

# TEACHING CREATION, EVOLUTION, AND THE NEW ATHEISM IN 21<sup>ST</sup> CENTURY AMERICA: WINDOW ON AN EVOLVING ESTABLISHMENT CLAUSE

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## INTRODUCTION

The legal controversy over teaching creation and evolution in American public schools has generated a steady stream of ever-shifting fact patterns affecting the interpretation and application of the U.S. Constitution's Establishment Clause. Decades before the Supreme Court faced such hot-button issues as religious instruction in public schools,<sup>1</sup> release time for religious instruction,<sup>2</sup> posting the Ten Commandments in classrooms,<sup>3</sup> official school prayer,<sup>4</sup> and moments of silence,<sup>5</sup> courts grappled with the role of religion in public education in the context of restrictions on teaching evolution in public school.<sup>6</sup> The first two phases of the creation-evolution legal controversy ended in widely publicized Supreme Court decisions.<sup>7</sup> With a spate of new school board regulations and state statutes, a third generation of controversies is now discernible. It coincides with the rise of the intelligent design movement, has so far been fought mostly at the local level, and remains unresolved. This new phase of the controversy is testing basic principles of Establishment Clause jurisprudence, particularly the purpose prong of the Supreme Court's *Lemon* test.

The first phase of the creation-evolution legal controversy featured a national religious crusade to outlaw teaching the Darwinian theory of human evolution in public schools, leading to the passage of the first such statute in Tennessee and the subsequent trial of John Scopes in 1925.<sup>8</sup> Lesser restrictions had already been imposed in other places and, after Scopes's successful prosecution, other states and local school districts followed

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<sup>1</sup> Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

<sup>2</sup> Zorach v. Clauson, 343 U.S. 306 (1952).

<sup>3</sup> Stone v. Graham, 449 U.S. 39 (1980).

<sup>4</sup> Engel v. Vitale, 370 U.S. 421 (1962).

<sup>5</sup> Wallace v. Jaffree, 472 U.S. 38 (1985).

<sup>6</sup> *E.g.*, Scopes v. State, 289 S.W. 363 (Tenn. 1927).

<sup>7</sup> The first phase concluded with *Epperson v. Arkansas*, 393 U.S. 97 (1968), the second with *Edwards v. Aguillard*, 482 U.S. 578 (1987).

<sup>8</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 717 (M.D. Pa. 2005); JEFFREY P. MORAN, AMERICAN GENESIS: THE ANTIEVOLUTION CONTROVERSIES FROM SCOPES TO CREATION SCIENCE x-xi, 19-23 (2012); EDWARD J. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION 48-57 (3d ed. 2003).

Tennessee in excluding Darwinism from the classroom.<sup>9</sup> The Supreme Court's landmark 1947 decision in *Everson v. Board of Education*<sup>10</sup> marked the beginning of the end of the first phase of the creation-evolution legal controversy. By incorporating the First Amendment bar against religious establishment to the liberties protected from state action by the Fourteenth Amendment, *Everson* led to a series of rulings on state and local policies and practices promoting religion in public education.<sup>11</sup> In successive decisions beginning in 1948, the U.S. Supreme Court struck down classroom religious instruction,<sup>12</sup> school-sponsored prayers,<sup>13</sup> mandatory Bible reading,<sup>14</sup> and, in the 1968 case of *Epperson v. Arkansas*,<sup>15</sup> anti-evolution laws. The law at issue in *Epperson*, like similar laws in other states, simply banned the teaching of human evolution; it did not authorize teaching other theories.<sup>16</sup> With the disappearance of these laws, opponents of Darwinian instruction began calling for the inclusion of alternative theories of organic origins into biology curricula.

These calls ushered in a second phase of the creation-evolution legal controversy, which was marked by state statutes and school board regulations mandating that, to counterbalance Darwinian instruction, schools also teach either the biblical account of creation or scientific evidence alleged to support it.<sup>17</sup> Under then-entrenched Establishment Clause principles, it did not take long for courts to end this phase of the controversy. In 1975, the Sixth Circuit struck down a Tennessee law providing that public school textbooks give equal emphasis to creationist theories of origin as to Darwinian ones.<sup>18</sup> In 1982, after a widely publicized fact-finding trial, a federal district court declared unconstitutional an Arkansas law providing balanced classroom

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<sup>9</sup> LARSON, *supra* note 8, at 72-81.

<sup>10</sup> 330 U.S. 1 (1947).

<sup>11</sup> LARSON, *supra* note 8, at 93-95.

<sup>12</sup> Illinois *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

<sup>13</sup> Engel v. Vitale, 370 U.S. 421 (1962).

<sup>14</sup> Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

<sup>15</sup> 393 U.S. 97 (1968).

<sup>16</sup> *Id.* at 99, n.3 (text of statute).

<sup>17</sup> Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 711, 717 (M.D. Pa. 2005).

<sup>18</sup> Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975).

treatment for “creation science” and “evolution science.”<sup>19</sup> Five years later, in *Edwards v. Aguillard*,<sup>20</sup> the Supreme Court settled the matter by finding that Louisiana’s Balanced Treatment Act “advance[d] a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety.”<sup>21</sup>

Legal rulings against teaching creation-science in public schools did not resolve the social, political, or religious issues that underlie the creation-evolution controversy. Many Americans remained skeptical about Darwinism and rejected the idea that it should be the only theory of origin taught in public schools.<sup>22</sup> Perhaps the state could neither ban Darwinian instruction nor counterbalance it with religious or “scientific” creationism, but could state or local school districts direct that biology courses incorporate questions about the sufficiency of Darwinism to explain natural phenomena, or evidence of intelligent design in nature?<sup>23</sup> Such questions gained traction among conservative Protestants during the 1990s and spawned litigation and legislation in the new century. The adequacy of purely naturalistic theories of evolution, programs to open science education to teaching evidence of intelligent design, claims that Darwinism is only a theory, and calls to focus instruction on the controversy over evolutionary naturalism were all challenged.<sup>24</sup> This Article explores this emerging third phase of the creation-evolution controversy beginning with some background in Part II, followed by successive parts examining (1) how disclaimer lawsuits have impacted the interpretation of secular purpose; (2) the constitutionality of so-called academic freedom statutes; and (3) emerging limits on anti-creationist official acts.

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<sup>19</sup> *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

<sup>20</sup> 482 U.S. 578 (1987).

<sup>21</sup> *Id.* at 596.

<sup>22</sup> For various public opinion surveys on these issues, see MICHAEL B. BERKMAN & ERIC PLUTZER, *EVOLUTION, CREATIONISM, AND THE BATTLE TO CONTROL AMERICA’S CLASSROOMS* 64-92 (2010).

<sup>23</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 718 (M.D. Pa. 2005) (noting that the concept of intelligent design, “in its current form, came into existence after the *Edwards* case was decided in 1987”).

<sup>24</sup> MORAN, *supra* note 8, at 110-13.

## I. DARWINISM, CREATIONISM, AND INTELLIGENT DESIGN

As courts faced with constitutional issues in this area suggest in their opinions, definitions matter.<sup>25</sup> Evolution, evolutionism, and Darwinism are somewhat interchangeable terms. Creationism is a broad term that incorporates a variety of views about God creating nature. Creation-science and intelligent design, in contrast, are terms of art. An exploration of these terms provides an introduction to the history of the creation-evolution controversy and also sets the stage for understanding the current legal struggles.

*A. Darwinism and the New Atheism*

“Darwinism” refers to a theory of organic evolution devised by the English naturalist Charles Darwin in the mid-nineteenth century. In his 1859 book, *Origin of Species*, Darwin depicted all plant and animal species as evolving from pre-existing species over untold eons through the natural selection of variations that make some individual organisms better fitted to their environment than others.<sup>26</sup> Individuals possessing fitter traits survived, reproduced, and propagated those beneficial traits into the next generation, displacing those with less-fit traits.<sup>27</sup> As the process continued over generations—particularly in times of environmental change or as individuals moved into new environments—minor variations accumulated into major ones, ultimately leading to the evolution of new species.<sup>28</sup> Extrapolating backward to the beginning of life, Darwin envisioned a branching tree of life in which all current species descended with modification from one or a few original types.<sup>29</sup> Although disagreements emerged over what drove the process, the evidence for common descent assembled by Darwin and his followers quickly persuaded the European and American scientific community that all known past and present species evolved over

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<sup>25</sup> See, e.g., *Edwards*, 482 U.S. at 591-92; *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1267 (E.D. Ark. 1982); *Kitzmiller*, 400 F. Supp. 2d at 726.

<sup>26</sup> JOHN HEDLEY BROOKE, *SCIENCE AND RELIGION: SOME HISTORICAL PERSPECTIVES* 255 (1991).

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

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

<sup>29</sup> *Id.*

time and were not directly or “specially” fashioned by God.<sup>30</sup> By 1880, virtually all American botanists, zoologists, paleontologists, and other naturalists had accepted the concept of organic evolution and were using it to further their understanding of the natural processes of life.<sup>31</sup>

As the Mendelian laws of genetics became widely understood and accepted during the early twentieth century, Roger Fisher, Theodosius Dobzhansky, and other biologists integrated them with Darwin’s original theory to forge the Modern Neo-Darwinian Synthesis that has dominated the life sciences ever since.<sup>32</sup> The synthesis holds that variations in the phenotype (or expressed traits) of organisms are caused by genetic combinations and mutations that occur at conception.<sup>33</sup> Once fixed, these genetic factors—some dominant and some recessive—are inheritable under standard genetic laws and result in a pool of genetic diversity within populations which can respond rapidly to changes in the environment.<sup>34</sup> In this manner, minute variations in dominant and recessive genes have driven the evolution of living things since the first appearance of self-replicating molecules. At bottom, the process relies on random genetic variations and a competitive struggle for existence.<sup>35</sup>

Modern biologists disagree on the religious implications of Darwinism. The official body of elite science in the United States, the National Academy of Sciences, maintains that evolutionary biology is silent on the issue of God. In a 1998 statement, it declared: “Science is limited to explaining the natural world through natural causes. Science can say nothing about the supernatural. Whether God exists or not is a question about which science is neutral.”<sup>36</sup>

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<sup>30</sup> EDWARD J. LARSON, *EVOLUTION: THE REMARKABLE HISTORY OF A SCIENTIFIC THEORY* 125-29 (2004).

<sup>31</sup> RONALD L. NUMBERS, *THE CREATIONISTS* 6-7 (1992).

<sup>32</sup> LARSON, *supra* note 30, at 221-37.

<sup>33</sup> *Id.* at 173, 233.

<sup>34</sup> *Id.* at 228-35.

<sup>35</sup> *Id.* at 227-28.

<sup>36</sup> NAT’L ACAD. OF SCI., *WORKING GROUP ON TEACHING EVOLUTION, TEACHING ABOUT EVOLUTION AND THE NATURE OF SCIENCE* 58 (1998). For a later restatement of this position, see NAT’L ACAD. OF SCI., *INST. OF MED., SCIENCE, EVOLUTION, AND CREATIONISM* 12 (2008) (“Because they are not part of nature, supernatural entities cannot be investigated by science.”) Science historian Jeffrey P. Moran asserts that

Among the prominent American biologists championing this position are Brown University professor Kenneth Miller, a Roman Catholic who has co-authored leading high school and college biology textbooks, and National Academy geneticist Francis Collins, an evangelical Protestant who directs the National Institutes of Health.<sup>37</sup> Dissent from this view is led by British geneticist Richard Dawkins who has long argued that, by dispensing with need for a divine designer of organic beings, “Darwin made it possible to be an intellectually fulfilled atheist.”<sup>38</sup> Written partially in response to concern over religious fanaticism stirred by the 9/11 attacks, Dawkins’s *The God Delusion* became a bestseller in 2006.<sup>39</sup> Along with American neuroscientist Sam Harris, American philosopher of science Daniel Dennett, and British journalist Christopher Hitchens, all of whom wrote popular books with similar themes during the decade, Dawkins became one of the “Four Horsemen of New Atheism,” denouncing belief in God as a pathological delusion and invoking Darwinism to discredit it.<sup>40</sup>

### *B. Creationism and Creation Science*

Many conservative American Protestants never warmed to the idea of organic evolution due to the difficulty of reconciling it with the biblical account in Genesis that speaks of God creating the earth and all the various kinds of animal, including humans,

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“most scientists and theologians agree that scientific naturalism does not—cannot, by definition—make pronouncements about the supernatural.” MORAN, *supra* note 8, at 134.

<sup>37</sup> See KENNETH R. MILLER, *FINDING DARWIN’S GOD: A SCIENTIST’S SEARCH FOR COMMON GROUND BETWEEN GOD AND EVOLUTION* 194 (2007); see also FRANCIS S. COLLINS, *THE LANGUAGE OF GOD: A SCIENTIST PRESENTS EVIDENCE FOR BELIEF* 6 (2006).

<sup>38</sup> RICHARD DAWKINS, *THE BLIND WATCHMAKER: WHY THE EVIDENCE OF EVOLUTION REVEALS A UNIVERSE WITHOUT DESIGN* 10 (2d ed. 1996). For Dawkins’s status as a leading scientific critic of religious belief, see KARL W. GIBERSON & DONALD A. YERXA, *SPECIES OF ORIGINS: AMERICA’S SEARCH FOR A CREATION STORY* 123 (2002); MORAN, *supra* note 8, at 132.

<sup>39</sup> On the first page of *The God Delusion*, Dawkins writes, “Imagine, with John Lennon, a world with no religion. Imagine no suicide bombers, no 9/11. . . .” RICHARD DAWKINS, *THE GOD DELUSION* xi (2006).

<sup>40</sup> See Alice Gribbin, *The Four Horsemen of New Atheism Reunited*, *NEW STATESMAN* (Dec. 22, 2011), <http://www.newstatesman.com/print/181731>.

in six days.<sup>41</sup> Protestants traditionally place these creation events about 6000 years ago.<sup>42</sup> In response to nineteenth century developments in geology, many conservative Protestant theologians came to accept a much longer earth history, which they typically reconciled with the Genesis account by interpreting the days of creation to symbolize geologic ages or by positing a gap in the account that left unlimited time for cosmic and geological development before God created Adam and Eve.<sup>43</sup> Nevertheless, they generally held out for the special creation of humans and resisted Darwin's theory of natural selection, which they viewed as incompatible with a loving creator.<sup>44</sup> In his 1874 book *What Is Darwinism?*, for example, despite his belief that the days of creation symbolized geologic ages, Princeton theologian Charles Hodge spoke for many conservative Protestants when he equated Darwin's denial of divine design in the origin of species with the denial of God.<sup>45</sup>

Among conservative American Protestants, the prevailing interpretation of the Genesis account became more literalistic following publication of *Genesis Flood* by Henry M. Morris and John C. Whitcomb in 1961.<sup>46</sup> This book depicted the fossil record and earth's geological features as the abrupt product of a worldwide flood in Noah's time, as recorded in Genesis, rather than the gradual result of geologic action over eons as asserted by virtually all geologists.<sup>47</sup> In 1970, Morris founded the Institute for Creation Research as a center dedicated to finding evidence in nature to support a literal reading of the Bible, such as geological evidence of catastrophic water action in the Grand Canyon supportive of the belief that the Noachian flood shaped the earth's features, and paleontological evidence of people living amid dinosaurs in accord with the Genesis account of God creating

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<sup>41</sup> EDWARD J. LARSON, SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA'S CONTINUING DEBATE OVER SCIENCE AND RELIGION 33-34 (1997).

<sup>42</sup> PETER J. BOWLER, EVOLUTION: THE HISTORY OF AN IDEA 4 (1984).

<sup>43</sup> NUMBERS, *supra* note 31, at 45-46.

<sup>44</sup> *See id.* at 38-44.

<sup>45</sup> *Id.* at 14; BROOKE, *supra* note 26, at 303-04.

<sup>46</sup> McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1259 (E.D. Ark. 1982); MORAN, *supra* note 8, at 101-02.

<sup>47</sup> NUMBERS, *supra* note 31, at 203.

humans and all land animals on the same day.<sup>48</sup> This body of evidence and the inferences it was said to support became known as “creation science.”<sup>49</sup> Driven by a desire to give reasons for Christians to believe the Bible in a scientific age, Morris hailed creation-science as an evangelistic tool “in the great battle for the eternal souls of men and women.”<sup>50</sup> Giving urgency to his call, Morris asserted that belief in Darwinism directly caused many of the modern social evils decried by religious conservatives from atheism, socialism, and feminism to increased extramarital sex, abortion, and illicit drug use.<sup>51</sup>

The acceptance of creation-science by conservative Christians, along with the conviction among them that it was a fit subject for science education, led to the passage of the Arkansas and Louisiana Balanced Treatment Acts of 1981.<sup>52</sup> In those states and elsewhere, creationists lobbied school boards to include creation-science in the curriculum.<sup>53</sup> These efforts slowed when the Supreme Court, in *Edwards*, ruled that such laws violated the Establishment Clause.<sup>54</sup>

### C. *Intelligent Design*

In 1990, University of California law professor Phillip E. Johnson offered an alternative approach for creationism.<sup>55</sup> To be taken seriously after *Edwards*, he suggested, Darwin’s critics should distance themselves from the biblical literalism of creation-science.<sup>56</sup> Johnson’s target became the basic methodology that limits science to the study of natural explanations for physical phenomena and pushes any sense of purpose in nature into the

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<sup>48</sup> *Id.* at 283-90.

<sup>49</sup> *Id.* at 245.

<sup>50</sup> HENRY M. MORRIS & DONALD H. ROHRER, CREATION: THE CUTTING EDGE 9 (1982); see also NUMBERS, *supra* note 31, at 194; MORAN, *supra* note 8, at 116.

<sup>51</sup> MORAN, *supra* note 8, at 92-104; *McLean*, 529 F. Supp. at 1260; GIBERSON & YERXA, *supra* note 38, at 109.

<sup>52</sup> LARSON, *supra* note 8, at 147-55.

<sup>53</sup> *Id.* at 159.

<sup>54</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 717-18 (M.D. Pa. 2005).

<sup>55</sup> Phillip E. Johnson, *The Origin of Species Revisited: The Theories of Evolution and of Abrupt Appearance*, 7 CONST. COMMENT. 427, 430 (1990); see also *Kitzmiller*, 400 F. Supp. 2d at 719 (depicting Johnson as the father of the intelligent design movement).

<sup>56</sup> Johnson, *supra* note 55, at 428, 432-33.

realm of religion.<sup>57</sup> He wrote, “It is not only ‘fundamentalists,’ of course, but theists of any description who believe that an intelligent artificer made humanity for a purpose, whether through evolution or otherwise.”<sup>58</sup> As an evangelical Presbyterian, he placed himself among these theists.<sup>59</sup>

An adult convert to Christianity, Johnson began thinking critically about Darwinism after reading Dawkins’s 1986 bestseller, *The Blind Watchmaker*.<sup>60</sup> The book’s message—that modern biology justifies atheism—infuriated Johnson.<sup>61</sup> He set out to discredit it with his own book, *Darwin on Trial*, published in 1991. “I could see that Dawkins achieved his word magic with the very tools that are familiar to us lawyers,” Johnson reasoned, by using definitions to determine results, “We define science as the pursuit of materialist alternatives. Now what kind of answers do we come up with? By gosh, we come up with materialist answers!”<sup>62</sup> Natural selection may be the best naturalistic answer to the origin of species, he argued, but it might not necessarily be the correct one.<sup>63</sup> He claimed that if we admit that supernatural forces could shape the natural world, then the apparent abrupt appearance of species in the fossil record and the intricate complexity of natural systems should favor intelligent design over natural selection, and public schools should be able to teach this alternative so long as they promote no particular religious viewpoint.<sup>64</sup> In adopting this stance, Johnson and the intelligent design movement were taking on the defining tenet of modern science: methodological naturalism, which limits science to

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<sup>57</sup> *Id.* at 431-33.

<sup>58</sup> *Id.* at 431; Phillip E. Johnson, *Evolution as Dogma: The Establishment of Naturalism*, FIRST THINGS, Oct. 1990, available at <http://www.firstthings.com/article/2007/09/002-evolution-as-dogma-the-establishment-of-naturalism-43>.

<sup>59</sup> Johnson, *supra* note 55, at 430.

<sup>60</sup> BARBARA FORREST & PAUL R. GROSS, CREATIONISM’S TROJAN HORSE: THE WEDGE OF INTELLIGENT DESIGN 17 (2004). The cover of the 1996 edition of *The Blind Watchmaker* depicts it as a national bestseller. See DAWKINS, *supra* note 38.

<sup>61</sup> EDWARD HUMES, MONKEY GIRL: EVOLUTION, EDUCATION, RELIGION AND THE BATTLE FOR AMERICA’S SOUL 66 (2007).

<sup>62</sup> Tim Stafford, *The Making of a Revolution*, CHRISTIANITY TODAY, Dec. 8, 1997, at 16, available at <http://www.christianitytoday.com/ct/1997/december8/7te016.html>.

<sup>63</sup> PHILLIP E. JOHNSON, DARWIN ON TRIAL 7-8 (1991).

<sup>64</sup> *Id.* at 34-37, 45-62.

seeking testable naturalistic explanations for physical phenomena.<sup>65</sup>

Johnson's work attracted the attention of Stephen Meyer, then a graduate student studying philosophy.<sup>66</sup> With Johnson's support, Meyer launched an intelligent design think tank, the Center for the Renewal of Science and Culture (CRS), as part of the Seattle-based Discovery Institute.<sup>67</sup> Among CRS's other Senior Fellows, Michael J. Behe and William A. Dembski have attracted the most attention.<sup>68</sup> Behe's writings do not question the evolutionary concept of common descent, but assert that some biochemical processes (such as the cascade of multiple proteins required for blood clotting) and biological features (such as the bacterial flagellum) are too irreducibly complex to have originated in the step-by-step fashion envisioned by Darwinism and therefore must have been intelligently designed.<sup>69</sup> This is a logical argument rather than a scientific proof of design, and Behe has not conducted any original scientific research on the matter.<sup>70</sup>

Seeking to break the stalemate in God's favor, Dembski's writings deploy probability filters (of the type used to sift radio signals from outer space for messages sent by intelligent beings) to detect whether the complexity within various biological systems is more likely the product of random chance or intelligent design.<sup>71</sup> They claim that the probabilities underlying some biochemical systems are statistically small enough to serve as evidence for intelligent design—though the probabilistic nature of such evidence inevitably makes its weight dependant on one's conception of the age, size, and dimensions of the universe.<sup>72</sup>

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<sup>65</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005). Using the abbreviation "ID" for the theory of intelligent design as postulated by Johnson and his followers, the *Kitzmiller* court observed, "Notably, every major scientific association that has taken a position on the issue of whether ID is science has concluded that ID is not, and cannot be considered as such." *Id.* at 737.

<sup>66</sup> HUMES, *supra* note 61, at 67-68.

<sup>67</sup> RONALD L. NUMBERS, *THE CREATIONISTS* 381-83 (Expanded ed. 2006); MORAN, *supra* note 8, at 18, 110 (noting that the Center was later renamed the Center for Science and Culture).

<sup>68</sup> See MORAN, *supra* note 8, at 109 (highlighting Behe and Dembski along with Johnson).

<sup>69</sup> EDWARD J. LARSON, *CREATIONISM IN THE CLASSROOM* 281 (2012).

<sup>70</sup> *Kitzmiller*, 400 F. Supp. 2d at 739-45.

<sup>71</sup> LARSON, *supra* note 69, at 281.

<sup>72</sup> *Id.*

Given enough time, enough planets in our universe, and enough universes, no probability is too small to be discarded as unlikely to happen.<sup>73</sup> Collectively, the work of Johnson, Behe, Dembski, and their colleagues became the modern doctrine of intelligent design.<sup>74</sup>

Along with sponsoring writing and research about design in nature, the Discovery Institute provides advice and materials to school boards and teachers on both alternatives to Darwinism and what it depicts as the controversy over evolutionary materialism.<sup>75</sup> The actions of those school boards and teachers have in turn generated a third phase of the creation-evolution legal controversy marked by (1) litigation over textbook and classroom disclaimers suggesting that Darwinism is “only a theory;” (2) questions about statutes authorizing schools to “teach the controversy” over evolution; and (3) lawsuits invoking the rights of creationist students and schools.<sup>76</sup> Each will be addressed in turn.

## II. FINDING A SECULAR PURPOSE FOR ANTI-DARWINIAN DISCLAIMERS

Textbook and classroom disclaimers about evolution offered a logical alternative for creationists once the Supreme Court foreclosed either banning Darwinian instruction altogether or balancing it with creationist coursework.<sup>77</sup> Proposed disclaimers took various forms and raised different legal issues. Protracted lawsuits arose over disclaimers in Louisiana, Georgia, and Pennsylvania.<sup>78</sup> Despite the national attention focused on those cases, a state-mandated textbook disclaimer still exists in Alabama, and has never been challenged in court.<sup>79</sup>

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<sup>73</sup> NUMBERS, *supra* note 67, at 384-86; FORREST & GROSS, *supra* note 60, at 128-36.

<sup>74</sup> NUMBERS, *supra* note 67, at 382-83.

<sup>75</sup> *E.g.*, Selman v. Cobb Cnty. Sch. Dist., 390 F. Supp. 2d 1286, 1294 (N.D. Ga. 2005); *Kitzmiller*, 400 F. Supp. 2d at 750.

<sup>76</sup> *See infra* Parts II, III, IV.

<sup>77</sup> EUGENIE C. SCOTT, *EVOLUTION VS. CREATIONISM: AN INTRODUCTION* 140 (2d ed. 2009).

<sup>78</sup> *See infra* Parts II.A, C-D.

<sup>79</sup> *See infra* Part II.B.

*A. Tangipahoa Parish, Louisiana*

The first modern legal battle over anti-Darwinian disclaimers began in Tangipahoa Parish, Louisiana in the mid-1990s and reached the Supreme Court in 2000. Creationists and conservative Christians were well represented on the Tangipahoa Parish Board of Education during the 1990s.<sup>80</sup> Working closely with a local chapter of the Christian Coalition and the New Orleans-based Origins Research Association (ORA), one member of the Tangipahoa Board, Enos F. “Jake” Bailey, nearly secured board approval in 1994 for a curriculum guide incorporating such creationist concepts as a young earth and intelligent design in nature.<sup>81</sup> ORA president Edward Boudreaux, a chemistry professor at the University of New Orleans, led the effort to pass the Louisiana Balanced-Treatment Act in 1981 and turned his attention to lobbying local school districts after that statute was declared unconstitutional by the U.S. Supreme Court in 1987.<sup>82</sup> ORA’s Models of Origins Curriculum Guide was a product of Boudreaux’s collaboration with Bailey and others on the Tangipahoa Parish Board.<sup>83</sup>

An April 1994 board meeting on the proposal turned angry after several faculty members from a local university challenged Boudreaux’s initiative.<sup>84</sup> One of them, philosophy professor and Tangipahoa Parish native Barbara Forrest, would go on to co-author a book about the proselytizing strategies of intelligent design advocates.<sup>85</sup> When it came time to act on the creationist curriculum guide, a history professor on the board, Howard Nichols, managed to orchestrate its defeat by a single vote.<sup>86</sup> Not to be denied, Bailey promptly joined with fellow creationists on the board to demand that the board require teachers, prior to classroom instruction on evolution, to read a disclaimer stating

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<sup>80</sup> LARSON, *supra* note 69, at 231.

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

<sup>82</sup> *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987). For background on Boudreaux, see LARSON, *supra* note 69, at 231.

<sup>83</sup> LARSON, *supra* note 69, at 231-32.

<sup>84</sup> *Id.* at 232.

<sup>85</sup> FORREST & GROSS, *supra* note 60.

<sup>86</sup> LARSON, *supra* note 69, at 232.

that Darwinism was not being presented to dissuade belief in the biblical account of creation.<sup>87</sup>

With the community already divided over the earlier creationism proposal, tensions flared anew. Bailey rejected a move to delete any explicit reference to religion from the disclaimer. Asserting that up to ninety percent of local school students were taught by their parents that God created all life, he argued that they would be confused if their science teachers gave a naturalistic account of origins without mentioning the biblical account. The proposal passed by a margin of five to four.<sup>88</sup> Frustrated opponents immediately threatened to challenge it in court.<sup>89</sup>

Herb Freiler, a local realtor with school-aged children, led the charge against the disclaimer. "What you are doing," he scolded board members at a public meeting prior to their passage of the disclaimer in April 1994, "is to just foist your own fundamentalist Christian viewpoint on the citizens of this parish at great embarrassment to many of us."<sup>90</sup> Securing the assistance of the state branch of the American Civil Liberties Union (ACLU), Freiler recruited other local residents to join him in suing the Board of Education in federal court.<sup>91</sup> The ACLU gave the board ten days to repeal the disclaimer, but the board voted to defend it

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<sup>87</sup> As adopted by the Tangipahoa Parish Board of Education, the adopted disclaimer read as follows:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 341 (5th Cir. 1999).

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

<sup>89</sup> LARSON, *supra* note 69, at 232.

<sup>90</sup> Thomas Vinciguerra, *In a Louisiana Parish, Dim Echoes of the 'Monkey Trial'*, N.Y. TIMES, June 25, 2000, § 4, at 7.

<sup>91</sup> LARSON, *supra* note 69, at 232.

in court.<sup>92</sup> “When the board put this into effect, we had our legal counsels advise us on it. We wanted to make sure the wording was legal,” Tangipahoa Parish School Superintendent Ted Cason said, “The board just wanted to make sure that the evolution theory isn’t being taken out of context. It’s a theory and it is not taught to promote or go against any Christian or religious belief.”<sup>93</sup>

### 1. In the District Court

Addressing plaintiffs’ motion for summary judgment,<sup>94</sup> the U.S. District Court for the Eastern District of Louisiana focused on the so-called purpose prong of the three-part test for Establishment Clause violations set forth in *Lemon v. Kurtzman*.<sup>95</sup> In defending its action before the district court, the school board articulated three purportedly secular purposes for the disclaimer.<sup>96</sup> “According to the board, the disclaimer serve[d] (1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution.”<sup>97</sup> Dismissing these purposes without a trial, the district court invalidated the disclaimer for failing to have a secular purpose.<sup>98</sup>

Applying the *Lemon* test’s purpose prong in this manner raised concerns. Ending the two earlier phases of the creation-evolution legal controversy, the U.S. Supreme Court used a lack of secular purpose first to strike down Arkansas’s 1929 voter-passed law against teaching evolution<sup>99</sup> and second to strike down Louisiana’s 1981 Balanced-Treatment Act.<sup>100</sup> In ruling on Arkansas’s old anti-evolution statute, the Court noted, “No

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<sup>92</sup> *Tangipahoa Board Faces ACLU Suit Threat*, BATON ROUGE ADVOC., Oct. 19, 1994, at 5B.

<sup>93</sup> *Id.*

<sup>94</sup> The district court’s decision is contained in *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819 (E.D. La. 1997).

<sup>95</sup> 403 U.S. 602, 612-13 (1971).

<sup>96</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 342 (5th Cir. 1999).

<sup>97</sup> *Id.* at 344.

<sup>98</sup> *Id.* at 342.

<sup>99</sup> *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

<sup>100</sup> *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987).

suggestion has been made that Arkansas' law may be justified by considerations of state policy other than *the religious views of some of its citizens*. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence."<sup>101</sup> Addressing the Louisiana balanced-treatment statute, which it called a "Creationism Act," the Court wrote:

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with *a particular religious viewpoint*. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects.<sup>102</sup>

Some critics read the language in these opinions as wrongly barring voters and legislators from bringing their religious views into lawmaking.<sup>103</sup> The framers never intended for the Establishment Clause to require a "naked public square" devoid of religious views, such critics charged.<sup>104</sup> The district court's dismissal of the school district's claims about its purposes in *Freiler* would fit the alleged pattern of excluding religious views from lawmaking.

## 2. By the Appellate Panel

On appeal, a Fifth Circuit panel rejected the district court's ruling.<sup>105</sup> In a significant affirmation of the right to consider religious views and values in lawmaking, the panel revisited the board's three stated purposes for the disclaimer and found that two of them satisfied the *Lemon* test:

We find that the disclaimer does further the second and third purposes articulated by the School Board. The

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<sup>101</sup> *Epperson*, 393 U.S. at 107-08 (emphasis added).

<sup>102</sup> *Edwards*, 482 U.S. at 593 (emphasis added).

<sup>103</sup> *E.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 111-12, 165-69 (1993); Steven D. Smith, *The Plight of the Secular Paradigm*, NOTRE DAME L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=1911420>.

<sup>104</sup> *E.g.*, RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA ix, 22 (1984); DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 260-62, 331-32 (2010).

<sup>105</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 345-47 (5th Cir. 1999).

disclaimer explicitly acknowledges the existence of at least one alternative theory for the origin of life, i.e., the Biblical version of creation. Additionally, the disclaimer reminds school children that they can rightly maintain beliefs taught by their parents on the subject of the origin of life. We have no doubt that the disclaimer will further its second and third avowed objectives of disclaiming any orthodoxy of belief that could be implied from the exclusive place of evolution in the public school curriculum and reducing student/parent offense caused by the teaching of evolution. Accordingly, we conclude that these two purposes are sincere.

In order to avoid the “callous indifference” first cautioned against by the Supreme Court in *Zorach v. Clauson*, we conclude that, under the instant facts, the dual objectives of disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives that the School Board could rightly address. . . . In so doing, we acknowledge that local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms.<sup>106</sup>

In essence, the court recognized that the government can act to protect religious believers even if the Establishment Clause precludes it from promoting religious beliefs. In support of its holding, the court cited a 1952 Supreme Court decision, *Zorach v. Clauson*,<sup>107</sup> upholding “release-time programs” in which public schools allowed some students to leave school during school hours to receive religious instruction while requiring others to stay in school. Our “institutions presuppose a Supreme Being,” Justice William O. Douglas wrote for the Court in *Zorach*,<sup>108</sup> which suggests that such institutions will reflect religious values. Read this way, the purposes that raise concern under the *Lemon* test are those seeking to advance or inhibit religious *belief* rather than those seeking to advance or inhibit religious *values* or interests.<sup>109</sup>

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<sup>106</sup> *Id.* at 345-46 (internal citations omitted).

<sup>107</sup> 343 U.S. 306, 313-15 (1952).

<sup>108</sup> *Id.* at 313.

<sup>109</sup> For precedent, see *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring).

This interpretation preserves a place for religious views in the public square.

Even though it survived the treacherous shoals of the *Lemon* test's purpose prong, the Fifth Circuit panel concluded that the disclaimer ran aground on the *Lemon* test's effect prong.<sup>110</sup> This prong, the court explained, asks whether a challenged government action has the primary effect of conveying "a message of endorsement or disapproval" of religion,<sup>111</sup> an inquiry that focuses on the intended audience and primary message that audience would likely perceive. Here, the panel concluded that by singling out the "Biblical version of creation" as the only named alternative to the scientific theory of evolution, the disclaimer had the primary effect of communicating the School Board's endorsement of biblical creationism to its intended audience, impressionable high school students.<sup>112</sup> As a result, the disclaimer violated both the *Lemon* test's effect prong and the so-called endorsement test, which is applied by some Supreme Court justices and used in some circuits as a gloss on the *Lemon* test.<sup>113</sup>

### 3. En Banc and in the Supreme Court

The full Fifth Circuit denied the School Board's subsequent petition for rehearing en banc.<sup>114</sup> A brief published statement explaining the denial suggested that the court's adverse ruling would not necessarily apply to a disclaimer that simply urged students to keep an open mind about origins without singling out a particular religious alternative to consider.<sup>115</sup> Seven of the court's fifteen judges, one shy of the number needed for rehearing, dissented to the denial.<sup>116</sup> Writing for the dissenters, Judge Rhesa Hawkins Barksdale observed:

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<sup>110</sup> *Freiler*, 185 F.3d at 346-48.

<sup>111</sup> *Id.* at 346.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 348. Although the endorsement test is presented here as an alternative Establishment Clause test, as developed through application, the endorsement test is primarily used as a lens to look for effects under the *Lemon* test. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714 (M.D. Pa. 2005).

<sup>114</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 201 F.3d 602, 603 (5th Cir. 2000).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

Based on my review of the record, the language of the disclaimer, and the context in which it was intended to be used, the primary effect of the disclaimer is *not* to advance religion; instead, it is to advance tolerance and respect for diverse viewpoints. The record reflects that, to the overwhelming majority of the parish students, the scientific concept of evolution conflicts with their (or their parents') beliefs about the origin of life and matter; and its exclusive place in the curriculum had caused concern among students and parents. The disclaimer's message is one of respect for diverse viewpoints, informing students that teaching evolution as the sole concept for the origin of life and matter is *not* intended to influence or dissuade them from forming their own opinions about the subject *or* from maintaining beliefs taught by their parents.<sup>117</sup>

These dissenters would support a disclaimer that not only urged students to reach their own conclusions about origins, which the panel apparently would have accepted as well, but also one expressly citing biblical creationism as an alternative to Darwinism.<sup>118</sup>

The school district's petition for a writ of certiorari fell one justice shy of a sufficient number to get on the Supreme Court docket.<sup>119</sup> In a published dissent joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia focused on the disclaimer's express reference to biblical creationism and found it acceptable in context:

The only aspect of the disclaimer that could conceivably be regarded as going beyond what the rehearing statement purports to approve is the explicit mention—as an example—of “the Biblical version of Creation.” To think that this reference to (and plainly not endorsement of) a reality of religious literature—and this use of an example that is not a contrived one, but to the contrary the example most likely to come into play—somehow converts the otherwise innocuous

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<sup>117</sup> *Id.* at 607 (Barksdale, J., dissenting).

<sup>118</sup> *Id.*

<sup>119</sup> *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251 (2000).

disclaimer into an establishment of religion is quite simply absurd.<sup>120</sup>

Placing the decision in a historical context, Justice Scalia added:

In *Epperson v. Arkansas*, we invalidated a statute that forbade the teaching of evolution in public schools; in *Edwards v. Aguillard*, we invalidated a statute that required the teaching of creationism whenever evolution was also taught; today we permit a Court of Appeals to push the much beloved secular legend of the Monkey Trial one step further. We stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration. I dissent.<sup>121</sup>

Clearly, cracks were appearing in the wall of separation between permissible and impermissible accommodation of creationism in public schools. With the rehearing statement and dissent to the denial of certiorari issued in 2000, the new century opened with brightening prospects for creation-minded lawmakers and school officials.

#### *B. Alabama Textbook Disclaimer*

Parallel developments at the state level in Alabama also suggested that a carefully worded disclaimer might well pass constitutional muster. In 1995, shortly after Tangipahoa Parish Board of Education adopted its classroom disclaimer, the Alabama Board of Education moved in a similar direction. As part of its state science-education standards, it declared, “Explanations of the origin of life and major groups of plants and animals, including humans, shall be treated as theory and not as fact.”<sup>122</sup> Shortly thereafter, at the urging of Governor Fob James, the Board also adopted a specific disclaimer for inclusion in all evolutionary biology textbooks used in public schools.<sup>123</sup> The textbook disclaimer depicted evolution as a controversial theory,

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<sup>120</sup> *Id.* at 1255 (Scalia, J., dissenting) (internal citations omitted).

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

<sup>122</sup> LARSON, *supra* note 69, at 217-18.

<sup>123</sup> *Id.* at 218.

differentiated between micro and macroevolution by noting that the latter “should be considered a theory,” and concluded with a list of allegedly unanswered questions about biological origins.<sup>124</sup> Microevolution and macroevolution are terms used in creation-science to differentiate between changes within the “kinds” of plants and animals created by God as depicted in the Genesis account (microevolution) and changes from one basic kind or type of plant or animal to another (macroevolution).<sup>125</sup> Evolutionary biologists, in contrast, recognize microevolution and macroevolution as simply different levels of analysis of the same phenomenon.<sup>126</sup> Unlike the classroom disclaimer struck down by the Fifth Circuit, Alabama’s textbook disclaimer did not expressly

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<sup>124</sup> In full, the disclaimer stated as follows:

This textbook discusses evolution, a controversial theory some scientists present as a scientific explanation for the origin of living things, such as plants, animals and humans.

No one was present when life first appeared on [E]arth. Therefore, any statement about life’s origins should be considered as theory, not fact.

The word “evolution” may refer to many types of change. Evolution describes changes that occur within a species. (White moths, for example, may “evolve” into gray moths.) This process is microevolution, which can be observed and described as fact. Evolution may also refer to the change of one living thing to another, such as reptiles into birds. This process, called macroevolution, has never been observed and should be considered a theory. Evolution also refers to the unproven belief that random, undirected forces produced a world of living things.

There are many unanswered questions about the origin of life which are not mentioned in your textbook, including:

- Why did the major groups of animals suddenly appear in the fossil record (known as the “Cambrian Explosion”)?
- Why have no new major groups of living things appeared in the fossil record for a long time?
- Why do major groups of plants and animals have no transitional forms in the fossil record?
- How did you and all living things come to possess such a complete and complex set of “Instructions” for building a living body?

Study hard and keep an open mind. Someday, you may contribute to the theories of how living things appeared on earth.

SCOTT, *supra* note 77, at 242.

<sup>125</sup> See NUMBERS, *supra* note 31, at 220; SCOTT, *supra* note 77, at 203-06.

<sup>126</sup> SCOTT, *supra* note 77, at 205.

name any religious alternatives to Darwinism. Perhaps for this reason, it was never challenged in court.

Even so, in 2001, following the election of a new governor and the Fifth Circuit decision in the Tangipahoa Parish case, the Alabama Board of Education revised its textbook disclaimer and state science standards.<sup>127</sup> Rather than depict evolution as a controversial theory, the revised disclaimer and science standards singled out only “evolution by natural selection.”<sup>128</sup> Many religious critics of Darwinism focus their objections on the supposedly atheistic implications of its theory of evolution by *natural selection* and, some of them accept theistic theories of evolution.<sup>129</sup> The revised disclaimer also replaced the closing list of allegedly unanswered questions with the following concluding language:

There are many unanswered questions about the origin of life. With the explosion of new scientific knowledge in biochemical and molecular biology and exciting new fossil discoveries, Alabama students may be among those who use their understanding and skills to contribute to knowledge and to answer many unanswered questions. Instructional materials associated with controversy should be approached with an open mind, studied carefully, and critically considered.<sup>130</sup>

Critics of the original disclaimer argued that none of the listed, specific questions were valid.<sup>131</sup> Of particular significance, the revised disclaimer deleted any express reference to microevolution and macroevolution. As revised, the disclaimer is less patently sectarian and reflects the views of a broader array of theists than the original text. Like its predecessor, it remains unchallenged in court.

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<sup>127</sup> LARSON, *supra* note 69, at 222.

<sup>128</sup> In this respect, the revised disclaimer begins, “The theory of evolution by natural selection is a controversial theory that is included in this textbook. It is controversial because it states that natural selection provides the basis for the modern scientific explanation for the diversity of life.” *Id.*

<sup>129</sup> See, e.g., NUMBERS, *supra* note 31, at 44, 181.

<sup>130</sup> LARSON, *supra* note 69, at 223.

<sup>131</sup> *Id.*

*C. Congress and Cobb County*

By 2002, the state of the law was capable of readily confusing school officials and citizens alike. On the one hand, a deeply divided federal circuit had struck down Tangipahoa Parish's "exercise critical thinking" disclaimer for singling out biblical creationism as an alternative to Darwinism.<sup>132</sup> On the other hand, no one had filed suit challenging the constitutionality of Alabama's keep-an-open-mind disclaimer that steered clear of mentioning alternatives to Darwinism. Further complicating the situation, Congress added the so-called Santorum Amendment to the conference committee's report on the No Child Left Behind Act of 2001.<sup>133</sup>

## 1. Santorum Amendment

Without fanfare, on the eve of final Senate passage of a critical education bill, U.S. Senator Rick Santorum, a conservative Catholic critic of Darwinism, quietly secured Senate passage of a floor amendment that stated in pertinent part, "where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy . . . ."<sup>134</sup> This language, which had been suggested to Santorum by Phillip Johnson following a congressional briefing by Discovery Institute fellows, did not appear in the version of the bill earlier passed by the House of Representatives.<sup>135</sup> After the Senate passed the Amendment, national science organizations lobbied to strip it from the final legislation.<sup>136</sup>

The conference committee charged with working out differences between the House and Senate versions of the bill responded to this controversy by crafting a compromise. The committee removed the Amendment from the bill itself but included language from it in the committee's non-binding explanatory report. In pertinent part, the Conference Report stated:

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<sup>132</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999).

<sup>133</sup> See FORREST & GROSS, *supra* note 60, at 243-48.

<sup>134</sup> *Id.* at 240-41. See also SCOTT, *supra* note 77, at 230.

<sup>135</sup> FORREST & GROSS, *supra* note 60, at 242.

<sup>136</sup> *Id.* at 243.

The Conferees recognize that a quality science education should prepare students to distinguish the data and testable theories of science from religious or philosophical claims that are made in the name of science. Where topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society.<sup>137</sup>

According to intelligent design advocates, the report language authorized state and local school districts to teach about the controversy surrounding evolution.<sup>138</sup> Defenders of Darwinism dismissed it as meaningless.<sup>139</sup> This confusing legal landscape confronted the elected School Board of Cobb County, Georgia, when it entered the disclaimer thicket in 2002.

## 2. *Selman v. Cobb County School District*

A traditionally conservative, historically rural area transformed into an affluent bedroom community for Atlanta with its own growing commercial infrastructure, Cobb County had a long history of restricting Darwinian instruction in its public schools. Prior to 2002, the school board had maintained a policy of strictly excluding the theory of human evolution from required science courses.<sup>140</sup> After Georgia's Department of Education adopted state science guidelines that included teaching evolutionary concepts, Cobb County School District began a process of adopting new science textbooks that led to its selection of the Prentice Hall high school text *Biology*, by Kenneth Miller and Joseph Levine.<sup>141</sup>

Adopting the Miller and Levine text necessitated a loosening of the district's restrictions on Darwinian instruction, which triggered calls for some form of retrenchment from a group of

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<sup>137</sup> H.R. REP. NO. 107-334, at 703 (2001) (Conf. Rep.).

<sup>138</sup> SCOTT, *supra* note 77, at 230; FORREST & GROSS, *supra* note 60, at 244-48.

<sup>139</sup> SCOTT, *supra* note 77, at 236-37.

<sup>140</sup> *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1289-90, 1296 (N.D. Ga. 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006).

<sup>141</sup> *Id.* at 1290-91.

conservative Christian parents and taxpayers.<sup>142</sup> Objectors complained about the absence of alternative theories of origin in the new texts and their failure to present Darwinism as a theory.<sup>143</sup> Before placing the new books in service, the school board sought the advice from its own counsel and intelligent design proponents at the Discovery Institute.<sup>144</sup> The end result, which built on the experience of Alabama, was an order directing school personnel to paste a disclaimer inside each of the new biology books advising readers that material about evolution “should be approached with an open mind, studied carefully, and critically considered.”<sup>145</sup> The disclaimer made no mention of intelligent design or any other alternatives to Darwinism.<sup>146</sup> In requiring the use of these so-called stickers, the board acted so quickly and quietly that few people took notice until they began appearing in the books.<sup>147</sup>

Having more than doubled in population to over 600,000 persons during the preceding two decades, with many of the new residents coming from the North for good jobs in metropolitan Atlanta, Cobb County was a far less homogeneous community in 2000 than when its school district first imposed restrictions on teaching evolution.<sup>148</sup> In this “new” Cobb County, concern, if not outrage, about the stickers quickly spread. The first to file suit was Jeffrey Selman, a computer programmer who moved to the area from New York, depicted himself as a “patriot” and “practicing Jew,” and regularly protested the pervasiveness of evangelical Christian influences in local and state government.<sup>149</sup> Other plaintiffs soon joined him in litigation overseen by the state ACLU chapter.<sup>150</sup>

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<sup>142</sup> *Id.* at 1291.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1294.

<sup>145</sup> *Id.* at 1292. In its entirety, the disclaimer stated: “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.” *Id.*; see SCOTT, *supra* note 77, at 155.

<sup>146</sup> *Selman*, 390 F. Supp. 2d at 1291.

<sup>147</sup> See *id.* at 1292, 1294-97.

<sup>148</sup> LARSON, *supra* note 69, at 254.

<sup>149</sup> Mary MacDonald, *Cobb Dads Heed Call to War on Evolution; School Debate Provokes Action*, ATLANTA J-CONST., Sept. 8, 2002, at 1A.

<sup>150</sup> LARSON, *supra* note 69, at 255.

Even as Selman's suit was simmering, the Cobb County Board of Education stirred the pot by considering a proposal to authorize classroom discussion of alternative views on organic origins.<sup>151</sup> "We've been told by our attorney we're not allowed to teach creationism," Board Chair Curt Johnston commented, "[b]ut the point is we want free and open discussion in the classroom."<sup>152</sup> The proposal touched off what Johnston depicted as "the most difficult and polarized debate" that he had experienced as a board member.<sup>153</sup> Marjorie Rogers, one the parents who complained about the adoption of the Miller and Levine text, submitted a petition signed by some 2,300 local parents in support of imposing restrictions on Darwinian instruction.<sup>154</sup> Selman countered by threatening to expand his lawsuit.<sup>155</sup> Ultimately, in September of 2002, the board adopted a revised policy, which stated in pertinent part:

It is the educational philosophy of the Cobb County School District to provide a broad based curriculum; therefore, the Cobb County School District believes that discussion of disputed views of academic subjects is a necessary element of providing a balanced education, including the study of the origin of the species. This subject remains an area of intense interest, research, and discussion among scholars . . . . The purpose of this policy is to foster critical thinking among students, to allow academic freedom consistent with legal requirements, to promote tolerance and acceptance of diversity of opinion, and to ensure a posture of neutrality toward religion. It is the intent of the Cobb County Board of Education that this policy not be interpreted to restrict the teaching of evolution, to promote or require the teaching of creationism, or to discriminate for or against a particular set of religious beliefs, religion in general, or non-religion.<sup>156</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Discussing Creationism Is Issue in Georgia*, ST. LOUIS POST-DISPATCH, Aug. 24, 2002, at 24.

<sup>153</sup> MacDonald, *supra* note 149.

<sup>154</sup> SCOTT, *supra* note 77, 154-55.

<sup>155</sup> Mary MacDonald & Mia Taylor, *Cobb Adopts Evolution Policy; Science Classes Can Hear Diverse Views on Origins*, ATLANTA J-CONST., Sept. 27, 2002, at 1A.

<sup>156</sup> *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1296 (N.D. Ga. 2005).

The board adopted this revised policy nearly six months after approving the Miller and Levine biology textbook with the condition that the stickers be affixed to them.<sup>157</sup>

Following a bench trial that featured expert testimony on Darwinism by *Biology* co-author Kenneth Miller,<sup>158</sup> District Court Judge Clarence C. Cooper ruled against the disclaimer.<sup>159</sup> Like the Fifth Circuit in *Freiler*, however, he did so after finding that it served two valid secular purposes.<sup>160</sup> One, Judge Cooper ruled, was expressed in the board's revised policy on teaching origins; another emerged from other evidence presented at trial.<sup>161</sup>

The board's revised policy on teaching evolution, which was adopted after, but in conjunction with, the disclaimer, gave as its first purpose, "to foster critical thinking among students."<sup>162</sup> This secular purpose, Judge Cooper found, was "not a sham."<sup>163</sup> He explained:

First, it is important to note that prior to the adoption of the new textbooks and Sticker and the revision of the related policy and regulation, many students in Cobb County were not being taught evolution or the origin of the human species in school. Further, the School Board was aware that a large population of Cobb County citizens maintained beliefs that would potentially conflict with the teaching of evolution. Against this backdrop, the Sticker appears to have the purpose of furthering critical thinking because it tells students to approach the material on evolution with an open mind, to study it carefully, and to give it critical consideration.<sup>164</sup>

In *Freiler*, Judge Cooper noted, the Fifth Circuit had found a secular purpose for an "exercise critical thinking" disclaimer.<sup>165</sup> This case was stronger than *Freiler*, he opined, because "[u]nlike the disclaimer in the *Freiler* case, the Sticker in this case does not

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<sup>157</sup> *Id.* at 1295-96.

<sup>158</sup> *Id.* at 1310.

<sup>159</sup> *Id.* at 1312.

<sup>160</sup> *Id.* at 1302, 1305.

<sup>161</sup> *See id.* at 1301-03.

<sup>162</sup> *Id.* at 1301.

<sup>163</sup> *Id.* at 1302.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

contain a reference to religion in general, any particular religion, or any religious theory.”<sup>166</sup> Underscoring the point made by Justice Scalia in his dissent to the denial of certiorari, Judge Cooper observed that omitting references to religious alternatives “weighs heavily in favor of upholding the Sticker . . . .”<sup>167</sup>

Having found one sincere secular purpose for the stickers, the court could have concluded its analysis under the *Lemon* test’s purpose prong, but it went on to find another, more interesting secular purpose.<sup>168</sup> Based on the evidence, Judge Cooper concluded that the board’s chief purpose for adopting the disclaimer was to accommodate those persons in the community, including parents and voters, who held religious beliefs inconsistent with Darwinism.<sup>169</sup> He also found this purpose permissible, even while noting that it “[was] intertwined with religion,”<sup>170</sup> citing the Supreme Court’s decision in *Wallace v. Jaffree*<sup>171</sup> for authority; Judge Cooper explained, “The School Board’s decision to adopt the Sticker was indisputably influenced by sectarian interests, but the Constitution forbids only a purpose to endorse or advance religion.”<sup>172</sup>

Judge Cooper nevertheless struck the Cobb County disclaimer under the *Lemon* test’s effect prong and the Supreme Court’s related endorsement test.<sup>173</sup> Significantly, he struck the disclaimer, even though, unlike the Tangipahoa Parish disclaimer, Cobb County’s sticker did not mention any alternative religious theory of origins; Judge Cooper wrote:

Specifically, the informed, reasonable observer would know that a significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons. The informed, reasonable observer would also know

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1303.

<sup>169</sup> *Id.* (“[T]he highly credible testimony of the School Board members, although not contemporaneous with the sticker adoption, made it clear that the School Board adopted the Sticker to placate their constituents and to communicate to them that students’ personal beliefs would be respected and tolerated in the classroom. . . .”).

<sup>170</sup> *Id.*

<sup>171</sup> 472 U.S. 38, 56 (1985).

<sup>172</sup> *Selman*, 390 F. Supp. 2d at 1304.

<sup>173</sup> *Id.* at 1312.

that despite this opposition, the Cobb County School District was in the process of revising its policy and regulation regarding theories of origin to reflect that evolution would be taught in Cobb County schools. Further, the informed, reasonable observer would be aware that citizens and parents largely motivated by religion put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution, including placing a disclaimer in the front of certain textbooks that distinguished evolution as a theory, not a fact. Finally, the informed, reasonable observer would be aware that the language of the Sticker essentially mirrors the viewpoint of these religiously-motivated citizens.

While the School Board may have considered the request of its constituents and adopted the Sticker for sincere, secular purposes, an informed, reasonable observer would understand the School Board to be endorsing the viewpoint of Christian fundamentalists and creationists that evolution is a problematic theory lacking an adequate foundation.<sup>174</sup>

Even without mentioning any alternative religious theories of origin, the court concluded that the disclaimer “implicitly” boosted them by suggesting that Darwinism is a problematic theory within science.<sup>175</sup> Further, it expressed concern that the disclaimer targeted only evolution to be studied critically without explaining “why it [was] the only theory being isolated as such.”<sup>176</sup>

Against this backdrop, Judge Cooper wrote that the disclaimer “sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while [it] sends a message to those who believe in evolution that they are political outsiders.”<sup>177</sup> He added that this message would be most strongly communicated to “impressionable public school students who are likely to view the message on the Sticker as a union of church and state.”<sup>178</sup>

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<sup>174</sup> *Id.* at 1307.

<sup>175</sup> *Id.* at 1308-09.

<sup>176</sup> *Id.* at 1309.

<sup>177</sup> *Id.* at 1306.

<sup>178</sup> *Id.*

On appeal, without ruling on any substantive issues, the Eleventh Circuit overturned the trial court's ruling for procedural deficiencies in fact-finding.<sup>179</sup> On remand, the plaintiffs redoubled their assault on the disclaimer by bringing in additional attorneys and moving for further discovery.<sup>180</sup> After Judge Cooper granted this motion, the school board settled out of court. Under the settlement, the board stipulated that it would neither authorize any anti-evolution or pro-intelligent design disclaimers nor delete any material about evolution from the text.<sup>181</sup> The school district also agreed to pay \$166,659 towards plaintiffs' attorney fees in the case.<sup>182</sup> In effect, Judge Cooper's original opinion was left standing as the final judicial treatment of the matter.<sup>183</sup> That opinion did not foreclose anti-Darwinian disclaimers, but it suggested that—even if they made no reference to religious alternatives—they would be scrutinized to insure that they did not in practical effect endorse religious belief or disbelief.

#### D. *Kitzmiller v. Dover Area School District*

Although the Cobb County case attracted widespread attention, it paled in comparison to the international spotlight focused on Dover, Pennsylvania in 2005, when its school board adopted a classroom disclaimer specifically referencing intelligent design as an alternative to Darwinism.<sup>184</sup> Dover is nestled in Pennsylvania's rural heartland.<sup>185</sup> Though they did not expressly campaign on the issue of Darwinism in schools, religious conservatives held a majority of seats on Dover's school board.<sup>186</sup> In 2003, some of board members began seeking ways to incorporate religious creationism into the high school science curriculum.<sup>187</sup> After receiving advice from the Discovery Institute,

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<sup>179</sup> *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006).

<sup>180</sup> SCOTT, *supra* note 77, at 156.

<sup>181</sup> *Id.*

<sup>182</sup> LARSON, *supra* note 69, at 276-77.

<sup>183</sup> SCOTT, *supra* note 77, at 156.

<sup>184</sup> For a discussion of the media attention, see HUMES, *supra* note 61, at 181, 222, 261.

<sup>185</sup> *Id.* at xii, 5-6; Margaret Talbot, *Darwin in the Dock: Intelligent Design Has Its Day in Court*, NEW YORKER, Dec. 5, 2005, at 70.

<sup>186</sup> HUMES, *supra* note 61, at xv-xvi.

<sup>187</sup> *Id.* at 40-44, 58-62.

those board members shifted direction, turning instead to intelligent design.<sup>188</sup> One of them persuaded members of his church to contribute funds to purchase and donate to the school copies of the anti-evolution text, *Of Pandas and People: The Central Question of Biological Origins*.<sup>189</sup>

In October 2004, the Board voted to make ninth grade biology students “aware of gaps/problems in Darwin’s theory and of other theories of evolution, including, but not limited to, intelligent design.”<sup>190</sup> Before beginning the section on Darwinism, biology teachers were directed to read their students a prescribed statement about those problems and alert them to the donated intelligent design texts.<sup>191</sup> After teachers refused to read the statement, school administrators did so, and a lawsuit followed.<sup>192</sup>

### 1. Religious Endorsement in Effect

Represented by lawyers from the elite Philadelphia law firm of Pepper Hamilton in a case orchestrated by the ACLU, eleven parents filed suit in federal district court against the school

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<sup>188</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 750 (M.D. Pa. 2005); HUMES, *supra* note 61, at 76-78.

<sup>189</sup> *Kitzmiller*, 400 F. Supp. 2d at 756; Talbot, *supra* note 185, at 71.

<sup>190</sup> *Kitzmiller*, 400 F. Supp. 2d at 757.

<sup>191</sup> *Id.* at 727. In full, the disclaimer read as follows:

The Pennsylvania Academic Standards require students to learn about Darwin’s Theory of Evolution and eventually to take a standardized test of which evolution is a part.

Because Darwin’s Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin’s view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

*Id.* at 761.

<sup>192</sup> *See id.*; Talbot, *supra* note 185, at 73.

district in December 2004.<sup>193</sup> Clearly outgunned, the school district obtained the services of the Thomas More Law Center, a conservative Catholic legal rights organization based in Michigan that bills itself as the “sword and shield for people of faith.”<sup>194</sup> Late in 2005, a lengthy bench trial took place before Judge John E. Jones III, a former Republican state official nominated to the federal bench by President George W. Bush.<sup>195</sup> As support poured in for the plaintiffs and defendant in the case, prominent expert witnesses were identified for both sides, including Michael Behe for the school board and Kenneth Miller for the plaintiffs.<sup>196</sup> Reporters from as far away as Europe and Asia descended on Harrisburg to cover the trial, which attracted non-stop media attention across the United States and spawned several books and a public-television documentary.<sup>197</sup>

After hearing six weeks of testimony and reviewing dozens of legal briefs, Judge Jones ruled against the school district.<sup>198</sup> Central to his holding, Judge Jones found that the concept of intelligent design, or “ID” as he termed it, “is a religious view, a mere re-labeling of creationism, and not a scientific theory.”<sup>199</sup> He also found, “A ‘hypothetical reasonable observer,’ adult or child,

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<sup>193</sup> HUMES, *supra* note 61, at 181-92 (the ACLU arranged representation for the plaintiffs and assisted with the plaintiffs’ case); Talbot, *supra* note 185, at 73.

<sup>194</sup> HUMES, *supra* note 61, at 223, 230-32; Talbot, *supra* note 185, at 73.

<sup>195</sup> LARSON, *supra* note 69, at 282; *see also* Talbot, *supra* note 185, at 66.

<sup>196</sup> LARSON, *supra* note 69, at 233, 363-70. For an example of Miller’s work championing the compatibility of Darwinism and Christian belief, see KENNETH R. MILLER, *FINDING DARWIN’S GOD: A SCIENTIST’S SEARCH FOR COMMON GROUND BETWEEN GOD AND EVOLUTION* (1999).

<sup>197</sup> Books about the trial include: MATTHEW CHAPMAN, *40 DAYS AND 40 NIGHTS: DARWIN, INTELLIGENT DESIGN, GOD, OXYCONTIN AND OTHER ODDITIES ON TRIAL IN PENNSYLVANIA* (2007) (an English journalist and screenwriter, Chapman is a direct descendant of Charles Darwin); HUMES, *supra* note 61; LAURI LEBO, *THE DEVIL IN DOVER: AN INSIDER’S STORY OF DOGMA V. DARWIN IN SMALL-TOWN AMERICA* (2008); and GORDY SLACK, *THE BATTLE OVER THE MEANING OF EVERYTHING: EVOLUTION, INTELLIGENT DESIGN, AND A SCHOOL BOARD IN DOVER, PA* (2007); *Judgment Day: Intelligent Design on Trial* (Public Broadcasting Service NOVA television broadcast Nov. 2007).

<sup>198</sup> *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005) (noting the judge’s view that “after a six week trial that spanned twenty-one days and included countless hours of detailed expert witness presentations, the Court is confident that no other tribunal in the United States is in a better position than are we to traipse into this controversial area”).

<sup>199</sup> *Id.* at 726.

who is ‘aware of the history and context of the community and forum’ is also presumed to know that ID is a form of creationism.”<sup>200</sup> Further, the court added, the school board’s recommended and supplied supplementary text, *Of Pandas and People*, actually presented creation-science, which it “re-labeled” as intelligent design to get around the *Edwards* decision’s ban on teaching creation-science in public schools.<sup>201</sup> Finally, noting that “ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research,” Judge Jones concluded, “ID is not science.”<sup>202</sup> Accordingly, he ruled, “[A]n objective Dover High School ninth grade student will unquestionably perceive the text of the disclaimer, ‘enlightened by its context and contemporary legislative history,’ as conferring a religious concept on ‘her school’s seal of approval.’”<sup>203</sup> As such, it violated both the *Lemon* test’s effects prong and the endorsement test.<sup>204</sup>

## 2. Religious Endorsement in Intent

Although these rulings alone sufficed to strike down the disclaimer, Judge Jones also examined the school board’s actions under the *Lemon* test’s purpose prong. Here, as the *Freiler* and *Selman* courts had done, Judge Jones focused his purpose analysis squarely on whether, in adopting the disclaimer and placing *Of Pandas and People* in the high school, the board as a whole and various individual members acted with the clear intent of promoting religious belief in violation of the Establishment Clause.<sup>205</sup> Concluding that they did,<sup>206</sup> the court wrote:

Although Defendants attempt to persuade this Court that each Board member who voted for the biology curriculum change did so for the secular purpose of improving science

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<sup>200</sup> *Id.* at 721 (citing *Child Evangelism Fellowship, Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 531 (3d Cir. 2004)).

<sup>201</sup> *Id.* at 721, 726.

<sup>202</sup> *Id.* at 735, 745.

<sup>203</sup> *Id.* at 724 (quoting *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1300 (N.D. Ga 2005)); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000).

<sup>204</sup> *Kitzmiller*, 400 F. Supp. 2d at 734, 764.

<sup>205</sup> *See id.* at 747.

<sup>206</sup> *See id.* at 747, 763.

education and to exercise critical thinking skills, their contentions are simply irreconcilable with the record evidence. Their asserted purposes are a sham, and they are accordingly unavailing . . . .<sup>207</sup>

Indeed, based on his review of the facts and history of the board's actions, Judge Jones concluded, "To assert a secular purpose against this backdrop is ludicrous."<sup>208</sup> As such, Dover's disclaimer was doubly damned.

The district court had the final say in this case. Like most public school districts, Dover has an elected school board. In Dover, the regular school board elections fell four days after the trial concluded and a month before Judge Jones issued his decision in December 2005.<sup>209</sup> Because of resignations and scheduled turnover, eight seats on the nine-seat board were up for grabs in the November 2005 election.<sup>210</sup> Typically such contests are low-key. Not so that fall in Dover. A slate of eight candidates opposed to the disclaimer swept the election.<sup>211</sup> Among the losers, the disclaimer's principal proponents had the fewest votes.<sup>212</sup> After the election and before the court announced its decision, the new board members declared that the district would not appeal Judge Jones's ruling.<sup>213</sup> For it, *Time* magazine named Jones one of the 100 most influential persons of 2006.<sup>214</sup>

### III. THREADING THE NEEDLE WITH ACADEMIC FREEDOM STATUTES

The mixed results of the disclaimer battles decided between 2000 and 2005 led critics of Darwinian instruction to seek what they called Academic Freedom Statutes.<sup>215</sup> By this point, the fellows and staff members from the pro-intelligent design

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<sup>207</sup> *Id.* at 762.

<sup>208</sup> *Id.* at 763.

<sup>209</sup> HUMES, *supra* note 61, at 328.

<sup>210</sup> *Id.*; LARSON, *supra* note 69, at 323.

<sup>211</sup> HUMES, *supra* note 61, at 328-29.

<sup>212</sup> *Id.* at 329.

<sup>213</sup> *Id.* at 330.

<sup>214</sup> Matt Ridley, *The 2006 Time 100: John Jones*, TIME (May 8, 2006), available at [http://www.time.com/time/specials/packages/article/0,28804,1975813\\_1975844\\_1976448,00.html](http://www.time.com/time/specials/packages/article/0,28804,1975813_1975844_1976448,00.html).

<sup>215</sup> LARSON, *supra* note 69, at 323-24.

Discovery Institute were fully invested. They had advised school officials in Cobb County and Dover in drafting their anti-Darwinism disclaimers.<sup>216</sup> Those disclaimers expressly or implicitly referred to either creationism or intelligent design as an alternative to the scientific theory of evolution in a manner that courts concluded unconstitutionally commandeered public schools to promote religious belief. Deprived of this alternative, the Discovery Institute persevered in its efforts to advise and encourage public schools to teach the controversy over Darwinism.<sup>217</sup> In response, advocates of teaching evolution inevitably counter that there is no scientific controversy over the theory of evolution, in that virtually all scientists accept it. The controversy over Darwinism is religious, political, or ideological, they argue, not scientific.<sup>218</sup> Intelligent design advocates argue that these non-scientific controversies merit classroom discussion, but also maintain that there are scientific holes in evolution theory that can best be filled by invoking an intelligent designer of life.<sup>219</sup> Under the rules of science, however, if there were holes in Darwinism, biologists would fill them with better naturalistic explanations, not supernatural ones.<sup>220</sup>

Even before *Kitzmiller*, the Discovery Institute fit its teach-the-controversy approach to science education into a model academic freedom proposal, which served as the basis for state legislative bills and school board resolutions starting in 2002.<sup>221</sup> In 2007-08, for example, academic freedom bills surfaced in Alabama, Florida, Missouri, and South Carolina.<sup>222</sup> Typically, these bills asserted the rights of public school teachers and students to hold and express their own views on biological origins and other controversial scientific topics without the bills

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<sup>216</sup> See *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1294 (N.D. Ga. 2005); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 763 (M.D. Pa. 2005).

<sup>217</sup> See Talbot, *supra* note 185, at 76.

<sup>218</sup> LARSON, *supra* note 69, at 324.

<sup>219</sup> See, e.g., MICHAEL J. BEHE, *DARWIN'S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION* 187, 232-33 (1996) ("The observation of the intelligent design of life is as momentous as the observation that the earth goes around the sun . . .").

<sup>220</sup> See MORAN, *supra* note 8, at 134.

<sup>221</sup> SCOTT, *supra* note 77, at 159-61; see also MORAN, *supra* note 8, at 112-20.

<sup>222</sup> Robert E. Morelli, *Survival of the Fittest: An Examination of the Louisiana Science Education Act*, 84 ST. JOHN'S L. REV. 797, 822 n.172 (2010).

identifying any specific alternative theories.<sup>223</sup> In addition, they did not single out only Darwinism for censure, which proved problematic in *Selman* and *Kitzmiller*.<sup>224</sup>

#### A. Louisiana Science Education Act

Most of the proposed academic freedom bills stalled, but in 2008, a proposed academic freedom statute found traction in the Louisiana legislature.<sup>225</sup> The bill's text came from the Louisiana Family Forum, an evangelical Christian advocacy group known for supporting pro-life and pro-traditional family causes, which had in turn drew on support from the Discovery Institute.<sup>226</sup>

Early in 2008, the Forum's "Academic Freedom Act" was introduced into the Louisiana State Senate by the chair of its education committee, Ben Nevers, who had previously sponsored balanced-treatment legislation.<sup>227</sup> In committee, the bill was renamed the Louisiana Science Education Act and stripped of its most contentious features, including an itemized list of controversial theories and language that authorized teaching their strengths and weaknesses.<sup>228</sup> By the time the committee was through, little remained beyond a provision permitting state education officials to assist local school districts in promoting critical thinking skills in science.<sup>229</sup> During deliberations by the full senate, however, Nevers succeeded in reinserting a non-exclusive list of scientific theories deemed rightly subject to critical analysis.<sup>230</sup> The list included evolution, the origin of life, global warming, and human cloning.<sup>231</sup> Experts from the

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<sup>223</sup> See *id.* at 822-24; SCOTT, *supra* note 77, at 159-61.

<sup>224</sup> *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1309 (N.D. Ga. 2005) ("[T]he Sticker targets only evolution to be approached with an open mind, carefully studied, and critically considered without explaining why it is the only theory being isolated as such."); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 725 (M.D. Pa. 2005) ("This paragraph singles out evolution from the rest of the science curriculum and informs students that evolution, unlike anything else they are learning, is 'just a theory' . . .").

<sup>225</sup> Morelli, *supra* note 222, at 818-19.

<sup>226</sup> *Id.* at 821-22.

<sup>227</sup> *Id.* at 822.

<sup>228</sup> LARSON, *supra* note 69, at 324.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> LA. REV. STAT. ANN. § 17:285.1(B)(1) (2012).

Louisiana Family Forum and the Discovery Institute testified for the measure.<sup>232</sup> With two-thirds of the members joining as co-sponsors, Nevers's bill then sailed through both houses of the state legislature and was signed into law by Governor Bobby Jindal on June 25, 2008.<sup>233</sup> By this point, the bill had gained national media attention as well as censure from many science organizations and scientists, including the governor's former genetics professor at Brown University.<sup>234</sup>

The Act, which remains in effect, authorizes any local school board to initiate a request to the State Board of Elementary and Secondary Education on behalf of its district.<sup>235</sup> The State Board then allows and assists public school teachers and administrators in that district to promote critical thinking about evolution, global warming, human cloning, and other unnamed scientific "theories."<sup>236</sup> Within limits prescribed by their school board and the State Board of Education, public school teachers are permitted to use supplemental materials to help students critique these theories.<sup>237</sup>

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<sup>232</sup> Morelli, *supra* note 222, at 821-22.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 823-24; MORAN, *supra* note 8, at 120 (noting both the response of Jindal's former teacher and the relief expressed by his colleague, evolution educator and activist Kenneth Miller, in learning that Jindal was never his student).

<sup>235</sup> § 17:285.1 at (B)(1).

<sup>236</sup> *Id.* at (B)(1)-(2). This subsection of the Act provides as follows:

(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.

(2) Such assistance shall include support and guidance for teachers regarding effective ways to help students understand, analyze, critique, and objectively review scientific theories being studied, including those enumerated in Paragraph (1) of this Subsection.

*Id.*

<sup>237</sup> *Id.* at (C). This subsection of the Act provides as follows:

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, or other local public school board unless

*B. Tennessee Academic Freedom Statute*

Similar bills were introduced in the legislatures of other states following the enactment of Louisiana's Science Education Act, but none of them passed for several years.<sup>238</sup> In 2011, the House of Representatives of Tennessee—the same state that in 1925 enacted the first anti-evolution law and in 1973 enacted the first equal-time or balanced-treatment statute for creationism—easily passed an academic freedom bill designed to protect and encourage critical study of such “controversial” scientific theories as “biological evolution, the chemical origins of life, global warming, and human cloning.”<sup>239</sup> Responding to widespread characterization of the measure as another Scopes Monkey law, one supporter spoke for many when he declared on the House floor, that “since the late ‘50s, early ‘60s when we let the intellectual bullies hijack our education system, we’ve been on a slippery slope.”<sup>240</sup>

After the House action drew protests from scientists at Vanderbilt University, the University of Tennessee system, and Oak Ridge National Laboratory, the bill stalled in the Senate Education Committee for nearly a year before emerging in a

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otherwise prohibited by the State Board of Elementary and Secondary Education.

*Id.*

<sup>238</sup> LARSON, *supra* note 69, at 235.

<sup>239</sup> As passed, the introductory portion of the Act expresses the legislative purpose as follows:

(1) An important purpose of science education is to inform students about scientific evidence and to help students develop critical thinking skills necessary to become intelligent, productive, and scientifically informed citizens;

(2) The teaching of some scientific subjects required to be taught under the curriculum framework developed by the state board of education may cause debate and disputation including, but not limited to, biological evolution, the chemical origins of life, global warming, and human cloning; and

(3) Some teachers may be unsure of the expectation concerning how they should present information when debate and disputation occur on such subjects . . . .

H.R. 368, 107th Leg., 2d Reg. Sess. (Tenn. 2011).

<sup>240</sup> Andy Sher, *Tennessee House OKs Bill Shielding Teachers Who Doubt Evolution, Global Warming*, CHATTANOOGA TIMES FREE PRESS, Apr. 7, 2011, at 1.

revised form early in 2012.<sup>241</sup> Passing the Senate by a three-to-one margin, the bill became law when Governor Bill Haslam declined either to sign or veto it—making it the first bill enacted in that manner during his tenure; “I do not believe that this legislation changes the scientific standards that are taught in our schools or the curriculum that is used by our teachers,” he wrote in an attempt to explain his unusual decision to let the bill become law without his signature, “but good legislation should bring clarity and not confusion. My concern is that this bill has not met this objective.”<sup>242</sup>

Unlike the Louisiana Act, which is permissive, the Tennessee law imposes an affirmative duty on local school administrators to create an environment in public elementary and secondary schools that encourages critical thinking skills about controversial subjects in science.<sup>243</sup> These administrators must assist and may not hinder teachers from helping students to understand and critique existing scientific theories.<sup>244</sup>

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<sup>241</sup> LARSON, *supra* note 69, at 235.

<sup>242</sup> Chas Sisk, *Evolution Bill Will Be Law*, TENNESSEAN, Apr. 11, 2012, at 1A.

<sup>243</sup> See LA. REV. STAT. ANN. § 17:285.1 (2012); TENN. CODE ANN. § 49-6-1030 (2012). Subsection (a) of the Tennessee Act provides:

(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 curriculum framework developed by the state board of education.

*Id.*

<sup>244</sup> § 49-6-1030 at (b)-(c). These subsections of the Act provide:

(b) 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 assist teachers to find effective ways to present the science curriculum taught under the curriculum framework developed by the state board of education as it addresses scientific subjects that may cause debate and disputation.

(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

The two enacted academic freedom statutes contain notably similar lists of controversial scientific theories or subjects. Significantly, however, controversy surrounding the theory of global warming is more political, economic, or ideological than religious, and disputation over human cloning raises ethical issues of concern to secular and religious people alike.<sup>245</sup> In *Freiler*, the Fifth Circuit struck down Tangipahoa Parish's evolution-teaching disclaimer at least in part because, by singling out Darwinism for critical analysis, it had the effect of promoting religious alternatives.<sup>246</sup> Similar concerns were expressed by the courts in *Selman*<sup>247</sup> and *Kitzmilller*.<sup>248</sup> Naming other subjects, especially ones that are controversial for non-religious reasons, may lessen the likelihood that these laws violate the Establishment Clause, even in their application to Darwinism. Although some scientists and scientific organizations have lobbied the Louisiana and Tennessee legislatures to repeal their academic freedom statutes, including by boycotting the states for scientific conventions, no individuals or organizations have challenged them in court.<sup>249</sup> In such a litigious area, this fact may reflect a calculated choice to hold back. The legal opposition to state and school district restrictions on teaching evolution is able and disciplined,<sup>250</sup> and they may well perceive that facial challenges to the Louisiana and Tennessee law would, in the end, lose.<sup>251</sup>

#### IV. PROTECTING CREATIONIST SCHOOLS AND STUDENTS

Two other recent federal court decisions, both from the Ninth Circuit, round out the current phase of Establishment Clause

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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.

*Id.*

<sup>245</sup> LARSON, *supra* note 69, at 328.

<sup>246</sup> *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th Cir. 1999).

<sup>247</sup> *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1309 (N.D. Ga. 2005).

<sup>248</sup> *Kitzmilller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 725 (M.D. Pa. 2005).

<sup>249</sup> LARSON, *supra* note 69, at 328.

<sup>250</sup> See Steve Mirsky, *Teach the Science*, SCI. AM., Feb. 2006, at 36, 37-38 (profiling the National Center for Science Education).

<sup>251</sup> See SCOTT, *supra* note 77, at 160.

litigation, spawned at least in part by the creation-evolution controversy. The first was not limited to creationist instruction but involved a broad challenge by an association of Christian schools to alleged discrimination in admitting graduates of its member schools to the public University of California system.<sup>252</sup> The second also moved into new territory because it involved a public school student's complaint that his teacher violated the Establishment Clause by disparaging creationism and other religious beliefs.<sup>253</sup> Although the plaintiffs in both cases ultimately lost, the courts embraced a refined reading of the Establishment Clause that may prove significant in future cases that involve more common forms of creationism-related litigation.

#### *A. Raising the Issue of Hostility Toward Religion*

Opposition to Darwinian instruction is widely perceived as one reason why the number of students attending conservative Christian high schools increased in the past generation.<sup>254</sup> Many of these schools use biology textbooks published by either A Beka Book, which bills itself as a ministry of Pensacola Christian College, or Bob Jones University Press, the publishing house of an unabashedly fundamentalist Protestant institution.<sup>255</sup> Proponents of Darwinian instruction and critics of narrowly sectarian schools have long argued that students without a proper education in evolutionary science are ill prepared for college.<sup>256</sup> Taking this argument to the extreme during the 1925 *Scopes* trial, Columbia University President Nicholas Murray Butler threatened to bar Tennessee public school graduates from admission to his university so long as the state's anti-evolution law remained in effect.<sup>257</sup> Some evolutionists made similar comments about Kansas public school graduates in 1999, after that state's board of

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<sup>252</sup> *Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1089-90 (C.D. Cal. 2008).

<sup>253</sup> *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 978 (9th Cir. 2011).

<sup>254</sup> LARSON, *supra* note 69, at 328; *see generally*, MORAN, *supra* note 8, at 120 (explaining that private religious schools, home schools, and churches can teach creationism without fear).

<sup>255</sup> LARSON, *supra* note 69, at 328.

<sup>256</sup> *Id.*

<sup>257</sup> LARSON, *supra* note 41, at 157.

education deleted Darwinism from its science education standards.<sup>258</sup> The concern is greatest with respect to graduates of those conservative Christian schools in which Darwinism is either not taught in biology courses or taught in a way that disparages it.<sup>259</sup> Some universities have denied credit for such courses and looked askance at applicants from such schools.<sup>260</sup> Christian school students and parents have little recourse against such practices by private colleges and universities, which generally are free to set their own admissions policies, but may object when this form of exclusion is practiced by state universities supported by their tax dollars.

In California, the issue came to a head in 2004, after the University of California (UC) system began scrutinizing private-school courses and their textbooks based on their religious viewpoint.<sup>261</sup> Although interested parties disagreed on exactly how the process operated, no one questioned that the UC system denied admissions credit for courses that taught any subject from only a single religious perspective, including ones that relied on the Bible as an unerring source for facts and analysis.<sup>262</sup> Such courses, university officials maintained, would not teach the substantive content and methods of inquiry needed by students entering the UC system.<sup>263</sup>

For admission to a school in the UC system, unless they test-out of a particular subject or graduate in the top 4% of their class at a participating high school, applicants must pass a certain number of college preparatory courses in various subjects, including one year of laboratory science in at least two of three disciplines—biology, physics, or chemistry.<sup>264</sup> If a school's courses in these required subjects are not approved for admissions credit,

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<sup>258</sup> LARSON, *supra* note 69, at 329.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> Ass'n of Christian Sch. Int'l v. Stearns, 679 F. Supp. 2d 1083, 1089-90 (C.D. Cal. 2008); Complaint at 22, Ass'n of Christian Sch. Int'l v. Stearns, 679 F. Supp. 2d 1083 (C.D. Cal. 2008) (No. 05-6242), available at <http://www.universityofcalifornia.edu/news/acsi-stearns/acsicomplaint0805.pdf> (depicting the policy as new in 2004).

<sup>262</sup> Ass'n of Christian Sch. Int'l, 679 F. Supp. 2d at 1089-93, 1113 n.36.

<sup>263</sup> *Id.* at 1100.

<sup>264</sup> *Id.* at 1088-89; Complaint, *supra* note 261, at 14 (science requirements).

then their students are effectively precluded from attending a UC school.<sup>265</sup>

For admissions credit in biology, the UC system would not approve any high school course taught mainly from A Beka's textbook, *Biology: God's Living Creation*, or Bob Jones University Press's *Biology for Christian Schools*.<sup>266</sup> Both texts took a strictly creationist approach that denied Darwinism and embraced a literal reading of the Bible as authoritative in matters of science.<sup>267</sup> "Since the day that Darwinism invaded the classroom," the A Beka text states in its preface, "God's glory has been hidden from students. Now there is an opportunity in the Christian classroom to declare that glory with *Biology: God's Living Creation*."<sup>268</sup> Similarly, the Bob Jones text opens with the affirmation: "If [scientific] conclusions contradict the Word of God, the conclusions are wrong, no matter how many scientific facts appear to back them."<sup>269</sup>

Following the rejection of four of its courses for admissions credit in 2004, Calvary Chapel Christian School filed suit in federal court claiming that the UC course approval policy violated various constitutional rights, including the Establishment Clause.<sup>270</sup> Five Calvary Chapel students and the Association of Christian Schools International, a member organization including over 800 California parochial schools, joined as co-plaintiffs.<sup>271</sup> The UC system had approved 43 courses at Calvary Chapel for admission credit but rejected the school's courses in English, History, Government, and Religion.<sup>272</sup> In their complaint, the plaintiffs objected to the UC policy on its face and as applied to Calvary Chapel.<sup>273</sup> They also objected to UC's decision to deny

<sup>265</sup> LARSON, *supra* note 69, at 348.

<sup>266</sup> *Ass'n of Christian Sch. Int'l*, 679 F. Supp. 2d at 1113.

<sup>267</sup> *Id.* at 1113-14.

<sup>268</sup> GREGORY PARKER ET AL., *BIOLOGY: GOD'S LIVING CREATION* iii (2d ed. 1997).

<sup>269</sup> *Ass'n of Christian Sch. Int'l*, 679 F. Supp. 2d at 1114 (quoting textbook).

<sup>270</sup> *Ass'n of Christian Sch. Int'l v. Stearns*, 678 F. Supp. 2d 980, 987-88 (C.D. Cal. 2008).

<sup>271</sup> Complaint, *supra* note 261, at 2-6.

<sup>272</sup> *Ass'n of Christian Sch. Int'l*, 678 F. Supp. 2d at 987-92; *Court's Ruling on ACSI v. Stearns Lawsuit—Coursework Subject and Textbooks*, U. OF CAL. NEWS ROOM, <http://www.universityofcalifornia.edu/news/acsi-stearns> (last visited Mar. 20, 2013).

<sup>273</sup> *Ass'n of Christian Sch. Int'l*, 678 F. Supp. 2d at 982-83.

approval for a biology course at Calvary Baptist School that exclusively used the A Beka textbook.<sup>274</sup>

Both sides took the case seriously. In their suit, plaintiffs were represented by Wendell Bird, who wrote the original text of Louisiana's 1981 Balanced Treatment Act and defended it before the Supreme Court in *Edwards*, as well as a prominent California religious-rights legal group, Advocates for Faith and Freedom.<sup>275</sup> As their expert witness reviewing the two disapproved biology textbooks, the plaintiffs hired Discovery Institute fellow and former witness for the school district in *Kitzmiller*, Michael Behe.<sup>276</sup> To counter Behe, UC—which is widely regarded as the world's finest public university system and includes four of the top-ten ranked public universities in the United States—offered two of the nation's most renowned biologists: UC-Irvine professor Francisco Ayala, a former president of the American Association for the Advancement of Science and recent recipient of the famed Templeton Prize for the advancement of religion;<sup>277</sup> and Stanford University professor Donald Kennedy, who served as Commissioner of the U.S. Food and Drug Administration from 1977 to 1979, president of Stanford from 1990 to 1998, and editor of *Science*, America's leading peer-reviewed scientific journal, from 2000 to 2008.<sup>278</sup> In 2008, District Judge S. James Otero decided the case in two stages on separate motions for summary judgment, first on the facial challenge to the UC policy and then on the policy as applied.<sup>279</sup> A Stanford Law School graduate who had served for thirteen years on the Los Angeles Superior Court, Judge Otero was nominated to the federal bench by President George W. Bush in 2003.<sup>280</sup>

After considering and rejecting the plaintiffs' free-speech claim, Judge Otero turned to their Establishment Clause

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<sup>274</sup> *Id.* at 992.

<sup>275</sup> *Ass'n of Christian Sch. Int'l v. Stearns*, 679 F. Supp. 2d 1083, 1086 (C.D. Cal. 2008).

<sup>276</sup> *Id.* at 1114.

<sup>277</sup> *Id.* at 1113 n.39.

<sup>278</sup> *Id.* at 1113 n.38.

<sup>279</sup> *Id.* at 1120 (facial challenge); *Ass'n of Christian Sch. Int'l*, 678 F. Supp. 2d at 995 (challenge to the policy as applied).

<sup>280</sup> LARSON, *supra* note 69, at 330.

theory.<sup>281</sup> This theory rested on the plaintiffs' assertion, which the court accepted, that the government neutrality required by the Establishment Clause is violated as much by official hostility to religious belief as to endorsement of it.<sup>282</sup> With respect to biology instruction, the plaintiffs initially contended that UC showed official hostility by rejecting admissions credit for courses that included creation-science and intelligent design.<sup>283</sup> Based on a factual showing that UC approved some courses presenting such topics along with Darwinism, including ones using A Beka's *Biology* as a supplementary text, the court rejected this first contention.<sup>284</sup> It then proceeded to consider whether the UC policy nevertheless ran afoul of the *Lemon* test.<sup>285</sup>

UC did reject biology courses using the A Beka or Bob Jones books as the primary text. With respect to those texts, the court quoted from UC's experts as follows:

Professor Kennedy determined that “[b]y teaching students to reject scientific evidence and methodology whenever they might be inconsistent with the Bible . . . both texts fail to encourage critical thinking and the skills required for careful scientific analysis.” Professor Ayala found that the texts “reject the methodology generally accepted in science, which relies on observation and experimentation and on the formulation of laws and theories that need to be tested rather than accepted on the basis of the Bible or any other authority.”

Both professors concluded that neither of the two Christian textbooks are appropriate for use as the principal text in a college preparatory biology course.<sup>286</sup>

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<sup>281</sup> *Ass'n of Christian Sch. Int'l*, 679 F. Supp. 2d at 1108.

<sup>282</sup> *Id.* at 1109 (“Although Establishment Clause claims typically challenge government action that allegedly benefits religion, the clause also governs ‘a claim brought under a hostility to religion theory.’”).

<sup>283</sup> *Id.* at 1094.

<sup>284</sup> *Id.* at 1092.

<sup>285</sup> *Id.* at 1092, 1094. Regarding the *Lemon* test's applicability, the court wrote that it “continues to set forth the applicable constitutional standard for assessing governmental actions challenged under the Establishment Clause.” *Id.* at 1109.

<sup>286</sup> *Id.* at 1114 (internal citations omitted).

The court found that rejecting courses using these creationist books as their primary text served the secular purpose of “admit[ting] the most qualified students and ensur[ing] that those students have the knowledge and skills necessary to succeed at UC.”<sup>287</sup> Turning to the effect prong, the court concluded,

Here, a reasonable person would not find the primary effect of the UC course review process to be inhibition of religion. UC approves many courses that include religious perspectives or are submitted by religious schools. Additionally, an informed observer would be aware of the controversial nature of intelligent design and creation as scientific beliefs. No reasonable and informed observer could conclude that refusing to recognize intelligent design as science or other religious beliefs as academics has the primary effect of inhibiting religion.

Therefore, Defendants meet the secular effect prong of the *Lemon* test.<sup>288</sup>

Finally, the court added, reviewing submitted course descriptions and textbooks does not rise to the level of “invasive monitoring” that might “constitute impermissible entanglement” under the *Lemon* test’s third prong.<sup>289</sup> The university’s willingness to grant credit for courses incorporating religious perspectives appeared critical to the court’s favorable ruling.

The Ninth Circuit Court of Appeals affirmed the district court’s decisions in an unpublished opinion that did not address the biology course specifically. With respect to the facial claims, the appellate court wrote:

It is undisputed that UC’s policy does not prohibit or otherwise prevent high schools, including Calvary, from teaching whatever and however they choose or students from taking any course they wish. High schools can, and do, continue to teach courses even when they are denied UC approval. UC does not punish a school for teaching, or a student for taking, an unapproved course.

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<sup>287</sup> *Id.* at 1109.

<sup>288</sup> *Id.* at 1109-10 (internal citations omitted).

<sup>289</sup> *Id.* at 1110.

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Going beyond UC's written policies, the plaintiffs contend that UC has a well established practice of rejecting courses with standard content solely because they add a religious viewpoint. The evidence, however, is to the contrary. It is undisputed that UC has approved courses with religious content and viewpoints as well as courses that used religious textbooks as the primary and secondary course texts.<sup>290</sup>

Following the appellate court ruling, the U.S. Supreme Court declined to hear plaintiffs' appeal.<sup>291</sup>

### *B. Finding Hostility Toward Religion*

The Ninth Circuit took a half-step toward finding hostility toward creationism unconstitutional in 2011. Nearly two decades earlier, John Peloza, an evangelical Christian biology teacher at Capistrano Valley High School, sued Orange County California's Capistrano Unified School District for requiring him to teach evolution—which he equated with secular humanism—as true.<sup>292</sup> Peloza also complained that teachers and administrators had harassed him for taking this stance.<sup>293</sup> Rejecting Peloza's premise that evolution was a religious belief system, the Ninth Circuit wrote, "Although possibly dogmatic or even wrong, such a requirement would not transgress the establishment clause if 'evolution' simply means that higher life forms evolved from lower ones."<sup>294</sup>

In 2007, the Peloza case spawned further litigation when Chad Farnan, a creationist sophomore at Capistrano Valley High School, complained that James Corbett, one of the teachers accused in the earlier case of harassing Peloza, unconstitutionally disparaged creationism and other Christian beliefs in class.<sup>295</sup>

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<sup>290</sup> *Ass'n of Christian Sch. Int'l v. Stearns*, 362 F. App'x 640, 643-44 (9th Cir. 2010) (internal citations omitted).

<sup>291</sup> LARSON, *supra* note 69, at 348.

<sup>292</sup> *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 519, 521 (9th Cir. 1994); *see also* GEORGE E. WEBB, *THE EVOLUTION CONTROVERSY IN AMERICA* 262 (1994).

<sup>293</sup> *Peloza*, 37 F.3d at 520.

<sup>294</sup> *Id.*

<sup>295</sup> *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 981-82 (9th Cir. 2011).

Corbett was an experienced teacher with a Ph.D. from Ohio State University known for using provocative comments and contemporary analogies to make history come alive for students in his popular Advanced Placement European History course, which boasted a ninety percent-plus pass rate for its students taking the AP Euro exam.<sup>296</sup> Farnan was a politically conservative Christian who secretly recorded Corbett's sophomore AP Euro class after Corbett had denied permission to do so.<sup>297</sup> Without discussing his concerns with his teacher or school administrators, Farnan dropped out of the class during the fall semester and filed suit in federal court against Corbett and the school district for classroom remarks hostile toward religion in violation of the Establishment Clause.<sup>298</sup> He was represented by the same Christian legal-rights group that sued UC for its course-approval policy.<sup>299</sup>

Farnan's lawsuit quickly became a cause célèbre in conservative circles. Excerpts from Farnan's recordings of Corbett's lectures were aired on conservative talk radio and Fox News, including Corbett's depiction of talk-show host Rush Limbaugh as a "fat, pain-in-the-ass liar."<sup>300</sup> Even before the lawsuit ended, Farnan was speaking at Republican campaign rallies and a fundraiser at the nearby Nixon Presidential Library.<sup>301</sup> Corbett, in contrast, lost forty-five pounds during the lawsuit and his son was jeered as an atheist.<sup>302</sup> Constitutional law scholar Erwin Chemerinsky, dean of the nearby UC-Irvine law school, volunteered to defend Corbett.<sup>303</sup>

Twenty-two classroom comments touching on religion stood at the heart of Farnan's Establishment Clause case, which was decided in response to cross motions for summary judgment by Judge James Selna, a former state superior court judge nominated to the federal bench by President George W. Bush.<sup>304</sup> Media

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<sup>296</sup> LARSON, *supra* note 69, at 349.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> Scott Martindale, "Fight Back," *Implores Student Who Sued Teacher*, ORANGE COUNTY REG. (Oct. 16, 2009), <http://www.ocregister.com/articles/farnan-215191-corbett-teacher.html>.

<sup>302</sup> LARSON, *supra* note 69, at 349.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

attention focused on Corbett's statement, "When you put on your Jesus glasses, you can't see the truth."<sup>305</sup> In context, however, Judge Selna ruled that this comment did not express hostility to Christianity because Corbett said it in the course of explaining why Catholic peasants opposed the land reform efforts of eighteenth-century Austrian Emperor Joseph II that were designed for their benefit but opposed by the Church.<sup>306</sup> Similarly contextualized, all of the other comments fell away in the eyes of Judge Selna except one about the earlier case in which Corbett said of his creationist colleague, "I will not leave John Pelozo alone to propagandize kids with this religious, superstitious nonsense."<sup>307</sup> Regarding this comment, the court wrote:

Corbett states an unequivocal belief that creationism is "superstitious nonsense." The Court cannot discern a legitimate secular purpose in this statement, even when considered in context. The statement therefore constitutes improper disapproval of religion in violation of the Establishment Clause.<sup>308</sup>

Yet this is just the sort of comment that New Atheists make about creationism and various other religious beliefs.<sup>309</sup> If presented as

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<sup>305</sup> *Id.*

<sup>306</sup> *C.F. v. Capistrano Unified Sch. Dist.*, 615 F. Supp. 2d 1137, 1147, 1149 (C.D. Cal. 2009).

<sup>307</sup> *Id.* at 1146.

<sup>308</sup> *Id.*

<sup>309</sup> For example, in *The God Delusion*, Dawkins asserts, "The nineteenth century is the last time when it was possible for an educated person to admit to believing in miracles like the virgin birth without embarrassment." DAWKINS, *supra* note 39, at 116. The subtitle of Dawkins's *The Blind Watchmaker*, gives the book's thesis: "Why the Evidence of Evolution Reveals a Universe Without Design." DAWKINS, *supra* note 38. Teaching this thesis as science in public schools may be unconstitutionally hostile to religion under Judge Selna's reasoning. A representative passage from this book states:

Nearly all peoples have developed their own creation myth, and the Genesis story is just the one that happened to have been adopted by one particular tribe of Middle Eastern herders. It has no more special status than the belief of a particular West African tribe that the world was created from the excrement of ants.

*Id.* at 450-51.

science in public schools, they too could violate the Establishment Clause.

While ruling against Corbett's classroom depiction of creationism as "superstitious nonsense," Judge Selna absolved the school district from liability<sup>310</sup> and denied Farnan's request for an injunction prohibiting Corbett from making future classroom comments that could be perceived as hostile to religion.<sup>311</sup> In a subsequent ruling Judge Selna held that, even though the Pelozo comment constituted unconstitutional disapproval of religion, as a public employee Corbett was protected from liability under a qualified immunity defense because the right at issue was not clearly established at the time.<sup>312</sup> Commenting on the lack of comparable fact patterns in other cases, the court wrote, "The parties have not presented any cases in which a constitutional violation was found based on one or even a few hostile or disproving statements in the classroom."<sup>313</sup> Finding that a public school teacher's anti-religious remarks violate the Establishment Clause was a first for any court. Because of the ruling, a qualified immunity defense might not be available in later cases. Both sides appealed.

In a mixed opinion issued in 2011, the Ninth Circuit agreed that the Establishment Clause applies to official disapproval as well as official approval of religion but did not reach the issue of whether any of Corbett's comments violated that standard.<sup>314</sup> Noting that Farnan had not cited in his briefs any cases finding an individual public school teacher liable for expressing hostility toward religion, the appellate panel concluded that the law was not clearly established when Corbett made his comments and held

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Such creation accounts are depicted as "superfluous" in light of Darwinism. *Id.* at 451. Dawkins also asserts, "Modern theologians of any sophistication have given up believing in instantaneous creation." *Id.* at 344, 451. For further discussion of Dawkins comments on religion, see MORAN, *supra* note 8, at 132; GIBERSON & YERXA, *supra* note 38, at 119-42.

<sup>310</sup> *Capistrano Unified Sch. Dist.*, 615 F. Supp. 2d at 1155.

<sup>311</sup> *C.F. v. Capistrano Unified Sch. Dist.*, 647 F. Supp. 2d 1187, 1198 (C.D. Cal. 2009).

<sup>312</sup> *C.F. v. Capistrano Unified Sch. Dist.*, 656 F. Supp. 2d 1190, 1206 (C.D. Cal. 2009).

<sup>313</sup> *Id.* at 1205.

<sup>314</sup> *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985-86 (9th Cir. 2011).

that he thus was entitled to qualified immunity in making them.<sup>315</sup> According to the court, this settled the matter.<sup>316</sup> Nevertheless, future plaintiffs faced with unjustifiably hostile classroom comments about creationism will be able to find at least one similar case and to argue that it put teachers on sufficient notice against unequivocally disparaging the claims of creationism, creation-science, or intelligent design.<sup>317</sup>

### CONCLUSIONS

Despite significant creationist setbacks in Pennsylvania, Georgia, and Louisiana, the take-home message from earlier phases of the creation-evolution legal controversy—Darwinists win; creationists lose<sup>318</sup>—no longer automatically applies. By sharpening the focus of their Establishment Clause analysis on whether a governmental act has the purpose or effect of promoting religious belief (rather than religious values), courts have found valid reasons for public schools to accommodate creationist ideas. Perhaps as a result, some disclaimers and statutes encouraging critically thinking about Darwinism by public school students have gone unchallenged. Further, because courts have re-emphasized the Establishment Clause's applicability to official hostility toward religious belief (along with official endorsement), teaching New Atheism in public schools should face similar constitutional barriers as teaching intelligent design. Eight

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<sup>315</sup> *Id.* at 987-88.

<sup>316</sup> With respect to Corbett's comments, the appellate court wrote, "Because the district court's judgment must be affirmed on that basis, we decline to consider the constitutionality of Corbett's statements, and we vacate the district court's decision to the extent it decided the constitutionality of any of Corbett's statements." *Id.* at 986.

<sup>317</sup> Some sense of this change can be detected in the tone of the judicial decisions themselves. Despite noting that the government must be neutral in matters of religion, for example, the 1968 Supreme Court decision striking down Arkansas' anti-evolution law depicted it as "quixotic" and in footnotes compared it to laws against teaching that the earth is round and mocked creationists for "exhibiting a kind of phylogenetic snobbery" for objecting to simian rather than seraphic ancestors. *Epperson v. Arkansas*, 393 U.S. 97, 102 nn.9-10 (1968). Striking a markedly different tone in its ruling against Dover's anti-Darwinism disclaimer, the trial court in *Kitzmiller* wrote: "After a searching review of the record and applicable caselaw law, we find that *while ID arguments may be true*, a proposition on which the Court takes no position, ID is not science." *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005) (emphasis added).

<sup>318</sup> See HUMES, *supra* note 61, at 44, 59.

decades after the *Scopes* trial, the creation-evolution legal controversy continues to shape our understanding of the Establishment Clause.