific evidence [and] develop critical thinking skills.”³⁷⁹ Both statutes foster a key pedagogical goal for the school system by encouraging students to think critically in the area of scientific controversies.

This secular purpose in the academic freedom acts is a strong indicator that the statutes are likely to pass the first prong of the *Lemon* test. The statutes are facially neutral to any religious activity and there is no evidence that the legislatures had any religious motives in the adoption of the academic freedom acts. Even if individual legislators had religious purposes, the legislatures as a whole did not. The strong secular purpose and lack of religious intent by the legislatures are indicative of the constitutionality of the statutes.³⁸⁰

2. The Primary Effect of Academic Freedom Acts Neither Advances Nor Inhibits Religion

The second prong of the *Lemon* test looks to whether the primary effect of the statute is to advance or inhibit religion.³⁸¹ In essence, the court asks whether the statute conveys a message of endorsement or disapproval.³⁸² The question is not whether there are *any* effects from the statute, but whether the advancement or inhibition of religion is the *primary* effect.³⁸³ A consistent point “in Establishment Clause jurisprudence during the last half-century has been that incidental harmonies with religious beliefs do not disqualify secular concepts under the First Amendment.”³⁸⁴ The Establishment Clause will not ban a regulation simply because it happens to align with the beliefs of a particular religion.³⁸⁵ The statute simply cannot

378. LA. REV. STAT. ANN. § 17: 285.1 (2008).

379. TENN. CODE ANN. § 49-6-1030 (West 2012).

380. Morelli, *supra* note 16, at 828. Morelli notes that the purposes are found to be both secular and legitimate. Hence, he concludes that the statutes are likely to pass the first prong of the *Lemon* test. *Id.*

381. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

382. *Sherman ex rel. Sherman v. Koch*, 623 F.3d 501, 517 (7th Cir. 2010).

383. DeWolf, *supra* note 99, at 48.

384. DeWolf, *supra* note 314, at 89-90. The author notes multiple cases that hold that secondary effects on religion as a result of the statute are allowable. *Id.* at n.261; *Edwards v. Aguillard*, 482 U.S. 578, 605 (1987) (Powell, J., concurring) (quoting *Harris v. McRae*, 448 U.S. 297, 319 (1982)); *Lynch v. Donnelly*, 465 U.S. 668, 683 (1984).

385. DeWolf, *supra* note 99, at 46; *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

have a primary effect that advances or inhibits religion, nor can the statute endorse religion.³⁸⁶

Any effects upon religion that result from academic freedom acts will, by nature, only be secondary. The statutes are facially neutral and are to be applied in a religiously neutral manner. Any attempt by a teacher to use a scientific critique as a religious exercise will not be protected under the statutes since the statutes expressly forbid a religious use.³⁸⁷ As the court in *Sherman* noted, any attempt by a teacher to use the statute in a manner to promote or discourage religion would “be another case.”³⁸⁸ The primary effect of the statute will be an objective critique of scientific controversies.³⁸⁹ Any effects that may occur as the result of the application by a student of those critiques can only be secondary, if they even align with a particular religious belief.

There is also no coercion on the students to come to any particular conclusion.³⁹⁰ Just as the moment of silence statutes did not coerce students to participate in any religious activity,³⁹¹ the academic freedom acts simply permit the teachers to introduce critiques of scientific controversies in an objective manner.³⁹² The students are not directed to apply those critiques in any particular manner, so there can be no coercion. The statute expressly forbids any coercion by an individual teacher to direct those critiques toward a religious view.³⁹³

It is instructive to note that none of the courts found the moment of silence statutes to be in violation of the second prong of the *Lemon* test.³⁹⁴ The court in *Wallace* did not reach that prong because the statute failed the secular purpose prong.³⁹⁵ The courts in the other five moment of silence cases, including *Cooperman*, examined the statutes and found that they did

386. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

387. *Luskin*, *supra* note 112, at 61-62.

388. *Sherman*, 623 F.3d at 517.

389. *See, e.g.*, TENN. CODE ANN. § 49-6-1030 (West 2012). The statute allows teachers to help students “to explore scientific questions, learn about scientific evidence, develop critical thinking skills, and respond appropriately and respectfully to differences of opinion about scientific subjects.” *Id.*

390. *See supra* note 346.

391. *Croft v. Governor of Tex.*, 562 F.3d 735, 741 (5th Cir. 2009) (noting the statement by the bill’s sponsor that the bill “doesn’t direct any activity.”); *Bown v. Gwinnett Cnty. Sch. Dist.* 112 F.3d 1464, 1473 (11th Cir. 1997) (“We also note that this case does not involve impermissible government coercion of students to engage in religious activity.”).

392. LA. REV. STAT. ANN. § 17:285.1 (2008) (“[I]n an objective manner”); TENN. CODE ANN. § 49-6-1030 (West 2012) (“[I]n an objective manner”).

393. *See supra* note 346.

394. *See discussion supra* Part II.B; *see also Croft*, 562 F.3d at 745.

395. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

not violate the second prong of the *Lemon* test.³⁹⁶ The same should be true for the academic freedom acts. The academic freedom acts expressly forbid the use of the statute in a manner that would have a primary effect of advancing religion, with any secondary effects being permissible.³⁹⁷ They also do not coerce the students into any religious activity, nor do they endorse any religious activity.³⁹⁸ The student is free to use the critique as he or she pleases, and as a result, the academic freedom acts should not be found to be in violation of the second *Lemon* prong.

3. The Academic Freedom Acts Do Not Excessively Entangle the Government with Religion

The third prong of the *Lemon* test examines whether the statute has the effect of excessively entangling the government with religion.³⁹⁹ It should be noted here that the *Lemon* test does not prohibit any government entanglement with religion, but qualifies that the entanglement cannot be "excessive."⁴⁰⁰ In the second prong, some effects of religion are allowed; in the third prong, some entanglement would be permitted.⁴⁰¹ The entanglement just cannot be excessive.⁴⁰²

Just as none of the courts in the moment of silence cases found a violation of the third *Lemon* prong, there is no reason that academic freedom acts should be in violation.⁴⁰³ The court in *Sherman* concluded that the statute only mandated "a period of silence and thus there [was] no need for schools, teachers, or students to become entangled in questions of religion."⁴⁰⁴ The same is true for the academic freedom acts. The teachers are exclusively allowed to teach objective critiques of scientific controversies. There is no need for the teachers to be involved in questions of religion.

One critic argues that the LSEA allows the teachers to bring in supplemental textbooks and other instructional materials to assist in the scientific critiques.⁴⁰⁵ The statute allows supplemental textbooks, but those texts are limited to those approved by the local School Board unless

396. See discussion *supra* Part II.B.

397. See *supra* note 351.

398. See *supra* note 346.

399. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

400. *Id.*

401. *Id.*

402. *Id.*

403. See discussion *supra* Part II.B.

404. *Sherman*, 623 F.3d at 519.

405. Morelli, *supra* note 16, at 828.

prohibited by the State.⁴⁰⁶ The Tennessee statute does not even allow that much freedom, stating that teachers can only objectively critique controversies being taught “*within the curriculum framework* developed by the state board of education.”⁴⁰⁷ But this argument concerning entanglement narrowly focuses on only one type of teacher—the science teacher. Just about every teacher can bring in supplemental texts within reason.

The academic freedom acts expressly prohibit the use of the scientific critiques for *any* religious purpose.⁴⁰⁸ There should be no reason for the government to become entangled with a science teacher to any extent greater than it is involved with any other type of teacher. Those fears are simply speculative, and as the court noted in *Brown*, “speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity.”⁴⁰⁹ Constitutional adjudication is the ability to “distinguish between real threat and mere shadow.”⁴¹⁰ Those shadows of what might happen do not necessitate any excessive government entanglement with religion. The academic freedom acts should not be found in violation of the third *Lemon* prong.

C. *Endorsement Test Analysis of Academic Freedom Acts*

None of the courts in the moment of silence cases applied Justice O’Connor’s endorsement test to decide the cases.⁴¹¹ Nevertheless, the endorsement test has been used in other Establishment Clause cases, so a possibility exists that a court might apply the test to an academic freedom act challenge.⁴¹² The test is the outlier as to whether a court would find the academic freedom acts to be constitutional. The test involves the court examining “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the statute] as a state endorsement. . . .”⁴¹³ Facially, the academic freedom acts easily meet this standard. The texts of the statutes are religiously neutral;

406. LA. REV. STAT. ANN. § 17:285.1 (2008).

407. TENN. CODE ANN. § 49-6-1030 (West 2012) (emphasis added).

408. See *supra* note 351.

409. *Brown v. Gilmore*, 258 F.3d 265, 278 (4th Cir. 2001).

410. *Wallace v. Jaffree*, 472 U.S. 38, 90 (1985) (Burger, J., dissenting).

411. See discussion *supra* Part II.B. A review of the cases shows that no court in any of the six cases analyzed the moment of silence statutes using the endorsement test.

412. See, e.g., *Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989).

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

there is nothing in the legislative history to suggest that the legislatures of either states were motivated by a religious motive, and the statutes are written for a narrow implementation that includes only scientific, objective critiques of scientific controversies. Justice O'Connor noted that a "moment of silence law that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others, should pass this test."⁴¹⁴ The same truth applies to the academic freedom acts.

The major problem with the endorsement test lies in the ambiguity of the "reasonable observer." There is no discernible standard as to the level of knowledge that is attributable to the reasonable observer.⁴¹⁵ While a full critique of the endorsement test is outside the scope of this Comment, the ambiguous nature of the reasonable observer presents a large problem to Establishment Clause jurisprudence. In essence, "[t]he outcome of any constitutional case judged under the endorsement/objective observer analysis can be changed by simply altering the characteristics of the observer."⁴¹⁶ What that means to the academic freedom acts is that a judge has the discretion to burden the objective observer with so much extraneous (and unrelated) knowledge so that the observer can *only* observe endorsement. A prime example of that burdening is seen in *Kitzmiller*.⁴¹⁷ The Judge determined that the reasonable observer was aware of the court decisions involving evolution and creationism and (wrongly) attributed that knowledge to the observer, connecting the creationism debate to intelligent design.⁴¹⁸ The observer was left with no alternative other than to find endorsement.⁴¹⁹ Not a single court, however, utilized the endorsement test in determining the moment of silence cases.⁴²⁰ Even though other school prayer cases were brought prior to those discussed in this Comment, the history of prayer in school cases was not attributed to any objective observer.⁴²¹ The challenges were determined with the present

414. *Id.*

415. Jesse H. Chopper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 511 (2002).

416. *Id.* at 513-14.

417. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714-46 (M.D. Pa. 2005) (analyzing the School Board policy using the endorsement test).

418. *See supra* note 69.

419. *Kitzmiller*, 400 F. Supp. 2d at 746.

420. *See discussion supra* Part II.B. A review of the cases shows that no court utilized the endorsement test in the court's analysis.

421. *Id.* A review of the cases shows that no court attributed any prior school prayer history to a reasonable observer.

information.⁴²² It should be the same for the academic freedom acts. The academic freedom acts have no religious purpose, but given that evolution is one of the topics that can be critiqued, an attempt to burden the reasonable observer with knowledge of every case involving evolution should be expected. The decision lies in the discretion of the court.

V. CONCLUSION

The academic freedom acts gave public school teachers the freedom to explore the strengths and weaknesses of various scientific theories, including neo-Darwinian evolution. Even though controversy exists as to the motives and effects of these statutes, it should be noted that the court in *Edwards* stated that it might permit even more than these statutes:

We do not imply that a legislature could never require that *scientific critiques of prevailing scientific theories* be taught. . . . [T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the *clear secular intent of enhancing the effectiveness of science instruction*.⁴²³

Academic freedom acts do not go as far as introducing other theories. The academic freedom acts simply allow for the critique of scientific controversies solely to encourage critical thinking and enhance science education. The academic freedom acts pass all three prongs of the *Lemon* test, like their cousins, the moment of silence cases. They have a clear secular purpose of fostering critical thinking, they neither advance nor inhibit religion, and they do not cause excessive government entanglement with religion. Consequently, the academic freedom acts do not violate the Establishment Clause. Any opposition to the academic freedom acts exists solely in the speculation of what a teacher *might* do, not what the acts allow. Just as the students were free in the moment of silence cases to do as they pleased, so are the students that hear the scientific critiques. Justice O'Connor reminded the Court that, "a moment of silence is not inherently religious."⁴²⁴ Neither is a scientific critique.

422. *Id.*

423. *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (emphasis added).

424. *Wallace v. Jaffree*, 472 U.S. 38, 72 (1985).