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ARTICLES

Making *Lemonade*: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause

LOUIS J. VIRELLI III*

I.

The evolution debate in America has recently gained unprecedented momentum. On January 3, 2006, a California school district introduced a course advocating concepts of creationism, including “intelligent design.”¹ On November 8, 2005, the Kansas Board of Education adopted revised public school science standards that are critical of evolution.² Approximately one year earlier, a school board in Dover, Pennsylvania instituted a policy requiring that public school science students be presented with a statement criticizing evolution and encourag-

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1. See Louis Sahagun & Eric Bailey, *A Fault Line for 'Intelligent Design,'* L.A. TIMES, Jan. 12, 2006, at A1. Intelligent design is an explanation of human creation that espouses the existence of a supernatural influence as the creator of humankind, and that many see as contrary to the theory of evolution. See, e.g., PERCIVAL DAVIS & DEAN KENYON, *OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS* (2d ed. 1993) (setting forth the principles of intelligent design); *Tavis Smiley* (PBS television broadcast Aug. 29, 2005) (transcript available at http://www.pbs.org/kcet/tavissmiley/archive/200508/20050829_transcript.html) (interviewing Stephen Meyer, Senior Fellow, Discovery Institute, and discussing intelligent design) [hereinafter *Tavis Smiley*].

2. See, e.g., Jodi Wilgoren, *Kansas Board Approves Challenges to Evolution*, N.Y. TIMES, Nov. 8, 2005, at A14; Dennis Overbye, *Philosophers Notwithstanding, Kansas School Board Redefines Science*, N.Y. TIMES, Nov. 15, 2005, at F3; Scott Rothschild, *Criticism of Evolution Added to Science Standards*, LAWRENCE J.-WORLD, Nov. 9, 2005, available at http://www2.ljworld.com/new/2005/nov/09/criticism_evolution_added_science_standards/?evolution.

ing them to consider intelligent design as an alternative explanation of human origins.³ In a group interview at the White House on August 1, 2005, President George W. Bush told reporters that in his opinion intelligent design should be included alongside evolution in public school science classes.⁴ These developments highlight what has become a deeply divisive national issue: the role of religion in public education and, in particular, the predominance of evolution as the lone scientific explanation of human origins in public schools.⁵

The United States is a deeply religious country.⁶ Our culture, tradi-

3. See, e.g., Mike Weiss, *War of Ideas Fought in a Small-Town Courtroom*, S.F. CHRON. Nov. 6, 2005, at A1 (quoting Dover school board resolution regarding evolution: "'Because Darwin's Theory is a theory, it continues to be tested. . . . The Theory is not a fact. Gaps exist in the Theory for which there is no evidence. . . . Intelligent Design is an explanation of the origin of life that differs from Darwin's view. . . . Students are encouraged to keep an open mind'"); Bill Sulon, *Intelligent Design Trial Ends*, THE PATRIOT NEWS, Nov. 5, 2005, available at <http://www.pennlive.com/news/patriotnews/index.ssf?/base/news/1131199230170280> (discussing Dover resolution). The school board's policy was invalidated by the district court on December 15, 2005. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

4. See Peter Baker and Peter Slevin, *Bush Remarks on 'Intelligent Design' Theory Fuel Debate*, WASH. POST, Aug. 3, 2005, at A1 ("President Bush invigorated proponents of teaching alternatives to evolution in public schools with remarks saying that schoolchildren should be taught about 'intelligent design'"); Daniel C. Dennett, *Show Me the Science*, N.Y. TIMES, Aug. 28, 2005, at 11 (referring to President Bush's comment that "he was in favor of teaching about 'intelligent design' in the schools").

A similar comment was made in December 2005 by Senator John McCain of Arizona, who told an interviewer that we should "[l]et the student decide" which explanation of human origins (evolution or intelligent design) is correct. C.J. Karamargin, *McCain Brings His Message to MTV Audience*, ARIZ. DAILY STAR, Dec. 26, 2005, available at <http://www.azstarnet.com/allheadlines/108592>.

5. See Nancy Gibbs, *Parents Behaving Badly*, TIME, Feb. 21, 2005, at 40, 49 (explaining that parents of schoolchildren "are often as concerned about content as grades, as in the debate over creationism vs. evolution vs. intelligent design"); Charles Krauthammer, *Phony Theory, False Conflict*, WASH. POST, Nov. 18, 2005, at A23 (stating that "every few years this country . . . insists on hearing yet another appeal of the Scopes monkey trial"); Michael D. Lemonick, *Stealth Attack on Evolution*, TIME, Jan. 31, 2005, at 53, 54 (discussing the creationism/evolution debate in public schools); Tavis Smiley, *supra* note 1 (discussing intelligent design and the possibility of introducing it in public schools); Jay Tolson, *Divided, We Stand*, U.S. NEWS & WORLD REP., Aug. 8, 2005, at 42, 45 (noting that since public schools were founded in the 1820's, Americans have been "forced to confront the question of what kind of religious principles should inform the moral instruction of children in these schools"); Claudia Wallis, *The Evolution Wars*, TIME, Aug. 15, 2005, at 26 (outlining the ongoing debate over how to teach human origins).

6. See, e.g., *Bauchman v. W. High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997) ("Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally. Courts also have recognized that 'a variety of motives and purposes are implicated' by government activity in a pluralistic society." (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984))); RICHARD G. HUTCHESON, JR., *GOD IN THE WHITE HOUSE* (1988); Daniel O. Conkle, *The Path of American Religious Liberty: From the Original Theology to Formal Neutrality and an Uncertain Future*, 75 IND. L.J. 1, 31 (2000) ("[R]eligion not only influences politics in the contemporary United States, but . . . religion is [incorporated into] politics to a degree that may be unparalleled in the American past."); *Understanding American Evangelicals: A Conversation with Mark Noll and Jay Tolson*, CENTER CONVERSATIONS (Ethics & Pub. Pol'y

tions, politics, and law are all imbued with religious symbols, statements, and principles.⁷ Religion is in turn the source of some of the nation's most contentious debates. Famously divisive issues such as abortion, gay rights, and the right to die are inextricably intertwined with religious doctrine and conviction.⁸ At the heart of many of these issues lies the question of the proper role of religion in public life. Religious adherents often seek to have their convictions reflected in public institutions. This desire is manifest in religiously motivated support of public policies, political candidates, and judicial nominees.⁹

Center, Washington, D.C.), June 2004, at 7, available at http://www.eppc.org/docLib/20040602_cc%2329v8.pdf (quoting historian George Marsden as saying that "[n]ot to understand religion . . . in American history is like trying to make sense of Moby Dick without the whale").

According to the U.S. Census Bureau, more than eighty percent (roughly 167 million out of 207 million) of American adults in 2005 consider themselves "adherents to a religious community." U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005, at 55 (2004), available at http://www.census.gov/prod/www/statistical-abstract-2001_2005.html. Fifty-eight percent of Americans in 2003 "say that belief in God is a prerequisite to personal morality." THE PEW GLOBAL ATTITUDES PROJECT, VIEWS OF A CHANGING WORLD 115 (2003), available at <http://people-press.org/reports/pdf/185.pdf>. Finally, as of 1997, sixty-one percent of Americans believed that democracy cannot survive "without a widespread belief in God or a Supreme Being." George Gallup Jr., *Religion in America: Will the Vitality of Churches Be the Surprise of the Next Century?*, U.S. SOC'Y & VALUES, Mar. 1997, <http://usinfo.state.gov/journals/itsv/0397/ijse/tocsv.htm>.

7. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); 4 U.S.C. § 4 (2000) (providing the Pledge of Allegiance, which includes the phrase "one Nation under God"); Jay Sekulow, *Why the Supreme Court Should Save the Pledge of Allegiance*, <http://www.constitutioncenter.org/education/ForEducators/Viewpoints/WhytheSupremeCourtShouldProtectthePledgeofAllegiance.shtml> (last visited Oct. 7, 2005) (reciting "the words that have been used to open each session of the high court for hundreds of years—'God save the United States and this Honorable Court'"); U.S. Dep't of Treasury, *Fact Sheets: Currency and Coins*, <http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml> ("The motto IN GOD WE TRUST was placed on United States coins largely because of the increased religious sentiment existing during the Civil War.").

8. See, e.g., Nancy Gibbs, *The Faith Factor*, TIME, June 21, 2004, at 26, 26 ("It's only natural that a country founded by pilgrims would never let its politics wander far from its faith."); Laurie Goodstein, *Schiavo Case Highlights Catholic-Evangelical Alliance*, N.Y. TIMES, Mar. 24, 2005, at A20 ("Now the alliance of evangelicals and Catholics is among the most powerful forces molding American politics."); Linda Greenhouse, *Justices Explore U.S. Authority over States on Assisted Suicide*, N.Y. TIMES, Oct. 6, 2005, at A1 (describing how the issue of assisted suicide "attracted dozens of briefs . . . from medical professionals, elected officials, and religious and policy organizations"); Adam Nagourney, *G.O.P. Right is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14 (addressing the role of religion in the debate over an individual's right to die); Jay Tolson, *Divided, We Stand*, U.S. NEWS & WORLD REP., Aug. 8, 2005, at 42, 44 (explaining that many of the most controversial "issues of our time" are imbued with the question of "religion's place in American politics and public life"); Alan Wolfe, *The State of the Church-State Debate*, SLATE, Aug. 1, 2005, <http://www.slate.com/id/2123459/> (discussing the debate generally).

9. See, e.g., Peter Baker & Charles Babington, *Role of Religion Emerges As Issue*, WASH. POST, Oct. 13, 2005, at A8 ("President Bush said yesterday that it was appropriate for the White

A tension is created, however, when religious preferences are no longer simply a reason for casting a particular vote, but instead are the subject of that vote. The Establishment Clause of the First Amendment addresses that tension by ensuring governmental neutrality with respect to religion.¹⁰ In the last century, however, the proper scope and application of the Establishment Clause has been a source of heated debate. A common battleground for this debate is the public schools,¹¹ with perhaps the most persistent issue being whether and how to teach students about the origins of human existence. Two competing viewpoints dominate this discussion. The theory of evolution contends that humans developed from lower life forms through a process of adaptation and development known as “natural selection.”¹² Creationism, by contrast, subscribes to the biblical account of human beings’ appearance on Earth.¹³

In their struggle to reconcile these competing viewpoints with their educational mission and their constituents’ religious beliefs, state and local governments have adopted a variety of legislative measures, including prohibiting the teaching of evolution and requiring that crea-

House to invoke Supreme Court nominee Harriet Miers’s religion in making the case for her to skeptical conservatives, triggering a debate over what role, if any, her evangelical faith should play in the confirmation battle.”); Fred Barbash and Peter Baker, *Bush Selects Alito for Supreme Court*, WASH. POST, Oct. 31, 2005, available at <http://pewforum.org/news/display.php?NEWSID=5603> (citing as prominent issues in Judge Alito’s pending confirmation hearings “his record on abortion rights and church-state issues”); Robert Barnes, *A Triumph for Warner, and a Guide for His Party*, WASH. POST, Nov. 9, 2005, at A1 (discussing the importance of religious faith in 2005 elections); David S. Broder, *Need to Connect with Religious, Rural Voters Noted*, WASH. POST, Nov. 4, 2004, at A35 (citing Democrats’ “need to . . . reconnect with people of faith” after the 2004 presidential election); Nancy Gibbs, *The Faith Factor*, TIME, June 21, 2004, at 26 (describing the importance of religion in the 2004 presidential campaign and “the story of presidential faith throughout history”); David D. Kirkpatrick, *Frist Set to Use Religious Stage on Judicial Issue*, N.Y. TIMES, Apr. 15, 2005, at A1 (describing how religious sentiment has become an important factor in providing political support for judicial nominees).

10. U.S. CONST. amend. I (prohibiting Congress from making any law “respecting an establishment of religion”). This prohibition has been extended to state and local lawmakers through the Fourteenth Amendment. *Everson v. Bd. Of Educ.*, 330 U.S. 1, 14-15 (1947) (incorporating the Establishment Clause); *Gitlow v. New York*, 268 U.S. 652, 670 (1925) (incorporating the First Amendment).

11. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 653 (2002) (upholding school voucher program); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-13 (2001) (concluding that permitting religious student groups to use school facilities does not violate the Establishment Clause); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (striking student-initiated and student-led prayer at school).

12. See generally CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (1859).

13. See Deborah A. Reule, Note, *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, 54 VAND. L. REV. 2555, 2557 n.10 (2001) (“[Creationism is defined as] the viewpoint that the literal Biblical account of creation is the correct explanation for the origin of the earth and its living forms.”).

tionism and evolution be taught together.¹⁴ These measures, however, have all been invalidated under the Establishment Clause.¹⁵ As a result, creationists are forced to adopt new methods of promoting their view of human origins. One of those approaches is the advancement of intelligent design, the idea that human beings are the product of an “intelligent,” or supernatural, designer.¹⁶ Although experiencing some momentum, particularly after President Bush’s supportive remarks, intelligent design has yet to become part of any public school curriculum, and is widely regarded as an inchoate political movement.¹⁷

The more popular approach for combating evolution instruction is the use of evolution disclaimers—qualifying statements about the veracity of evolution’s explanation of human origins. Unlike prior policies that sought either to eradicate evolution instruction or mandate lessons in creationism, disclaimers are more subtle and adaptable to changes in constitutional doctrine. Although every disclaimer challenged under the Establishment Clause to date has been invalidated, new versions are continually being developed and introduced into public school curricula. Lawmakers rely on decisions invalidating disclaimers to assist them in designing new ones tailored to avoid the constitutional shortfalls of their

14. See, e.g., ARK. CODE ANN. §§ 80-1627, 80-1628 (1960) (prohibiting public schools from teaching “the theory or doctrine that mankind ascended or descended from a lower order of animals”); ARK. CODE ANN. § 80-1663 (1985 Supp.) (requiring balanced treatment of evolution and creationism in public schools); LA. REV. STAT. ANN. §§ 17:286.1-17:286.7 (1981) (forbidding evolution instruction in public school unless accompanied by instruction in creationism).

15. See *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (invalidating Louisiana’s balanced treatment statute); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (invalidating Arkansas’ prohibition on teaching evolution); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1274 (E.D. Ark. 1982) (invalidating Arkansas’ balanced treatment statute).

16. See *DAVIS & KENYON*, *supra* note 1; Reule, *supra* note 13, at 2587; Jerry Coyne, *The Faith That Dare Not Speak Its Name: The Case Against Intelligent Design*, THE NEW REPUBLIC, Aug. 22, 2005, at 21, 23 (describing intelligent design as consisting of both “a simple critique of evolutionary theory,” and “the assertion that the major features of life are best understood as the result of creation by a supernatural intelligent designer”).

17. See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 745 (M.D. Pa. 2005) (striking down an evolution disclaimer that referred to intelligent design as an alternate explanation of human origins, and concluding that intelligent design “is not science”); Claudia Wallis, *The Evolution Wars*, TIME, Aug. 15, 2005, at 27, 30-32 (explaining that creationists are focusing on “‘attempting to get criticism of Darwinian evolution in the science standards, not intelligent design,’” and explaining that “[e]ven scientists who believe in intelligent design do not feel it is ready for prime time”); Marilyn Rauber, *Creationists Try to Edge Around Ban*, RICH. TIMES-DISPATCH, Dec. 5, 2004, at A1 (explaining that “the tactic that most worries supporters of evolution is the use of anti-evolution disclaimers,” rather than the introduction of intelligent design); Tavis Smiley, *supra* note 1 (including an explanation by Stephen Meyer, a leading proponent of intelligent design, that “we’re not asking for [intelligent design] to be required in the schools”); Nicole Winfield, *Vatican Paper Hits ‘Intelligent Design’*, WASH. POST, Jan. 18, 2006, available at <http://abcnews.go.com/International/wireStory?id=1519041> (“The Vatican newspaper has published an article saying ‘intelligent design’ is not science and that teaching it alongside evolutionary theory in school classrooms only creates confusion.”).

predecessors. The result is a new generation of disclaimers that are facially neutral with regard to religion—they criticize evolution without any explicit reference to a specific religion or religious doctrine. Facial neutrality alone, however, cannot render evolution disclaimers constitutional.¹⁸ To the extent that they constitute a governmental advancement of religion,¹⁹ neutral disclaimers violate the Establishment Clause as readily as their religiously explicit counterparts.

Current Establishment Clause doctrine, however, is ill-equipped to deal with evolution disclaimers, and particularly facially neutral disclaimers. A new constitutional standard is necessary that can consistently and reliably evaluate the shifting disclaimer landscape.²⁰ Part II discusses the history of the evolution debate, culminating in the relatively recent focus on disclaimers as the preferred means of combating evolution instruction. Part III considers the development of the Establishment Clause doctrine in the context of public school instruction on human origins, focusing on courts' creation and subsequent departure from the standard set in *Lemon v. Kurtzman*,²¹ and points out the shortcomings of those interpretations in evaluating evolution disclaimers. Finally, in light of the problems with existing doctrine, Part IV suggests a more comprehensive approach for evaluating the new generation of facially neutral evolution disclaimers under the Establishment Clause.

II.

After taking root in the nineteenth century, the debate over evolution instruction peaked in the 1920's with the coincident rise to prominence of religious fundamentalism and Darwinism.²² Tennessee,

18. See, e.g., *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1313 (N.D. Ga. 2005) (invalidating facially neutral evolution disclaimer).

19. The criticism of evolution or the promotion of sectarian viewpoints on human origins is primarily an evangelical Christian pursuit. THE PEW RESEARCH CENTER, RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES: PUBLIC DIVIDED ON ORIGINS OF LIFE 10-11 (2005), available at <http://people-press.org/reports/display.php3?ReportID=254> ("White evangelicals and black Protestants are the only religious groups expressing majority support for teaching creationism instead of evolution in public schools."); see also *id.* at 8 ("Among religious groups, white evangelical Protestants are most distinctive in their support for the creationist position."). As a result, governmental preference for this viewpoint threatens to run afoul of the most basic Establishment Clause principle, namely that the State may not prefer a particular religion over another. See *infra* notes 44-51 and accompanying text.

20. Although not the focus of this Article, there is no apparent reason why the suggestions contained herein for evaluating facially neutral evolution disclaimers are not equally applicable to other facially neutral provisions challenged under the Establishment Clause.

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

22. See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1258-59 (E.D. Ark. 1982) (explaining that "[t]he religious movement known as Fundamentalism began in nineteenth century America as part of evangelical Protestantism's response to social changes, new religious thought and Darwinism. . . . Following World War I . . . Fundamentalism focused on evolution as

Florida, and Oklahoma all banned the teaching of evolution in public schools,²³ but it was the Tennessee Supreme Court that staged the first, and perhaps most well-known, legal battle on the subject. The court upheld a Tennessee statute prohibiting the teaching of evolution, thereby providing creationists with their first (and only) legal victory in the fight over evolution instruction.²⁴ Although the decision was followed by the enactment of similar statutes in Mississippi and Arkansas,²⁵ relative legislative quiet ensued. No new anti-evolution legislation was passed after 1928, and the issue was largely relegated to local attempts to discourage the teaching of evolution.²⁶

The debate resurfaced in 1968, when the Supreme Court struck down an Arkansas statute prohibiting teaching that humankind “‘ascended or descended from a lower order of animals’”²⁷ This decision changed the way anti-evolutionists sought to influence education policy.²⁸ Precluded from banning evolution from public schools altogether, anti-evolutionists sought a new, legally permissible way to combat evolution instruction. They chose “scientific creationism,” the viewpoint that the biblical creation account can be supported scientifically.²⁹ The preferred method of promoting scientific creationism was

responsible for [a perceived decline in traditional morality]”); Derek H. Davis, *Kansas Versus Darwin: Examining the History and Future of the Creationism-Evolution Controversy in American Public Schools*, 9 KAN. J.L. & PUB. POL’Y 205, 210-12 (1999) (describing the conflict between Darwinism and the rise to prominence of Christian fundamentalism in the early twentieth century).

23. See Coyne, *supra* note 16, at 22 (listing the three states that passed anti-evolution statutes prior to *Scopes*: Florida, Oklahoma, and Tennessee).

24. See *Scopes v. State*, 278 S.W. 57 (Tenn. 1925), *rev’d on other grounds*, 289 S.W. 363 (Tenn. 1927). The statute at issue in *Scopes* prohibited public school teachers in Dayton, Tennessee from offering any instruction on the origins of humankind that denied divine creation in favor of a theory that humans were descended from lower-order animals. See *Scopes*, 289 S.W. at 363 (referring to the defendant’s “violation of chapter 27 of the Public Acts of 1925,” known as the “Anti-Evolution Act”).

25. See Coyne, *supra* note 16, at 22 (“In the wake of *Scopes*, anti-evolution laws were passed in Mississippi and Arkansas, adding to those passed by Florida and Oklahoma in 1923.”).

26. See Reule, *supra* note 13, at 2570.

27. *Epperson v. Arkansas*, 393 U.S. 97, 99 (1968).

28. For purposes of this discussion, the phrase “anti-evolutionists” will be used interchangeably with “creationists” to describe individuals who believe that the biblical story of creation should be taught in public schools. See Coyne, *supra* note 16, at 22 (explaining that after *Epperson*, “[t]he opponents of evolution proceeded to rethink their strategy, deciding that if they could not beat scientists, they would join them. They thus recast themselves as ‘scientific creationists,’ proposing an ostensibly non-religious alternative to the theory of evolution that might be acceptable in the classroom”); Chris Mooney, *The Dover Monkey Trial*, SEED, Oct.-Nov. 2005, at 31 (“In the wake of [*Epperson*], the anti-evolutionist legal strategy advocated ‘equal time’ legislation. . . .”).

29. See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1259 (E.D. Ark. 1982) (“In the 1960’s and early 1970’s, several Fundamentalist organizations were formed to promote the idea that the Book of Genesis was supported by scientific data. The terms ‘creation science’ and

through balanced-treatment legislation.³⁰ Balanced-treatment legislation did not prohibit evolution instruction, but instead required that creationism and evolution be taught in equal measure.³¹ In 1981, Arkansas adopted a balanced-treatment statute that was promptly challenged and invalidated on First Amendment grounds by a federal district court.³² Five years later, the Supreme Court invalidated a similar statute.³³ With balanced-treatment legislation joining bans on evolution instruction as unconstitutional, anti-evolutionists were again forced to seek new methods of combating evolution instruction in public schools.

These new methods can be described generally as the Wedge Strategy.³⁴ The Wedge Strategy challenges evolution instruction by promoting alternatives that are "consonant with Christian and theistic convictions."³⁵ Since 1999, the Wedge Strategy has been pursued through two general approaches.³⁶ The first is the revision of state science standards.³⁷ While not prohibiting evolution instruction, revised standards discourage schools from teaching evolution by endorsing textbooks that omit it and by excluding evolution from standardized tests.³⁸ Although Kansas, Mississippi, West Virginia, and Tennessee have at one time adopted this approach,³⁹ there are currently no states that omit

'scientific creationism' have been adopted by these Fundamentalists as descriptive of their study of creation and the origins of man.").

30. Mooney, *supra* note 28, at 31 ("In the wake of [Epperson], the anti-evolutionist legal strategy began to advocate 'equal time' legislation.").

31. See *McLean*, 529 F. Supp. at 1261-63; Reule, *supra* note 13, at 2573 (explaining that the balanced treatment legislation at issue in *McLean* was "specifically designed to avoid conflict with the First Amendment" in light of *Epperson*).

32. *McLean*, 529 F. Supp. at 1255 (invalidating the Balanced Treatment for Creation-Science and Evolution Science Act, ARK. CODE ANN. § 80-1663 (1981 Supp.)).

33. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (invalidating the Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, LA. REV. STAT. ANN. § 17:286.1 - 17:286.7 (1981)).

34. See Center for the Renewal of Science and Culture, The Wedge Strategy, <http://www.antievolution.org/features/wedge.html> (last visited Dec. 22, 2005); Coyne, *supra* note 16, at 32 (discussing the "wedge strategy").

35. Center for the Renewal of Science and Culture, The Wedge Strategy, <http://www.antievolution.org/features/wedge.html> (last visited Dec. 22, 2005).

36. See Reule, *supra* note 13, at 2581-88.

37. See *id.*

38. The removal of evolution from standardized tests is an increasingly effective disincentive in light of President Bush's "No Child Left Behind" education reform, which relies heavily on standardized test scores to allocate federal funding. See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

39. See American Geological Institute, Government Affairs Program, Evolution Debate in Kansas, <http://www.agiweb.org/gap/evolution/KS.html> (last visited Oct. 17, 2005) (recounting the Kansas State Board of Education's 1999 decision "to change education standards such that teachers were no longer required to teach evolutionary principles"); Lawrence S. Lerner, *Teaching Evolution State by State*, FREETHOUGHT TODAY, Jan.-Feb. 2001, available at http://www.ffrf.org/fttoday/2001/jan_feb01/lerner.html (explaining that, as of February 2001, four states (Kansas,

all treatment of evolutionary theory from their science curricula.⁴⁰

Since 2001, the most prominent approach to combating evolution instruction has been the movement to “teach the controversy,” either by teaching alternate explanations of human origins⁴¹ or through evolution disclaimers. Evolution disclaimers are statements read by school officials or placed in science textbooks that question the validity of evolutionary theory. In some cases, they suggest alternate explanations or encourage students to seek their own. Evolutionists consider disclaimers particularly worrisome because they offer a broader range of options for discrediting evolution.⁴² Unlike alternative explanations of human origins, evolution disclaimers do not claim to be limited to a particular substantive doctrine. They seek only to criticize evolution, and therefore are able to remain facially neutral by avoiding references to sectarian or

Mississippi, Tennessee, and West Virginia) had state science standards that “ignore evolution completely”).

40. As of December, 2005, however, five states—Florida, Kentucky, Mississippi, Oklahoma, and South Dakota—had standards that used the term “evolution” either sparingly or not at all, instead choosing phrases such as “change over time.” PAUL R. GROSS, *THE STATE OF STATE SCIENCE STANDARDS* 15, 34, 40, 46-47, 57, 61 (2005), available at <http://www.edexcellence.net/doc/Science%20Standards.FinalFinal.pdf>. As many as thirteen states had adopted a treatment of evolution described as “useless, disguised, or absent.” *Id.* at 15. Moreover, Kansas revised its state science standards on November 8, 2005. The new standards are critical of evolution and redefine science to include non-natural explanations for observable phenomena. *See id.* at 39 (reducing Kansas’ grade from “C” to “F” based on its adoption of state science standards “whose treatment of evolutionary material has been radically compromised”); *see also* Wilgoren, *supra* note 2 (describing the new standards); Overbye, *supra* note 2 (“In the course of revising the state’s science standards to include criticism of evolution, the board promulgated a new definition of science itself.”). The new standards are not expected, however, to have a significant effect on the way science is taught in Kansas classrooms. *See* Rothschild, *supra* note 2 (“For all the hue and cry, the vote will have no immediate practical impact on teaching science in Kansas classrooms, officials said.”).

41. Proposals requiring public schools to teach alternative explanations of human origins—in particular intelligent design—are currently being entertained in at least 10 states. *See* American Geological Institute, Government Affairs Program, Evolution Debate in Kansas, http://www.agiweb.org/gap/legis108/evolutionKS_cont.html (last visited Oct. 17, 2005) (describing current efforts in Pennsylvania, Ohio, Michigan, Wisconsin, Wyoming, Kansas, Missouri, Mississippi, Alabama, and Georgia to introduce alternate theories of human origins into science classrooms).

Intelligent design is popular among wedge strategists because it provides a substantive and ostensibly secular explanation of human origins independent of evolution. *See* Coyne, *supra* note 16, at 32 (quoting proponents of intelligent design explaining that the advantage of intelligent design for anti-evolutionists is that it gets “the Bible and the Book of Genesis out of the debate” on the teaching of human origins in public schools). This popularity may wane, however, in the face of a recent district court decision holding that intelligent design is a religious, not a scientific, doctrine that may not be taught in public schools. *See* *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 745 (M.D. Pa. 2005) (“It is our . . . conclusion that [intelligent design] is an interesting theological argument, but that it is not science.”).

42. *See* Gross, *supra* note 40, at 15 (citing disclaimers as the primary means of response by anti-evolutionists seeking to discredit evolution); Rauber, *supra* note 17, at A1 (explaining that “the tactic that most worries supporters of evolution is the use of anti-evolution disclaimers inserted into science textbooks”).

quasi-sectarian doctrines such as creationism or intelligent design. This perceived advantage has led anti-evolutionists to persist in developing new disclaimers despite the fact that previous measures have failed constitutional scrutiny.⁴³ With the emergence of disclaimers as the primary means of combating evolution instruction in public schools, it is essential to take a critical view of the legal standards by which they are analyzed under the Establishment Clause.

III.

A discussion of the proper doctrinal approach to resolving a constitutional question necessarily implicates the scope and meaning of the underlying constitutional provision. In the case of the Establishment Clause, this is no small matter. For more than 200 years, its proper interpretation and application have been the source of vigorous debate and controversy.⁴⁴ Thomas Jefferson and James Madison, perhaps the two most prominent contributors to the Establishment Clause, wrote of a complete separation between matters of religion and government.⁴⁵

43. For example, Louisiana introduced a disclaimer that was struck down by the Fifth Circuit. *See Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999). Rather than abandon disclaimers altogether, a number of states have either adopted or considered adopting revised disclaimers in hopes of curing the infirmities that the Fifth Circuit considered fatal. *See Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005) (invalidating disclaimer adopted by Cobb County, Georgia, school district); *Kitzmiller*, 400 F. Supp. 2d at 707; Press Release, American Civil Liberties Union, ACLU of Arkansas Action Results in Removal of Evolution Disclaimers From Science Textbooks (Feb. 10, 2005), *available at* <http://www.aclu.org/religion/schools/16369prs20050210.html> (recounting the Beebe School District's (Arkansas) retraction of its evolution disclaimer); National Center for Science Education, *Textbook Disclaimer Proposed in Shelby County*, Feb. 21, 2005, http://www.ncseweb.org/resources/news/2005/TN/259_textbook_disclaimer_proposed_i_2_21_2005.asp (reporting proposal of evolution disclaimer provision in Shelby County, Tennessee); National Center for Science Education, *Evolution in Alabama*, Mar. 14, 2005, http://www.ncseweb.org/resources/news/2005/AL/633_evolution_in_alabama_3_14_2005.asp (reporting recent change in Alabama State Board of Education disclaimer and hypothesizing that the change was "intended to shelter the disclaimer against the sort of legal challenge that was brought against the disclaimer used in Cobb County, Georgia"); F. Arthur Jones II, *A Creative Solution?: Assessing the Constitutionality of a New Creation/Evolution Disclaimer*, 49 LOY. L. REV. 519, 533-35 (2003) (noting that Georgia and Alabama adopted disclaimers after *Freiler*, and that disclaimers in Oklahoma and Louisiana were proposed but politically defeated).

44. *See, e.g.*, LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* x-xvi (1986).

45. Jefferson wrote that because "religion is a matter which lies solely between man & his God . . . I contemplate with sovereign reverence the act of the whole American People which declared that their legislature should 'make no law respecting an establishment of religion . . .,' thus building a wall of separation between Church & State." ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE* 114-15 (1982). This echoed his earlier sentiments in *A Bill for Establishing Religious Freedom in Virginia*, which mandated that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities." Thomas Jefferson, *A Bill for*

Despite the breadth of their language, the First Amendment was initially understood to apply only to the federal government.⁴⁶ It was not until the emergence of the incorporation doctrine that the Establishment Clause was applied to state and local governments.⁴⁷ Justice Black provided perhaps the clearest account of the Establishment Clause's modern scope and meaning:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'⁴⁸

Since *Everson*, the Court has reiterated that the Establishment Clause mandates government neutrality regarding religion; the government cannot grant one religion or religious doctrine preferential status.⁴⁹ This requirement has been extended to prohibit governmental preference for

Establishing Religious Freedom, in CORD, *supra*, at 249, 250. In his *Memorial and Remonstrance*, Madison likewise maintained that "in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance. . . . [I]f Religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body." James Madison, *Memorial and Remonstrance*, in MELVIN I. UROFSKY, *RELIGIOUS FREEDOM* 212, 214 (2002). He expressed a similar view before the Virginia Convention on June 12, 1788: "*There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation.*" THE COMPLETE MADISON 306 (Saul K. Padover ed., 1953).

46. See Joseph Story, *The Religion Clauses of the First Amendment*, reprinted in UROFSKY, *supra* note 45, at 229, 232 ("[T]he real object of the amendment . . . [is] to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."); CORD, *supra* note 45, at 5 (describing the First Amendment as requiring the "separation of Church and the national State," and explaining that "the separation of Church and the national State envisioned by the adopters of the First Amendment would leave the matter of religious establishments or disestablishment to the wisdom of the several States"); LEVY, *supra* note 44, at 76 ("[T]he prohibition against an establishment of religion—whatever that meant—applied to Congress only and not to the states.").

47. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 14-15 (1947) (incorporating the Establishment Clause); *Gitlow v. New York*, 268 U.S. 652 (1925) (incorporating the First Amendment).

48. *Everson*, 330 U.S. at 15-16; UROFSKY, *supra* note 45, at 54 (describing Justice Black's description of the Establishment Clause in *Everson* as "the root rationale for nearly every [subsequent] religion case decided by the Court").

49. Jefferson explained as much in his writing on the passage of the Virginia Bill for Establishing Religious Freedom. See THOMAS JEFFERSON, *Autobiography*, in THE WRITINGS OF THOMAS JEFFERSON 66-67 (Library ed. 1903) (explaining that the bill was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination"). Madison echoed Jefferson in proclaiming his fear that "one sect might obtain a pre-eminence, or two combine together and establish a religion to which they could compel others to conform." 1 ANNALS OF CONG. 757-58 (Joseph Gayles ed., 1789-1791).

religion over non-religion.⁵⁰ For purposes of this analysis, it is sufficient to assume that the Establishment Clause prohibits the government from intentionally promoting a particular religion or religious doctrine.⁵¹ This modest assumption provides a useful baseline for measuring the effectiveness of various Establishment Clause standards in evaluating evolution disclaimers.

A. *The Lemon Test*

Decisions associated with evolution instruction in public schools have employed a variety of tests and standards under the rubric of the Establishment Clause. Each of these tests, however, suffers from inherent flaws that are often magnified within the context of facially neutral evolution disclaimers. In *Epperson v. Arkansas*,⁵² a high school science teacher successfully challenged an Arkansas statute that prohibited

50. See, e.g., *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (describing as “a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion”); *Sch. Dist. v. Schempp*, 374 U.S. 203, 216 (1963) (explaining that the Court has “rejected unequivocally the contention that the Establishment Clause forbids only government preference of one religion over another”); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 872 n.1 (1995) (Souter, J., dissenting) (stating that the view that the Establishment Clause only forbids governmental preference of one religion over another “was lost long ago, for ‘this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another’” (quoting *Schempp*, 374 U.S. at 216)). But see *Rosenberger*, 515 U.S. at 854-55 (Thomas, J., concurring) (describing the proposition that the Establishment Clause prohibits preference of religion over non-religion as a matter of ongoing debate, citing scholarship advocating both sides of that debate).

To the extent they represent a governmental preference for or advancement of religion, evolution disclaimers represent the promotion of one religion over another, not only the advancement of religion in general over non-religion. Many denominations, including the Roman Catholic Church, do not take issue with evolution instruction. See, e.g., Nicole Winfield, *Vatican: Faithful Should Listen to Science*, WASH. POST, Nov. 4, 2005, available at http://www.templeton.org/topics_in_the_news/051104-Yahoo-Vatican.pdf (recounting statements by Pope John Paul II that “the faithful have an obligation to listen to that which secular modern science has to offer” and that evolution is “more than just a hypothesis” because there is proof supporting it). Criticism of evolution and sectarian views of human origins are primarily evangelical Christian pursuits. THE PEW RESEARCH CENTER, RELIGION A STRENGTH AND WEAKNESS FOR BOTH PARTIES: PUBLIC DIVIDED ON ORIGINS OF LIFE 7, 10-11 (2005) available at <http://people-press.org/reports/display.php3?ReportID=254> (“Among religious groups, white evangelical Protestants are most distinctive in their support for the creationist position. . . . White evangelicals and black Protestants are the only religious groups expressing majority support for teaching creationism instead of evolution in public schools.”). Consequently, governmental preference for this viewpoint runs afoul of the most basic Establishment Clause principle—the State cannot prefer a particular religion over another.

51. Although most Establishment Clause discussions focus on religious consequences, rather than legislative purpose, see discussion *supra* notes 46-51 and accompanying text, a finding of religious intent would only make a provision more constitutionally suspect. Hence, the assumption that the Establishment Clause prohibits legislation that successfully and *purposefully* advances religion is, hopefully, uncontroversial.

52. 393 U.S. 97 (1968).

evolution instruction. The Supreme Court explained that a statute violates the Establishment Clause if it is “hostile to,” or works to “aid, foster, or promote” one religion over another, or religion over nonreligion.⁵³ It then invalidated Arkansas’ evolution ban on the grounds that the state legislature’s “fundamentalist sectarian” motivation in enacting the statute was inconsistent with the First Amendment’s religious neutrality requirement.⁵⁴ *Epperson* laid the groundwork for the *Lemon* test and, more specifically, for the Court’s approach to evolution cases.

The *Lemon* test is the product of the Supreme Court’s decision in *Lemon v. Kurtzman*.⁵⁵ Although *Lemon* did not explicitly address the issue of evolution in public schools, it established the three-part test that remains the controlling standard in evolution instruction cases.⁵⁶ *Lemon* involved challenges to statutes from Pennsylvania and Rhode Island on the grounds that they unconstitutionally provided federal funding to religious schools.⁵⁷ In formulating its analysis, the Court drew on the “cumulative criteria” of its Establishment Clause jurisprudence to arrive at a three-part test.⁵⁸ In order to survive Establishment Clause scrutiny, the Court held that a statute must: (1) have a secular purpose (the “purpose prong”); (2) produce a principle or primary effect that neither advances nor inhibits religion (the “effects prong”); and (3) not foster excessive governmental entanglement with religion (the “entanglement prong”).⁵⁹ In applying the purpose prong, the Court found no basis to conclude that either legislature sought to promote religion. It relied on the fact that the language of both statutes included explicit secular purposes, and on the principle that a legislature’s stated purpose merits “appropriate deference.”⁶⁰ Without addressing the effects prong, the Court struck down the statutes under the entanglement prong. It held that the statutes fostered impermissible governmental involvement with religion because they required state enforcement to ensure that federal subsidies were limited to secular activities.⁶¹

The *Lemon* test is under-inclusive with respect to evolution dis-

53. *Id.* at 104.

54. *Id.* at 108-09.

55. 403 U.S. 602 (1971).

56. See *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251 (2000), *denying cert. to* *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999) (acknowledging the applicability of the *Lemon* test in an evolution disclaimer case); *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987) (relying on the *Lemon* test to resolve a constitutional challenge to an evolution disclaimer); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005) (same).

57. See *Lemon*, 403 U.S. at 607-11.

58. *Id.* at 612.

59. *Id.* at 612-13.

60. *Id.* at 613 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 248 (1968)).

61. See *id.* at 614.

claimers. The Court's application of the purpose prong reveals a low threshold; a statute is unconstitutional only if it is found to have *no* secular purpose.⁶² The *Lemon* Court did not explicitly require that legislatures state their purpose, but if they do, it held that such statements are entitled to judicial deference.⁶³ Even reading a requirement of authenticity or validity into this standard, a clear statement of a secular legislative purpose is sufficient to survive Establishment Clause scrutiny in all but those cases where the stated purpose is obviously pretextual.⁶⁴ This standard is under-inclusive for at least two reasons. First, it permits statutes with a significant or even primary religious purpose, provided they proffer any secular aim. It is likewise under-inclusive because it is so easily circumvented. Lawmakers need only identify one plausible, secular legislative purpose to ensure that a provision with the actual intent of advancing religion will survive constitutional scrutiny.⁶⁵ Judicial deference to statements of legislative intent exacerbates this under-inclusiveness, as do facially neutral evolution disclaimers, which are extremely difficult to identify as having a purely sectarian purpose due to the absence of any explicit religious references.

The effects prong is also under-inclusive, because it applies only where the *primary* consequence of a statute is to advance or inhibit religion. It fails to account for cases where the primacy of a particular statutory consequence may be difficult to measure or easy to disguise. Like the purpose prong, the effects prong's under-inclusiveness is magnified when applied to facially neutral disclaimers. Finally, the entanglement prong is narrow. It prohibits only those statutes that are inappropriately entangled with religion or that coerce religious participation.⁶⁶ Because disclaimers typically only require governmental involvement at their inception, rather than ongoing enforcement efforts, they are unlikely to implicate the entanglement prong.

Considered in its entirety, the *Lemon* test is under-inclusive because

62. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (explaining that the purpose prong does not prohibit a statute that is "motivated in part by a religious purpose," but only one which "is entirely motivated by a purpose to advance religion").

63. *Lemon*, 403 U.S. at 613.

64. See *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.").

65. This is not to say that a statute's actual or primary purpose is the appropriate measure of constitutionality, see *infra* Part III B, but only to point out that the First Amendment's prohibition against an establishment of religion should not necessarily be limited to statutes with no defensible secular goal.

66. This prong has been interpreted both as an extension of the effects test and as similar to Justice Kennedy's coercion test. See *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (articulating the standard referred to as the "coercion test," which states that "government may not coerce anyone to support or participate in religion or its exercise").

it prohibits only those statutes that either have *no* secular purpose, have as their *primary* effect the advancement of religion, or inextricably intertwine religion with government. This limited scope renders the *Lemon* test incapable of adequately enforcing the Establishment Clause's religious neutrality requirement. The test permits a broad category of disclaimers—including facially neutral disclaimers—that purposefully and successfully promote religion without having an obviously predominant sectarian purpose or effect. Perhaps for this reason, courts evaluating evolution statutes since *Lemon* have interpreted its prohibitions broadly to invalidate provisions that, while perhaps unconstitutional establishments of religion, do not violate the letter of the test.

B. *Legislative Motivation Standard*

Despite the *Lemon* test's ostensibly clear and objective standards, courts applying it in the evolution context have interpreted it to effectively create a new, more stringent standard. With respect to the purpose prong, courts have focused on whether the legislature's actual intent or motivation in enacting a statute was to promote religion. In *McLean v. Arkansas Board of Education*,⁶⁷ the court used the purpose prong to invalidate Arkansas' balanced-treatment statute.⁶⁸ Absent an explicit statement of legislative purpose, the court relied on statements made by the statute's sponsors and on the State's historical treatment of evolution to conclude that the statute was part of a "religious crusade . . . motivated by opposition to the theory of evolution and [a] desire to see [creationism] taught in the public schools."⁶⁹ This religious motivation was deemed sufficient to invalidate Arkansas' balancing statute on the grounds that it was passed with the "specific purpose" of advancing religion.⁷⁰ The Supreme Court reviewed a similar balancing statute in *Edwards v. Aguillard*.⁷¹ Despite citing to the *Lemon* test's authority in Establishment Clause cases,⁷² the Court chose not to focus on the test's literal requirement of a single, valid secular purpose. Like the court of appeals before it, the *Edwards* Court relied on legislative motivation to invalidate the statute.⁷³ *Edwards* and *McLean* thus broadened *Lemon*'s

67. 529 F. Supp. 1255 (E.D. Ark. 1982).

68. *Id.* at 1264, 1274.

69. *Id.* at 1263.

70. *Id.* at 1264.

71. 482 U.S. 578 (1987).

72. *See id.* at 582-83, n.4.

73. *See id.* at 591 (explaining that the statute could not withstand constitutional scrutiny because its "preeminent purpose . . . was clearly to advance the religious viewpoint that a supernatural being created humankind"). The Court explained that the purpose prong prohibited statutes intended to advance religion. *Id.* at 585. Acknowledging that courts are normally deferential to a stated legislative purpose, the Court found that the Act did not advance

purpose prong beyond its literal, objective meaning toward a more subjective inquiry into whether the lawmakers' primary motivation was religious.⁷⁴

This shift in favor of actual legislative motivation is significant because it represents an attempt to remedy the purpose prong's under-inclusiveness through the adoption of a new standard that is even more flawed. As an initial matter, legislative motivation is generally too elusive to constitute a workable constitutional standard.⁷⁵ This is especially apparent when applied to provisions, like evolution disclaimers, that are facially neutral. A legislative motivation test is also inadequate because it is both over and under-inclusive. It is over-inclusive because the impetus for adopting a particular statute may not be reflected in, or even relevant to, the subject matter of the statute. Individual legislators are not—nor, as a practical matter, could they be—constitutionally required to divorce themselves from their religious beliefs when acting in their capacity as lawmakers.⁷⁶ As a result, those beliefs may inform any or all of their political decisions, regardless of whether the statute or issue at hand is religious.⁷⁷ For example, under a legislative motivation stan-

Louisiana's stated purpose of promoting academic freedom. *Id.* at 589 ("[T]he Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting 'evolution by counterbalancing its teaching at every turn with the teaching of creationism.'" (citation omitted)). In support, the Court cited the legislative history, which indicated that the Louisiana legislature sought to promote creationism. *See id.* at 587, 591-93, 592 nn.12-14.

74. The *Edwards* dissenters recognized this departure. As Justice Scalia pointed out, *Lemon*'s secular purpose threshold has traditionally been quite low, and Establishment Clause jurisprudence does not require that legislation be invalidated solely because legislators acted in accordance with their religious convictions. *See id.* at 633-34 (Scalia, J., dissenting). Justice Scalia accused the majority of departing from *Lemon* and invalidating the act because it demonstrated a "discriminatory preference for the teaching of creation science." *Id.* at 630.

75. *See Edwards*, 482 U.S. at 638 (Scalia, J., dissenting) ("[D]etermining the subjective intent of legislators is a perilous enterprise. It is perilous, I might note, not just for the judges who will very likely reach the wrong result, but also for the legislators who find that they must assess the validity of proposed legislation—and risk the condemnation of having voted for an unconstitutional measure—not on the basis of what the legislation contains, nor even on the basis of what they themselves intend, but on the basis of what *others* have in mind." (citations omitted)); *see also Arizona v. California*, 283 U.S. 423, 455 (1931) ("Into the motives which induced members of Congress to [act] . . . this court may not inquire."); *Fletcher v. Peck*, 10 U.S. 87 (1810) ("In a contest between two individuals, claiming under an act of a legislature, the court cannot inquire into the motives which actuated the members of that legislature. If the legislature might constitutionally pass such an act; if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit between individuals founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the legislature which passed the law.")

76. In fact, many elected officials achieve their positions, at least in part, on the strength of their religious convictions. *See, e.g., Robert Barnes, A Triumph for Warner, and a Guide for His Party*, WASH. POST, Nov. 9, 2005, at A1 (discussing the importance of religious faith in 2005 elections); David Broder, *Need to Connect with Religious, Rural Voters Noted*, WASH. POST, Nov. 4, 2004, at A35 (discussing the importance of faith in the 2004 presidential election).

77. This is not to take a position in the longstanding discussion of the proper role of religion

dard, a murder statute could run afoul of the Establishment Clause simply because its enactment was motivated by the legislature's desire to promote the religious doctrine that murder is against God's will. To invalidate the statute on those grounds would not only create immeasurable confusion and uncertainty in the law, but would stretch the Establishment Clause's reach beyond the bounds of assuring religious neutrality and into political speech. The same principle applies to evolution disclaimers. The fact that a disclaimer may be religiously motivated cannot make that disclaimer per se unconstitutional. Any other conclusion would not only lead to potentially absurd results, but would shift the constitutional inquiry from whether government is impermissibly establishing religion to whether religion is a motivating force behind the actions of individual legislators. While the latter could certainly be evidence of the former, it alone is not sufficient to invalidate a statute.

The legislative motivation test is also under-inclusive. As judicial focus on legislative motivation becomes more apparent, lawmakers are able to conceal their motivations by drafting facially neutral statutes and creating legislative records that highlight secular justifications. The result is a new class of provisions that are motivated by religious concerns and that have a religious effect, but that do not contain language that betrays that intent or effect. A carefully formulated statute could thus survive the prevailing interpretation of the purpose prong despite having the same religious purpose and effect as its unconstitutional predecessors. Therefore, while a literal reading of *Lemon*'s purpose prong is under-inclusive, the legislative motivation test is perhaps even more severely flawed.

C. *The Effects/Endorsement Test in Disclaimer Cases*

Like the evolution cases that preceded them, cases involving evolution disclaimers have cited *Lemon* as the controlling constitutional stan-

in political decision making. See generally Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677 (1993) (arguing that "[r]eligious arguments may properly play a variety of roles in liberal democracies"); RELIGION AND THE LIBERAL POLITY (Terence Cuneo ed., 2005) (advocating for religious inclusivism in political deliberation); KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 30 (1988) (noting that it is "self-evident to most seriously religious persons" that "[r]eligious convictions of the sort familiar in this society bear pervasively on people's ethical choices, including choices about laws and government policies"); Stephen Macedo, *Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?*, 105 ETHICS 468, 475 (1995) (arguing that public decision making and discourse should be performed "in terms of reasons and arguments that can be shared with reasonable people whose religious and other ultimate commitments differ"); JOHN RAWLS, POLITICAL LIBERALISM 212 (1993) (discussing the proper role of religion in a political society's decisions, formulation of plans, and prioritization of results). For purposes of this discussion, it is enough to note that legislative motivation by itself is insufficient to establish constitutionality.

dard, but have deviated from its literal meaning. Unlike their predecessors, however, these disclaimer cases relied primarily on *Lemon's* effects prong in reaching their conclusions. *Freiler v. Tangipahoa Parish Board of Education*⁷⁸ involved a disclaimer that was required to be read to students prior to their studying evolution in science class.⁷⁹ The disclaimer stated that the teaching of evolution was not intended to discourage their belief in the "Biblical version of Creation" or any other concept of human origins, and encouraged students to form their own opinions or adhere to those of their parents.⁸⁰ The district court, applying *Lemon's* purpose prong, relied on the legislative motivation standard used in *McLean* and *Edwards* to strike down the disclaimer.⁸¹ The Fifth Circuit affirmed, but on different grounds.⁸² The appellate court applied the literal language of *Lemon's* purpose prong, explaining that a provision must only have one sincere, secular purpose to survive scrutiny.⁸³ "Treat[ing] the School Board's three-fold articulation of purpose with deference," the court concluded that the disclaimer met this standard.⁸⁴ The court then went on to apply *Lemon's* effects prong.⁸⁵ It held that the disclaimer violated the effects prong because the "benefit to religion conferred by the reading of the Tangipahoa disclaimer is more than indirect, remote, or incidental."⁸⁶ Like the legislative-motivation analysis, this approach is not only a departure from precedent, it is fatally flawed.

As an initial matter, the standard articulated by the Fifth Circuit in *Freiler* is overbroad. Legislation cannot be unconstitutional simply

78. 975 F. Supp. 819 (E.D. La. 1997), *aff'd*, 185 F.3d 337 (5th Cir. 1999).

79. *Id.* at 821.

80. *Id.*

81. Relying on the Supreme Court's statement in *Wallace v. Jaffree*, 472 U.S. 38 (1985), that a statute is unconstitutional "if it is entirely motivated by a purpose to advance religion," *Freiler*, 975 F. Supp. at 827 (quoting *Wallace*, 472 U.S. at 57), the district court concluded that the disclaimer at issue violated the Establishment Clause because it was "motivated" by "religious concerns." *Id.* at 830. In support of this conclusion, the district court pointed to statements by the resolution's sponsor that his goal in introducing the resolution was to promote creationism. *See id.* at 829.

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

83. *Id.* at 344 ("If the disclaimer furthers just one of its proffered purposes and if that same purpose proves to be secular, then the disclaimer survives scrutiny under *Lemon's* first prong.").

84. *Id.* at 344-45.

85. *Id.* at 346. The court likened the effects prong of the *Lemon* test to the endorsement test applied by the Supreme Court in *County of Allegheny v. ACLU of Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), and referred to the two interchangeably in its analysis. *Freiler*, 185 F.3d at 346; *see also* *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 713 (M.D. Pa. 2005) ("[T]he [endorsement] test is most closely associated with *Lemon's* 'effect prong.'").

86. *Freiler*, 185 F.3d at 348. In support of this conclusion, the court cited the disclaimer's juxtaposition of its criticism of evolution with its urging students to contemplate alternate theories, its reminder that students may maintain the beliefs of their parents, and its presentation of the biblical version of creation as the only enumerated alternative to evolution. *Id.* at 346.

because it has a single, non-negligible religious effect.⁸⁷ Nevertheless, *Freiler* held that a provision's constitutionality depends on the religious nature of each of its social consequences, regardless of the relative weight of those consequences and whether they were intended or even foreseeable by the legislature. This standard is over-inclusive because it threatens a wide range of secular statutes and could create a significant chilling effect on the legislative process that is not contemplated by the Establishment Clause.

The *Freiler* court's decision is also under-inclusive to the extent it relies on the specific language of the disclaimer.⁸⁸ Just as a standard based on legislative motivation is vulnerable to manipulation of the legislative record, a focus on sectarian statutory language is also easily manipulated by altering the form and text of the disclaimer. This danger is most readily apparent in facially neutral disclaimers.

Building on the court's reasoning in *Freiler*, Georgia's Cobb County school board adopted a facially neutral disclaimer to be placed in science textbooks. The disclaimer, which was challenged in *Selman v. Cobb County School District*,⁸⁹ stated that evolution "is a theory, not a fact," and "should be approached with an open mind, studied carefully, and critically considered."⁹⁰ The *Selman* court concluded that the Cobb County disclaimer satisfied *Lemon*'s purpose prong because, unlike the disclaimer in *Freiler*, the Cobb County disclaimer did not refer to any religious alternatives to evolution.⁹¹ The court then considered whether

87. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §16-20, at 1512 (2d ed. 1988) (noting the danger in federal courts becoming "deeply enmeshed in the machinery of state and local government, reviewing equal protection challenges to seemingly neutral government choices"); see also *Carey v. Brown*, 447 U.S. 455, 489 (1980) (Rehnquist, J., dissenting) ("It would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation. Nor are we so ready to frustrate the expressed will of Congress or that of the state legislatures." (citation omitted)).

88. See *Freiler*, 185 F.3d at 348 (striking down disclaimer, at least in part, for its explicit reference to the biblical version of creation).

89. 390 F. Supp. 2d 1286 (N.D. Ga. 2005).

90. *Id.* at 1292.

91. *Id.* at 1302 ("[T]he Sticker in this case does not contain a reference to religion in general, any particular religion, or any religious theory. This weighs heavily in favor of upholding the Sticker as constitutional."); accord *Adler v. Duval Cty. Sch. Bd.*, 206 F.3d 1070, 1084 (11th Cir. 2000) ("For the most part, statutes which the Supreme Court has invalidated for lack of secular purpose have openly favored religion or demonstrated a religious purpose on their face."). Although the *Selman* court found that the promotion of critical thinking was a sufficiently valid secular purpose to satisfy the first prong of *Lemon*, the court continued the judicial trend toward expanding the reach of the *Lemon* test by applying a modified version of the purpose prong. It analyzed what it deemed the "primary" purpose of the disclaimer—the reduction of offense to anti-evolutionist students and parents. *Selman*, 390 F. Supp. 2d at 1303-04. Relying on testimony from board members, the court concluded that the board adopted the disclaimer to "placate their constituents and to communicate to them that students' personal beliefs would be respected and tolerated in the classroom." *Id.* at 1303. The court acknowledged that the decision to adopt the

the disclaimer satisfied *Lemon's* effects test. Rather than rely on the literal language of that standard, however, the *Selman* court substituted the endorsement test articulated in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.⁹² It described the endorsement test as prohibiting any statement that, when viewed by a reasonable observer who is familiar with the statement's historical and cultural context, conveys a message of government endorsement of religion.⁹³ Citing this standard, the court invalidated the Cobb County disclaimer because it conveyed the message that those who "oppose evolution for religious reasons . . . are favored members of the political community. . . ."⁹⁴ In reaching this conclusion, the court focused on the community's religiously motivated support for the disclaimer and the fact that its language "mirrors the viewpoint of these religiously motivated citizens."⁹⁵ It found that a reasonable observer would be aware of certain citizens' religious reasons for supporting the disclaimer and the school board's interest—despite not having similar religious motivations—of appealing its religiously motivated constituents.⁹⁶ Regardless of whether it led to the proper constitutional result, this analysis is inadequate to judge future disclaimers.

Taken one way, the court's analysis amounts to little more than the legislative-motivation standard adopted in earlier evolution cases. By assuming that a reasonable observer is intimately familiar with the personal opinions and motivations of individual legislators, the court obviates any distinction between "observing" the religious effects of a statutory provision and evaluating the legislature's motivation.⁹⁷ Read another way, the analysis is deficient because it focuses on the political motivations for the provision's adoption, which does not require a finding that the disclaimer itself has any religious connection whatsoever. By this rationale, a provision promoted by the local citizens for religious purposes and enacted by a legislative body in acknowledgment of that popular support would violate *Lemon's* effects test by giving the reasonable observer the impression that the local government favors religion.

disclaimer was "influenced by sectarian interests," but determined that the disclaimer at issue served only as an accommodation of religion and did not serve the purpose of advancing it in violation of *Lemon's* purpose prong. *Id.* at 1304.

92. 492 U.S. 573 (1989).

93. *Selman*, 390 F. Supp. 2d at 1305. The *Selman* court went on to explain that unlike the subjective analysis embodied in *Lemon's* purpose prong, the effects test inquiry is "'in large part a legal question to be answered on the basis of judicial interpretation of social facts.'" *Id.* at 1306 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring)).

94. *Id.* at 1306.

95. *Id.* at 1307.

96. *Id.*

97. See discussion *supra* notes 74-85 and accompanying text.

This conflates voters' individual motivations and faith with state establishment of religion. It is not necessarily true (nor, for that matter, particularly likely) that religiously motivated public support is reliable evidence of a sectarian policy or provision. Religious convictions form the foundation of many voters' positions on every aspect of public life. Equating religiously motivated support from a lawmaker's constituents with a constitutionally invalid advancement of religion leads to an exceedingly broad and unworkable interpretation of the Establishment Clause.

More important than the specific flaws in the court's reasoning in *Selman*, however, are the weaknesses in the endorsement test that are highlighted by its analysis. Because the endorsement test is dependent on the perceptions of a hypothetical reasonable observer, the outcome of a review applying that test depends heavily on the amount and type of information attributed to that hypothetical person. Although the term reasonable observer is not entirely without definition,⁹⁸ the amount of information available to that observer is determined solely by the court on a case-by-case basis. In *Selman*, the court assumed that a reasonable bystander would be aware of the motivations and desires of not only the government officials responsible for adopting the disclaimer, but of their constituents. The result, as explained above, is a standard that is overbroad because it threatens the viability of any provision that was the product of legislative or public religious sentiment. The converse, however, is equally possible and problematic. If a reasonable bystander is assumed to possess a more limited amount of information, then the test may become under-inclusive, as the hypothetical observer will not be sufficiently informed to comprehend the religious implications of the provision. This is particularly problematic in the context of facially neutral evolution disclaimers, where the language of the disclaimer itself is less helpful in discerning the disclaimer's religious connections. In short, the endorsement test is flawed in its treatment of evolution disclaimers—in particular facially neutral disclaimers—because it results in a potentially circular analysis whereby the amount of information attributed to a hypothetical “reasonable observer” could both dictate and be influenced by the constitutional outcome.⁹⁹

98. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 715 (M.D. Pa. 2005) (defining a reasonable observer for purposes of the endorsement test as one that is familiar with the policy's “legislative history, as well as the history of the community and the broader social and historical context in which the policy arose”).

99. The most recent evolution disclaimer case, *Kitzmiller v. Dover Area School District*, reflects the limitations of the endorsement test. In *Kitzmiller*, the court considered a challenge to a requirement that school officials read a statement to ninth grade science students that evolution is “not a fact,” and that “[g]aps in the theory exist for which there is no evidence.” 400 F. Supp. 2d at 708. The statement also described intelligent design as an alternative to evolution and referred

In sum, as demonstrated above, the three primary approaches used to evaluate evolution cases under the Establishment Clause are each severely flawed. These inadequacies necessitate an improved method of evaluating evolution disclaimers—in particular facially neutral disclaimers¹⁰⁰—under the Establishment Clause in order to promote greater accuracy and stability in the law.¹⁰¹

students to the available reference book, *Of Pandas and People*. *Id.* at 708-09. The court cited both the endorsement test and the *Lemon* test in invalidating the statement. Applying the endorsement test, the court first concluded that there were two relevant observers to consider—the reasonable student and reasonable adult citizen in the community. *See id.* at 722-35. It then attributed to those reasonable observers an amount of information about the disclaimer's legislative and political circumstances similar to that in *Selman*. *Id.* It concluded that a reasonable observer would understand the individual religious motivations of the drafters and of the proponents of intelligent design generally. *See id.* at 728 ("An objective student is also presumed to know that the Dover School Board advocated for the . . . disclaimer in expressly religious terms . . . and that the Board adopted the [intelligent design] policy in furtherance of an expressly religious agenda. . . . [T]he objective student is presumed to know that encouraging the teaching of evolution as a theory rather than as a fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations."). It also concluded that a reasonable observer would understand that intelligent design is not a scientific concept but is synonymous with creationism, and that its reference book posits that God is the "master intellect" behind human existence. *Id.* at 718.

The court's analysis in *Kitzmiller* further evidences some of the difficulties inherent in the endorsement test. As an initial matter, the identification of the reasonable observer is problematic, particularly in the event the constitutional outcome varies from observer to observer. Assuming that a hypothetical observer is familiar with the motivations of individual legislators is similarly problematic because it renders the endorsement test virtually indistinguishable from the overbroad legislative motivation standard. It is also difficult to assume that a reasonable student or citizen of Dover would necessarily know and understand the intentionally obscure premise of *Of Pandas and People*, particularly in light of the court's discovery that the book was not, at the time the disclaimer was adopted, regularly available in the community. *See id.* at 756 (noting that the sixty copies of the book for use in Dover High School that were funded by a church collection had to be shipped to Dover). In short, the court's application of the endorsement test in *Kitzmiller* required a number of difficult determinations about the proper amount of information to attribute to two different, reasonable observers of the Dover disclaimer, all of which were ostensibly instrumental to its conclusion. Depending on the results of each of these individual decisions, the court's analysis could easily be rendered over, or under, inclusive.

100. This discussion focuses on facially neutral disclaimers for two reasons. First, explicitly religious disclaimers were effectively condemned by the court in *Freiler*, and are therefore likely to be supplanted by facially neutral disclaimers as drafters continue to seek new formulations that will survive constitutional scrutiny. *See Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999) (striking down disclaimer, at least in part, for its explicit reference to the biblical version of creation); *cf. Selman*, 390 F. Supp. 2d at 1302 (explaining that the absence of explicitly religious language in a disclaimer "weighs heavily in favor of upholding the Sticker as constitutional"). Second, in terms of their constitutionality under the Establishment Clause, explicitly religious disclaimers are more straightforward than their neutral counterparts. In general, the presence of sectarian language renders a disclaimer more likely to represent a purposeful advancement of religion than the absence of such language. If the proposed standard is indeed better suited to analyzing facially neutral disclaimers, it will therefore likewise be superior in the context of explicitly religious disclaimers.

101. Stability and predictability are important, time-honored principles in our legal system. *See, e.g., THE FEDERALIST* No. 49 (James Madison) (discussing the "requisite stability" of "the

IV.

The disparate-impact test used to evaluate facially neutral discriminatory statutes under the Fifth and Fourteenth Amendments is a useful model for this new standard. For starters, the discriminatory statutes targeted by the disparate-impact doctrine are similar to evolution disclaimers. Much like statutes that discriminate based on race or gender by singling out a particular group for unequal treatment, evolution disclaimers seek to demean evolution's credibility by distinguishing evolution from all other scientific theories.¹⁰² Moreover, like statutes that have a discriminatory impact without specifically identifying the disadvantaged group, many evolution disclaimers, particularly since the court's decision in *Freiler*, target evolution without including any overtly religious references. Conversely, both categories of legislation have the potential to be not only constitutional, but desirable, as in cases where a statute's social benefits are significant and the negative impact on evolution or a particular class of individuals is minimal.

The disparate-impact test consists of a two-part inquiry. It asks first whether a provision causes a disparate impact, and, if so, whether that impact is the product of a discriminatory legislative purpose.¹⁰³ The doctrine is reserved for statutes that lead to unequal results for particular

wisest and freest governments"); see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921) (explaining that the judicial system could not function if a judge could not "lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him"); Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 1991 J. SUP. CT. HIST. 13, 16 (stating that the rule of law underlying our own Constitution requires continuity and a respect for precedent).

102. Justice Scalia accused the majority of entertaining this point of view in his dissent in *Edwards*. 482 U.S. 578, 630 (1987) (Scalia, J., dissenting) (stating that the majority invalidated the act because it demonstrated a "discriminatory preference for the teaching of creation science").

103. See *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). The doctrine is based on the general principle that the Equal Protection Clause guarantees "equal laws, not equal results," *Feeney*, 442 U.S. at 273, and that the social impact of a particular law is not itself a constitutional question, but one that should be addressed by the legislature. See *id.* at 272 ("[T]he manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.").

Although the disparate impact test is not the only approach to evaluating the constitutionality of facially neutral discriminatory statutes, it is the better one in this instance. The other standard also involves a two-part test, the first prong of which asks whether a statute contains either an "overt or covert" discriminatory classification. *Id.* at 273. If the answer is no, then the disparate impact doctrine applies. See *id.* If the answer is yes, the statute's constitutionality is reviewed in the same manner as a facially discriminatory statute. See *id.* By allowing for review of even a "covert" classification, this standard could protect against legislative attempts to circumvent constitutional protections through careful drafting. The remaining portion of this approach is less helpful in the disclaimer context, however, as it provides for equal protection review of statutes containing a discriminatory classification. For evolution disclaimers, this second phase would ask whether a "discriminatory" disclaimer satisfies the low threshold of the rational basis test—i.e., whether the language of the disclaimer is rationally related to a legitimate government purpose. See *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Because this would be virtually

individuals or groups when combined with independent social conditions such as patterns of prejudice in “interrelated ‘gateway’ areas [such as] housing, employment and education.”¹⁰⁴ These social conditions represent an intervening cause that creates a degree of attenuation between the provision under review and its unequal consequences. The disparate-impact doctrine is best suited to deal with this attenuation because it focuses courts not on the legislative question of how to correct social patterns of prejudice, but on the legal question of legislative purpose.¹⁰⁵ In this way, the doctrine restrains courts from overturning every facially neutral statute with an undesirable or unequal effect, while simultaneously ensuring that otherwise unconstitutional provisions do not survive constitutional scrutiny merely through careful drafting. In the context of facially neutral evolution disclaimers, social prejudice against evolution may lead to the de facto promotion of religious explanations of human origins in public schools, despite the fact that the disclaimers do not mention religion. In this situation, the “disparate-impact model” first looks at whether a facially neutral disclaimer has the effect of granting preferential treatment to a particular religion. If the answer is yes, the question becomes whether that impact was the result of its drafters’ religious intent. This two-tiered approach permits courts to review a neutral disclaimer without encountering the problems of over and under-inclusiveness inherent in existing Establishment Clause doctrine.

This doctrinal advantage is evident when we compare the disparate-impact model to prior doctrinal approaches. Assuming, as we did above, that the Establishment Clause prohibits the intentional advancement of one religion or religious doctrine over another,¹⁰⁶ the statutes at the center of the Establishment Clause’s prohibition are those that advance a solely sectarian doctrine or belief for strictly religious purposes. The first “ring” of provisions are those that are next most likely to be precluded by the Establishment Clause: legislation that has as its only con-

indistinguishable from *Lemon*’s purpose prong, it is not an improvement over existing Establishment Clause doctrine.

104. *TRIBE*, *supra* note 87, at 1511; *accord* *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (examining the effect of a political redistricting statute as caused by racial prejudice); *Hernandez v. New York*, 500 U.S. 352 (1991) (jury selection); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (educational redistricting); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (political redistricting); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (educational redistricting); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (prohibition on narcotics use); *Vill. of Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252 (1977) (zoning); *Washington v. Davis*, 426 U.S. 229 (1976) (public hiring).

105. *See* *TRIBE*, *supra* note 87, at 1511 (discussing the role of “patterns of prejudice” in disparate-impact cases).

106. *See* discussion *supra* notes 45-52 and accompanying text.

sequence the advancement of religion, yet was enacted for secular as well as religious reasons, or that was enacted only for religious reasons, and, among other secular effects, promotes religion. This category is unconstitutional because it is composed of legislation that not only successfully and purposefully promotes religion, but does so with no more than a limited secular influence. Moving further away from the doctrinal center, the next group of legislation is that which has secular purposes and consequences, but is nonetheless likely to run afoul of the Establishment Clause because it also successfully and purposefully advances religion.

The third "ring" includes legislation that is strictly religiously motivated but serves only a secular purpose, or, conversely, has as its predominant effect the advancement of religion, yet is the product of a purely secular intent. Because each is so heavily imbued with either religious sentiment or results, it may appear statutes in either category should be invalidated. In reality, the opposite is true. As discussed above, religiously motivated legislation without a religious impact should not be struck down because legislative motivation alone is not grounds to invalidate a statute.¹⁰⁷ Provisions with no religious purpose but with an exclusively religious impact, however, may seem more problematic. Because they create a religious effect, these statutes are more likely to appear to foster state promotion of religion. Practically speaking, however, such enactments are extremely unlikely, as they would constitute a complete failure by the legislature to obtain its secular objectives. A statute with a purely secular purpose can only result in an exclusively religious effect by mistake, and should therefore be repealed on those grounds alone. Facially neutral statutes meeting this description are even less likely because their religious impact would not only have to be independent of their purpose, but of their explicit language as well.

The outer-most ring of legislation under the Establishment Clause consists of statutes that have secular motivations and effects, but are also the result of a religious legislative intent *or* have a religious impact.¹⁰⁸ Neither of these categories, particularly in the context of facially neutral provisions, are sufficiently narrow to be precluded by the Establishment Clause.

Although somewhat abstract, the delineation of these various categories is helpful in demonstrating how the disparate-impact model

107. See discussion *supra* Part III B.

108. The truly final category, of course, consists of statutes with no religious purpose or effect. They are not part of this analysis, however, because they are by definition outside of the Establishment Clause's prohibition.

avoids the pitfalls of existing Establishment Clause doctrine. For example, the *Lemon* test, which prohibits statutes that have either a strictly religious purpose or the primary effect of advancing religion, would encompass provisions in the “core” as well as the first and third “rings” described above. However, it would fail to identify statutes in the second ring—those that successfully and intentionally promote religion among other secular goals and outcomes—that likely violate the First Amendment. By contrast, the legislative-motivation standard would threaten legislation in all of the categories described above, regardless of their constitutionality. The endorsement test embodies all of these weaknesses. If the amount of information attributed to a reasonable, objective observer is significant enough, the test will cover all of the categories listed above, independent of merit. If a more limited amount of information is assumed, then the endorsement test risks being as limited as *Lemon*’s effects prong: it would invalidate only those statutes with predominant, obvious religious results, and miss statutes that successfully and intentionally promote religion without being exclusively sectarian.

The disparate-impact model is more precise. By considering both the religious impact and legislative intent of a statute, the disparate-impact model is broad enough to implicate legislation in the core and first two rings outlined above, but sufficiently limited to exclude the remaining statutes that are purely secular in either motivation or impact. This is particularly important in the context of facially neutral evolution disclaimers, which are most likely to include statutes in the second ring—those with a combination of religious and secular motivations and consequences—that the other approaches either fail to consider, or only include as part of an overly broad review.

For example, a scientific theory is defined as being subject to reexamination and, in the face of compelling evidence, amendment or even retraction.¹⁰⁹ It would be entirely unobjectionable, constitutionally or otherwise, to have schools “warn” science students of the dynamism of the scientific method. It may also be unobjectionable (although not as clearly so) to require educators to tell their students evolution is a theory

109. See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005) (citing expert testimony describing the scientific method as a “self-imposed convention of science, which limits inquiry to testable, natural explanations about the natural world . . . [and] is a ‘ground rule’ of science today which requires scientists to seek explanations in the world around us based upon what we can observe, test, replicate, and verify”). Although there is a robust philosophical debate regarding the definition of a scientific theory, the details of that debate are neither necessary to, nor within the scope of, this analysis. See Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 466-68 (1997) (summarizing the debate).

based on that method. The question could be complicated by naming multiple scientific theories in this statement, including evolution. Further down the constitutional slope would be a disclaimer informing students that there are opponents to various scientific theories, perhaps even identifying evolution as one such theory. If that same disclaimer then pointed out that the existing objections to evolution did not themselves rise to the level of scientific theories, however, the constitutionality of that statement may be more readily defensible.

The literal *Lemon* test likely would not identify any of these facially neutral disclaimers as problematic because they are all relatively easy to justify in secular terms. The legislative-motivation test, on the other hand, could be used to invalidate any of these examples upon a showing that a provision was adopted for a religious purpose. Similarly, the endorsement test could be used to uphold or reject any of them, depending on the depth of knowledge attributed to the "reasonable observer." By contrast, the disparate-impact model is more discriminating. A court applying the disparate-impact test would likely uphold the first statement on the grounds that defining a scientific theory does not have any religious implications. The second statement raises the question of whether naming evolution as a scientific theory subject to challenge (even when listed among other theories) results in a religious effect. If the answer is yes, the disparate-impact model asks the additional question of whether the legislature adopted the disclaimer with the intention of creating that religious impact. This is significant because it protects a provision from being invalidated solely because it has some religious implication. Whether the statement constitutes an unconstitutional establishment of religion is better determined by also considering the legislature's motivation in drafting it. A review of legislative purpose holds legislatures accountable for facially neutral provisions while avoiding unnecessarily chilling lawmakers by striking down a statute on the basis of a single, unintended, and perhaps unforeseen, social consequence. Similar circumstances apply to the analysis of the subsequent statements listed above. Disclaimers drafted in such a way that they implicate evolution without explicitly invoking religion complicate the constitutional analysis such that a one-dimensional review of the provisions' legislative motivation or religious impression is not sufficient to answer the richer constitutional question of establishment of religion.

The disparate-impact model is also preferable because it is more easily and consistently implemented. Unlike the legislative-motivation and endorsement tests, the disparate-impact model does not run the risk of being over-inclusive due to its requirement that a statute have some religious impact. As a result, it can require a broader and more probing

investigation into legislative intent than its less-constrained counterparts without itself overreaching. In addition to official statements or positions regarding a disclaimer, evidence of legislators' individual beliefs and those of their constituents can and should be considered in evaluating legislative intent. This will ensure that a disclaimer that has a religious impact and intent does not survive constitutional scrutiny simply because the drafters were careful to keep the disclaimer and its legislative record facially neutral. This approach is not only clearer than the endorsement test, which requires a case-by-case determination of what evidence is available to the reasonable observer, but it also helps alleviate the potential problem created by manipulation of the legislative record.¹¹⁰

In short, the diverse and dynamic nature of facially neutral evolution disclaimers necessitates they be reviewed under a single, well-defined standard. Through its two-part analysis and ability to probe deeply into the question of legislative intent without being overbroad, the disparate-impact model offers such a standard.

V.

The purpose of this analysis is a relatively modest one. It seeks to evaluate current approaches to judging the constitutionality of facially neutral evolution disclaimers and suggest a better alternative. Although application of the proposed disparate-impact model may not have led to different results in prior cases, it nevertheless serves an important doctrinal purpose. As an initial matter, it would help correct some of the shortcomings of existing Establishment Clause doctrine as it applies to evolution disclaimers. Perhaps more importantly, it provides a benchmark for future evolution-disclaimer cases—and, potentially, any other challenges to facially neutral statutes under the Establishment Clause—that will bring greater predictability to the doctrine. The disparate-impact model meets this challenge by avoiding both the under and over-inclusiveness of the *Lemon* test and its subsequent judicial interpretations. It also provides a vehicle for more focused and consistent judicial inquiry, which is particularly important in the current political and legal climate. The debate over evolution instruction has maintained a near

110. The personal and passionate nature of the evolution debate, particularly in public schools, may render this concern over manipulation of the legislative record moot. All records to date involving evolution disclaimers, even with respect to disclaimers that were facially neutral, have been rife with statements of the religious significance of the disclaimer, despite the existence of legal precedent counseling against such rhetoric. In fact, it may be that evolution disclaimers cannot gain the necessary support without some official appeal to lawmakers' religious sympathies. This does not mean, however, that manipulation of the legislative record should not be considered in adopting a new test for evolution disclaimers.

daily presence in the press, as evolution-disclaimer proposals have become more common and popular. In the face of such a contentious public debate, it is the role of the judiciary to protect individual citizens—especially vulnerable and impressionable school children—from State establishment of religion. This is best accomplished through the development of a stable, reliable, and logically sound standard like the disparate-impact model.