

2-1-2002

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### Repository Citation

Todd D. Keator, *Tale of the Monkey Trials: Chapter Three*, 62 La. L. Rev. (2002)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol62/iss2/9>

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## Tale of the Monkey Trials: Chapter Three

*“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”*<sup>1</sup>

For years, the Establishment Clause<sup>2</sup> has been the center of controversy between competing theories of natural evolution<sup>3</sup> and divine creation.<sup>4</sup> These two antagonistic theories have clashed on a constitutional battlefield over the appropriate means of educating public school children about the origins of mankind. Supporters of the Biblical version of creation have attempted to introduce their views into public schools while those adopting the scientific view of evolution have urged courts to maintain a strict separation between church and state. Considering past United States Supreme Court decisions, it appears that creationism is losing the battle.<sup>5</sup> Recently, the United States Supreme Court sustained this trend when it chose not to hear the case of *Tangipahoa Parish Board of Education v. Freiler*,<sup>6</sup> and let stand the decision of the United States Fifth Circuit Court of Appeals.<sup>7</sup> When it comes to squaring the competing theories of mankind’s origin with the Constitution, the theory of evolution has survived as the fittest.<sup>8</sup>

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1. U.S. Const. amend. I (emphasis added). The first part of this statement is commonly referred to as the “Establishment Clause,” and the second part is known as the “Free Exercise Clause.”

2. *Id.*

3. “[E]volution has been understood to mean the theory which holds that man has developed from some pre-existing lower type.” *Scopes v. State*, 289 S.W. 363, 364 (Tenn. 1927).

4. The terms “divine creation” and “creationism” will be used interchangeably throughout this paper to denote the theory of mankind’s origin that God spontaneously created human life on earth.

5. See *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573 (1987) (A Louisiana statute requiring balanced treatment for creation science and evolution-science was held to be a violation of the Establishment Clause. Under the statute, if one theory was to be taught, then equal time had to be devoted to the teaching of the other theory as well.). See also *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266 (1968) (holding unconstitutional an Arkansas statute which prohibited teachers in public or state-supported schools and institutions from teaching Darwin’s theory of evolution that mankind sprang forth from a lower species of animals).

6. 530 U.S. 1251, 120 S. Ct. 2706 (2000) (Scalia, J., dissenting).

7. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251, 120 S. Ct. 2706 (2000) (Scalia, J., dissenting). The Fifth Circuit upheld the lower court’s decision holding invalid a disclaimer adopted by the Tangipahoa Parish Board of Education to be read before each high school and elementary lesson on evolution. See *infra* note 9 for the text of the disclaimer.

8. Arguably, *Edwards* and *Epperson* are the two most important creationism cases the United States Supreme Court has heard, and creationism lost both times. Creationism again suffered defeat in *Freiler*.

I. BRIEF HISTORY OF THE *FREILER* CASE

On April 19, 1994, the Tangipahoa Parish Board of Education adopted a disclaimer to be read in every elementary and high school class prior to the teaching of any lesson regarding the theory of evolution.<sup>9</sup> The apparent purpose of the disclaimer was to inform the school children that the lesson they were about to receive would be on the scientific theory of evolution and was not meant to "influence or dissuade" them from adopting the "Biblical version of creation" or any other concept that they may have learned at home.<sup>10</sup> The disclaimer also recognized the "basic right and privilege" of each student to adopt his or her own beliefs regarding man's origin and encouraged critical thinking by the students.<sup>11</sup>

The parents of three public school students in Tangipahoa Parish challenged the disclaimer seven months after its adoption.<sup>12</sup> The parents claimed that it violated the Establishment Clause of the United States Constitution.<sup>13</sup> The United States District Court for the Eastern District of Louisiana ruled against the Tangipahoa Parish Board of Education and found the disclaimer to be in violation of the Establishment Clause.<sup>14</sup> The District Court opined that the disclaimer lacked a secular purpose.<sup>15</sup> The Fifth Circuit affirmed, but offered different reasons.<sup>16</sup> Contrary to the district court, the Fifth Circuit

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9. The text of the disclaimer was as follows:

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

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

*Freiler*, 530 U.S. at 1251, 120 S. Ct. at 2707.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* The parents also claimed a violation of the Establishment Clause of the Louisiana Constitution; however, the case was decided solely on the claim that a violation of the Establishment Clause of the United States Constitution had occurred. *Id.*

14. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 975 F. Supp. 819 (E.D. La. 1997).

15. *Id.* at 829.

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

found that the disclaimer *did* have a secular purpose.<sup>17</sup> However, the court ruled against the disclaimer because “the primary effect of the disclaimer [was] to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation.”<sup>18</sup>

The United States Supreme Court denied *certiorari* in *Freiler*; however, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented.<sup>19</sup> The dissenting justices stated their reasons as to why the Court should have heard the case and why it should have reversed the Fifth Circuit.<sup>20</sup>

#### A. Troubles with the *Freiler* Decision

For over two hundred years, the Supreme Court has played an essential and remarkable role in government. The Court is charged with the greatest duty of resolving the personal and governmental conflicts that inevitably arise in this nation. As noted by Erwin N. Griswold, “[t]hese conflicts are sometimes of extraordinary difficulty, both intellectual and practical, and it should hardly be surprising that their resolution is not always prompt or clear.”<sup>21</sup> For undertaking the task of resolving these difficult issues, the Court has earned the respect and understanding of our nation. Therefore, it is in the spirit of contributing to that respect and understanding that the criticisms in this comment are directed.

The Fifth Circuit and the United States Supreme Court each erred in the *Freiler* case. By ignoring the purposes and limits of the prohibition contained in the Establishment Clause, the Supreme Court allowed a decision that will not even permit schools to acknowledge the existence of a religious theory of creation.<sup>22</sup> An examination of the historical setting surrounding the enactment of the Establishment Clause, as well as the intent of the men who drafted it, reveals that these courts have strained too hard to maintain a rigid wall of separation between church and state. Thus, they have deviated far from the scope of the protections enshrined within the Establishment Clause by allowing it to be used for a purpose not contemplated by the Framers.

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17. *Id.* at 346.

18. *Id.*

19. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 120 S. Ct. 2706 (2000) (Scalia, J., dissenting).

20. *Id.*

21. Erwin N. Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 Utah L. Rev. 167, 167 (1963).

22. See *infra* note 70 and accompanying text for the purposes underlying the Establishment Clause.

By denying *certiorari* in *Freiler*, the United States Supreme Court allowed an "absolutist" interpretation of the Establishment Clause.<sup>23</sup> An absolutist viewpoint is problematic for two reasons. First, the approach involves "a failure to exercise the responsibilities—and indeed the pains—of judging. By ignoring factors relevant to sound decision, it inevitably leads to wrong results."<sup>24</sup> When the Supreme Court allowed such a decision to stand, it violated its duty to protect our constitutional freedoms<sup>25</sup> through sound interpretation of the Constitution.<sup>26</sup> Through the formulation of its own absolutist viewpoint, the Fifth Circuit decided *Freiler* in a manner that does not accord with the Constitution. The United States Supreme Court should not have tolerated the decision and should not have denied *certiorari*. Our courts should interpret the Constitution in a manner consistent with the intent of the Framers, and when a lower court fails to do so, the Supreme Court should correct the decision.<sup>27</sup> Otherwise, the credibility of judicial decision-making erodes.<sup>28</sup>

Second, this decision creates potential problems for public school curricula in the future. As a result of the *Freiler* decision, a public

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23. Griswold, *supra* note 21. The absolutist viewpoint narrowly construes the language of the Establishment Clause to mean that "no law" means no law. However, this viewpoint is flawed, for it fails to adequately interpret the essential words "establishment of religion." According to Griswold, "the words of the First Amendment . . . cannot be given sound meaning and effect merely through a mechanically absolutist approach." *Id.* at 171-72.

24. *Id.* at 181.

25. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487, 81 S. Ct. 247, 251 (1960).

26. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 ("It is emphatically the province and duty of the judicial department to say what the law is. . . . So if a law be in opposition to the constitution . . . the court must determine which of these conflicting rules governs the case. . . . [T]he constitution, and not [the opposing law], must govern. . . ."). The process of determining whether a law is in conflict with the Constitution first requires an interpretation of the constitutional provision at issue.

27. See generally William A. Aniskovich, *In Defense of the Framers' Intent: Civic Virtue, The Bill of Rights, and the Framers' Science of Politics*, 75 Va. L. Rev. 1311 (1989). This article acknowledges the debate regarding whether the Constitution should be interpreted using an "interpretivist" or "noninterpretivist" approach. The interpretivist approach interprets the Constitution based on its text and the intentions of the Framers. The noninterpretivist approach argues that the Constitution should be interpreted from sources beyond the text and the intent of the draftsmen. But no matter which side of the debate one is on, the intent of the Framers is always important when construing ambiguous constitutional provisions.

28. See *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986). Justice White wrote for the majority that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Id.* at 194, 106 S. Ct. at 2846.

school, when discussing the origins of mankind, cannot even acknowledge that alternative religious theories of mankind's origin exist, and it certainly cannot tell a student that he may pursue such theories on his own. This decision stifles freedom of thought. If children are not allowed to know that religions have theories of mankind's origin, then it appears that no subject that is remotely related to religion may be discussed in public schools. This decision paves the way for the courts to tell schools that they may no longer discuss religion's impact and influence on history, art, philosophy, and so forth.<sup>29</sup> The *Freiler* decision is indeed a slippery slope.

The Supreme Court should have granted *certiorari* in *Freiler*, reversed the Fifth Circuit, and affirmatively squared the Establishment Clause with its original purposes by asking one simple question: Is the disclaimer "a law respecting an establishment of religion?"<sup>30</sup> In answering this question, the Court should have begun by correcting the Fifth Circuit's erroneous application of the *Lemon* test.<sup>31</sup> Then, it should have discussed the outcome of the case under both the endorsement<sup>32</sup> and coercion tests.<sup>33</sup> Finally, in order to quiet some of the confusion surrounding Establishment Clause jurisprudence, the Court should have consolidated the three Establishment Clause tests to create one workable standard for courts to use in the future.

This comment begins with an exposition of the history surrounding the Establishment Clause and describes the intent of the men who drafted it. Next, it briefly summarizes Establishment Clause jurisprudence in the context of the "Monkey Trial"<sup>34</sup> cases and follows up with a discussion of the Fifth Circuit's erroneous decision

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29. *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 194 (1980) (The Supreme Court stated that "the Bible may constitutionally be used [in public schools] in an appropriate study of history, civilization, ethics, comparative religion, or the like.").

30. *See Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479 (1985). There, the Supreme Court, before deciding the case, framed the issue as follows: "[T]he narrow question for decision is whether § 16-1-20.1, which authorizes a period of silence for 'meditation or voluntary prayer,' is a law respecting the establishment of religion within the meaning of the First Amendment." *Id.* at 41-42, 105 S. Ct. at 2482 (emphasis added); "[O]ur duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." *Id.* at 89, 105 S. Ct. at 2507 (Burger, C.J., dissenting) (emphasis added).

31. *See infra* note 74 for a brief description of the *Lemon* test.

32. *See infra* note 75 for a brief description of the endorsement test.

33. *See infra* note 76 for a brief description of the coercion test.

34. *Collision of Faith, Science, Reason*, *Baton Rouge Advocate*, July 22, 2000, at 8B. The phrase "the Monkey Trial" was coined in 1925 by H.L. Mencken, a reporter for the *Baltimore Evening Sun*, to describe the case of *Scopes v. State*, 289 S.W. 363 (Tenn. 1927). This was the first case to deal with the issue of creationism versus evolution in public schools.

in *Freiler*. This comment ends with a criticism of the Fifth Circuit's application of the *Lemon* test. Then, resorting to the intent of the Framers who molded the Establishment Clause, it proposes a solution to the confusion surrounding Establishment Clause jurisprudence by offering a new, simpler test for courts to use when confronted with alleged Establishment Clause violations. Finally, applying this new standard, the *Freiler* disclaimer<sup>35</sup> is put to the test.

### B. Historical Origins of the Establishment Clause

Speaking for the Court, Justice Holmes once wrote that "a page of history is worth a volume of logic."<sup>36</sup> And, as the United States Supreme Court has noted, "interpretation of the Establishment Clause should 'compor[t] with what history reveals [is] the contemporaneous understanding of its guarantees.'"<sup>37</sup> Therefore, before further exploration of the *Freiler* decision or the jurisprudence surrounding it, a brief history of the Establishment Clause is in order.

From the seventeenth century until the mid-eighteenth century, state establishment of religion was viewed much differently than it is viewed today. At that time, nearly every colony had an "established" religion,<sup>38</sup> meaning that each colonial government "established" the

35. See *supra* note 9 for the text of the disclaimer.

36. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349, 41 S. Ct. 506, 507 (1921).

37. *Lee v. Weisman*, 505 U.S. 577, 632, 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355 (1984)). See also *Marsh v. Chambers*, 463 U.S. 783, 790, 103 S. Ct. 3330, 3335 (1983) ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied [to modern practices]"); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 670, 109 S. Ct. 3086, 3142 (1989) (Kennedy, J., concurring in part and dissenting in part) ("[T]he meaning of the [Establishment] Clause is to be determined by reference to historical practices and understandings."); *Wallace v. Jaffree*, 472 U.S. 38, 113, 105 S. Ct. 2479, 2519 (1985) (Rehnquist, J., dissenting) ("The true meaning of the Establishment Clause can only be seen in its history. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will . . . lead to . . . unprincipled decisionmaking . . .").

38. *Everson v. Bd. of Educ.*, 330 U.S. 1, 67 S. Ct. 504 (1947). In *Everson*, Justice Black, writing for the majority, gave an influential view of the history of the Establishment Clause. According to Justice Black, "[t]he centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy." *Id.* at 8-9, 67 S. Ct. at 508. See also *The Supreme Court's Holy Battles, A Companion Guide 2* (1989) [hereinafter *Holy Battles*]; Robert S. Alley, *The Supreme Court on Church and State* 8 (1988) (In seventeenth century colonies, with few exceptions, "the universal practice was that of establishment.").

majority religion and gave it tax funds and privileges.<sup>39</sup> The chosen church was to be the only church in the colony, and the clergy were given public support in the form of cash, land, and often goods such as tobacco.<sup>40</sup> Dissenters of the established church were either fined, persecuted, or killed.<sup>41</sup>

The most significant exception to the colonial establishment of religion was the Rhode Island experience led by Roger Williams.<sup>42</sup> A vigorous advocate for pure religious freedom, Williams believed that the church was to be kept separate and distinct from the corruptive influences of the state.<sup>43</sup> Williams was motivated by the belief that any support of religious establishments by the state would lead to persecution by either restraining individuals from exercising their desired choice of religion, or by compelling individuals to exercise a form of religion that their consciences forbade.<sup>44</sup> According to Williams, if the government could use religion, then the

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39. *Everson*, 330 U.S. 1, 67 S. Ct. 504 (1947). In his exploration of Establishment Clause history, Justice Black stated:

The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend . . . These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation.

*Id.* at 9-11, 67 S. Ct. at 508-09. See also *Holy Battles*, *supra* note 38, at 2; Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* xxi (1994) ("The evidence demonstrates that by an establishment of religion the framers meant any government policy that aided religion or its agencies, the religious establishments.").

40. Ronald B. Flowers, *That Godless Court?* 10 (1994).

41. *Everson*, 330 U.S. 1, 67 S. Ct. 504 (1947). As a result of established religion in the colonies, Justice Black recounted:

With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics [of a varying belief], and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.

*Id.* at 9, 67 S. Ct. at 508. See also *Holy Battles*, *supra* note 38, at 2.

42. Roger Williams, Thomas Jefferson, and James Madison had a profound influence on the underpinnings of the Establishment Clause. Although Williams did not directly influence Jefferson or Madison when the Establishment Clause was drafted, his contribution to the First Amendment is nevertheless important for the indirect influence his methodologies had on the drafters. Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty* 117 (1998).

43. Flowers, *supra* note 40, at 11.

44. Hall, *supra* note 42, at 125.



government could corrupt it (as had been done in Europe)<sup>45</sup> and use it to control the people.<sup>46</sup> As a result, he favored total individual freedom with respect to religion and did not allow the establishment of a religion in Rhode Island.<sup>47</sup> To Williams, it was too dangerous to individual freedom to place the power of religion in the hands of the government.<sup>48</sup>

Thomas Jefferson and James Madison agreed with the example set by Roger Williams. For differing reasons, they both believed that religion and government should not mix. Rather than favoring separation of church and state out of fear that the government would seek to control the people through religion, Madison feared that an established religion could be used to control the government.<sup>49</sup> Jefferson, on the other hand, simply believed that the state lacked all jurisdiction in the realm of religion.<sup>50</sup>

In addition to drawing from the Roger Williams experiment in Rhode Island, Thomas Jefferson was also motivated to separate church and state by the teachings of John Locke. Locke was a strict advocate for religious liberty and freedom of conscience.<sup>51</sup> He believed that democracy was not possible without freedom of religion, and he argued that "religious intolerance could be a threat to democracy itself . . . ."<sup>52</sup> According to Locke, people who live in a free society should be able to freely choose how to worship, if they choose to do so at all.<sup>53</sup>

From these teachings, Jefferson extracted the idea that government and religion had to be separated in order to preserve

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45. Prior to and during the 1780s, in "several European countries, one national religion, such as the Church of England in Great Britain, was established." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 646, 109 S. Ct. 3086, 3129 (1989) (Stevens, J., concurring in part and dissenting in part).

46. Francis G. Lee, *Wall of Controversy: Church-State Conflict in America* 8 (1986).

47. Flowers, *supra* note 40, at 11.

48. M. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* 6 (1965) ("Worldly corruptions . . . might consume the churches if sturdy fences against the wilderness were not maintained.").

49. Lee, *supra* note 46, at 8.

50. *Holy Battles*, *supra* note 38, at 9. See also *Lee v. Weisman*, 505 U.S. 577, 623, 112 S. Ct. 2649, 2674 (1992) (Souter, J., concurring) ("Jefferson necessarily condemned what, in modern terms, we call official endorsement of religion. He accordingly construed the Establishment Clause to forbid not simply state coercion, but also state endorsement, of religious belief and observance.").

51. Kenneth R. Craycraft, Jr., *The American Myth of Religious Freedom* 69 (1999).

52. Darien A. McWhirter, *Exploring the Constitution: The Separation of Church and State* 2 (1994).

53. *Id.*

democracy. To Jefferson, religion was a private, personal matter that the state had no authority to touch.<sup>54</sup> If the two intermingled, according to Jefferson, democracy would erode, and liberty, freedom of expression, individual thought, and religion would all sustain harm.<sup>55</sup>

In 1779, Jefferson introduced the Virginia Statute For Religious Freedom to the Virginia House of Delegates in an effort to curtail the practice of established religion in Virginia.<sup>56</sup> The bill's chief effect was to guarantee the free exercise of religion and to abolish religious establishments.<sup>57</sup> After years of debate and much trouble with Patrick Henry,<sup>58</sup> James Madison was able to secure passage of Jefferson's bill in Virginia in 1786.<sup>59</sup> The impact of this legislation forever preserved freedom of religion for Virginians. Jefferson's separationist ideals, memorialized in Virginia, would soon find themselves woven within the fabric of the First Amendment.<sup>60</sup>

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54. Jefferson's view was captured in the preamble to the Virginia Bill for Religious Liberty where he wrote the following:

Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his [own].

Virginia Bill for Religious Liberty, 1619 Leg., 1st Sess. (Va. 1619); Henry S. Commager, *Documents of American History* 125 (Dixon R. Fox ed., 1944).

55. *Holy Battles*, *supra* note 38, at 9.

56. *Id.* at 4. The bill provided the following:

[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; 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.

*Id.* at 4-5.

57. *Id.* at 4.

58. Patrick Henry, in 1783, proposed a bill opposite to Jefferson's which called for an annual tax on the citizens of Virginia to contribute to the state's support of the Christian religion. Jefferson vehemently opposed this plan along side James Madison. So bitter was Jefferson toward Henry that he wrote to Madison: "What we have to do, I think, is devoutly pray for his [Henry's] death." Eventually, due to the efforts of Madison, Henry's bill was defeated, leaving open the door for passage of Jefferson's bill. *Id.* at 5, 6.

59. *Id.* at 6.

60. The Supreme Court recognized that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same

Like Jefferson, Madison was also adamant about abolishing establishment and ensuring the separation of church and state. In the fight against Patrick Henry's proposed religion tax, Madison wrote his great Memorial and Remonstrance against the legislation. According to Justice Black, in the Memorial and Remonstrance, Madison did the following:

[He] eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions.<sup>61</sup>

Thus, Madison, like Jefferson, believed that the government had no jurisdiction in the realm of religion.<sup>62</sup>

Madison was also deeply motivated by a fear that faction might undermine the fledgling federal government.<sup>63</sup> Madison worried that established religion would lead to large religious sects that could dominate politically. He advocated freedom of religion so that a multitude of religions could flourish and diminish the possibility that one, over-bearing religious sect would rise and dominate the political arena.<sup>64</sup> While drafting the Constitution, Madison adhered to separationist ways, and no powers over matters of religion were given to the government in the body of the Constitution.<sup>65</sup> Apparently, Madison's position was that if the Constitution was void of express language giving Congress power to legislate concerning matters of religion, then Congress was powerless to do so.

Because of this belief, Madison felt that a bill of rights was unnecessary to protect individual religious freedom. However, Thomas Jefferson and the majority of people in many states disagreed

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protection against governmental intrusion on religious liberty as the Virginia statute." *Everson v. Bd. of Educ.*, 330 U.S. 1, 13, 67 S. Ct. 504, 510 (1947).

61. *Id.* at 12, 67 S. Ct. at 509.

62. In his "Memorial and Remonstrance Against Religious Assessments, 1785," James Madison wrote, in part:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . . We maintain therefore 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.

The Complete Madison 299-301 (Saul K. Padover ed., 1953).

63. Kenneth R. Craycraft, Jr., *The American Myth of Religious Freedom* 76 (1999).

64. *Id.* (discussing *The Federalist*, No. 51 (James Madison) in which Madison argued the need for the government to build legal and political institutions that could dilute the collective influence of religion).

65. Levy, *supra* note 39, at 77-80.

with him. Therefore, in an effort to secure ratification of the Constitution, Madison presented to the first Congress a bill of rights intended to protect individual liberties, including religious freedom, by explicitly limiting the power of the federal government.<sup>66</sup> After ratification in 1791,<sup>67</sup> the first sixteen words of the First Amendment guaranteed religious freedom in the United States.<sup>68</sup>

Soon after the adoption of the Bill of Rights, Thomas Jefferson, in a letter to the Danbury Baptist Association, wrote the following:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that [the Establishment Clause has built] a wall of separation between church and State.<sup>69</sup>

Thus, the famous phrase “wall of separation between church and State” was born. Based on the example set by Roger Williams and the teachings of John Locke, Thomas Jefferson and James Madison were able to firmly draw the line between church and state by sewing religious freedom into the fabric of our nation. The intent of the Framers—“that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinion or [beliefs]”<sup>70</sup>—was successfully preserved in the Constitution.

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66. *Id.* at 69, 77-80; see also *Wallace v. Jaffree*, 472 U.S. 38, 98, 105 S. Ct. 2479, 2511 (1985) (Madison’s “sponsorship of the Amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.”).

67. For the history of the debates surrounding ratification of the First Amendment, see *Wallace v. Jaffree*, 472 U.S. 38, 91-114, 105 S. Ct. 2479, 2508-19 (1985) (Rehnquist, J., dissenting).

68. U.S. Const. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”) For James Madison’s interpretation of the Establishment Clause, see 1 *Annals of Cong.* 424, 730 (1789) (“[Madison] apprehended the meaning of the words to be that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.”).

69. McWhirter, *supra* note 52, at 4.

70. Justice Black stated in *Everson v. Board of Education* that the Establishment Clause was intended to provide the same protection against governmental intrusion on religious liberty as Jefferson’s famous Virginia Bill for Religious Liberty. 330 U.S. 1, 13, 67 S. Ct. 504, 510 (1947). See also *Flowers*, *supra* note 40, at 17 (The Founders wrote that “[t]he government was not to establish one religion, neither was it to establish multiple religions . . . government

This is the purpose behind the Establishment Clause that the United States Supreme Court has turned to when evaluating alleged Establishment Clause violations.<sup>71</sup> Regarding theories of mankind's origin, the Supreme Court has held fast to the Jeffersonian purpose behind the Establishment Clause and erected a wall of separation between religious versions of creation and public schools. Unfortunately, in an effort to expand this trend, the court in *Freiler* mistakenly reinforced the wall when it should have instead carved out a window.<sup>72</sup>

## II. THE ESTABLISHMENT CLAUSE TESTS

Before examining the saga of Establishment Clause jurisprudence, a brief explanation of the standards used by the courts to gauge Establishment Clause violations is appropriate. Over the course of time, three different tests have been developed by the Supreme Court for ferreting out Establishment Clause violations:<sup>73</sup> the *Lemon* test,<sup>74</sup> the endorsement test,<sup>75</sup> and the coercion test.<sup>76</sup>

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was to be limited.”); Levy, *supra* note 39, at xvii (commenting on the history of the establishment clause and how the view has always been that “government aid to religion, even without preference to any church, violates the Establishment Clause”).

71. McWhirter, *supra* note 52, at 4. See *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (Chief Justice Waite wrote for a unanimous court that Thomas Jefferson's statement “may be accepted almost as an authoritative declaration of the scope and effect of the [religion clauses]” of the First Amendment.).

72. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 120 S. Ct. 2706 (2000).

73. *Id.* at 2707.

74. *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105 (1971). Under the *Lemon* test, three prongs must be met in order for a law to withstand constitutional scrutiny. If any of the three prongs fails, the law in question fails. According to *Lemon*, a law is unconstitutional if: (1) it lacks a secular legislative purpose; (2) its primary effect either advances or inhibits religion; or (3) it causes the government to become excessively entangled with religion. *Id.* at 612-613, 91 S. Ct. at 2111.

Under the first prong, courts perform a two-step analysis to determine if the law in question has a secular purpose. First, a “sham” inquiry is done to decide whether the law actually furthers the secular purposes articulated by its makers. *Edwards v. Aguillard*, 482 U.S. 578, 586-87, 107 S. Ct. 2573, 2579 (1987). If all of the purposes are found to be a sham, the inquiry ends and the law fails. But, if even one of the given purposes is genuine, then the inquiry continues to determine whether the genuine purpose is secular in nature. A permissible secular objective is one that neither advances nor disapproves of religion. *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985). To briefly summarize, under the first prong, a court must ask first if the questionable law actually furthers the purposes given for it by its makers, and second, the court must decide if those given purposes are secular—neither advancing nor inhibiting religion. If the first prong is met, the court should move on to the second.

Under prong two, a court looks past the given purposes for the law and

Unfortunately, the Supreme Court has offered no guidance as to what circumstances trigger each of the individual tests.<sup>77</sup> Therefore, courts faced with alleged Establishment Clause violations have been left to choose, on their own, which of the three tests to employ. The multi-test analysis has led to a collection of Establishment Clause jurisprudence which courts are quick to admit is "rife with confusion."<sup>78</sup> This confusion is problematic in that erroneous decisions are apt to occur when a court is not given a clear standard to work with.<sup>79</sup>

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analyzes its actual effects. Any state law which actively endorses or disapproves of religion is unconstitutional. Typically, laws that "aid one religion, aid all religions, or favor one religion over another" are considered to endorse religion and are therefore invalid. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (1999). The government cannot promote religion in any way under prong two; however, there is an exception. Various courts have said that "where the benefit to religion or to a church is no more than indirect, remote, or incidental . . . 'no realistic danger [exists] that the community would think that the [contested government practice] was endorsing religion or any particular creed.'" *Id.* (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395, 113 S. Ct. 2141, 2148 (1993)). Thus, a law with a valid secular purpose that gives a minuscule benefit to religion should survive under prongs one and two.

Prong three merely requires that the law not create an excessive entanglement with religion. If the law becomes too entangled with religion, the law will fail. In 1997, the Supreme Court suggested that the excessive entanglement inquiry could be dispensed with as a separate inquiry and combined with *Lemon's* secular purpose prong. *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997). Therefore, it is no longer clear that this is, in fact, a separate prong.

75. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 109 S. Ct. 3086 (1989). Because the Supreme Court has expressed its disapproval of the *Lemon* test in various contexts, other tests have arisen to take its place. One such test is the endorsement test. Under the endorsement test, "the court seeks to determine whether the government endorses religion by means of the challenged action." *Freiler*, 185 F.3d at 343. A violation of the endorsement test occurs when the state's action "conveys a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs." *Id.* Analysis under the endorsement test is "similar to analysis pursuant to [*Lemon's* second prong]," and state actions which impermissibly advance religion have been held to simultaneously fail *Lemon's* second prong and the endorsement test. *Id.* at 346.

76. *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992). The coercion test analyzes the coercive effect that state-sponsored religious activity has on the public. *Freiler*, 185 F.3d at 343. Under this test, a state's activity will violate the Establishment Clause when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992). According to Justice Kennedy, coercion is any state-sponsored activity that "places public pressure, as well as peer pressure," on people attending the event. *Lee*, 505 U.S. at 593, 112 S. Ct. at 2658.

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

78. *Id.* at 343.

79. With these three tests in mind, it is easy to see how courts might become confused when faced with an alleged Establishment Clause violation. How is a

## III. TALE OF THE "MONKEY TRIALS"

The first case to address the issue of creationism versus evolution was *Scopes v. State*.<sup>80</sup> At the time of the case, Tennessee had a statute that forbade in public schools the teaching of any theory that "denie[d] the story of the divine creation of man as taught in the Bible and [taught] instead that man [had] descended from a lower order of animals."<sup>81</sup> Mr. Scopes had been convicted of violating this statute. The Supreme Court of Tennessee reversed the conviction on procedural grounds, but held the Tennessee statute to be constitutional. The court reasoned that a state, in dealing with its own employees engaged in its own work, was not limited by the prohibitions incorporated in the Fourteenth Amendment.<sup>82</sup>

Years later, the United States Supreme Court was not as lenient as the Tennessee court toward anti-evolution legislation. *Epperson v. Arkansas*<sup>83</sup> involved an Arkansas statute similar to the Tennessee statute in *Scopes*. The Arkansas statute forbade teachers in public schools from teaching "the theory or doctrine that mankind ascended or descended from a lower order of animals."<sup>84</sup> The Court declared the law unconstitutional, finding that it conflicted "with the constitutional prohibition of state laws respecting an establishment of religion."<sup>85</sup>

Crucial to the Court's decision was its finding that the Arkansas statute violated principles of neutrality. According to the Court, the "[government] may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or

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court to choose which test should be employed in a given situation? Should all three tests always be used to analyze every situation? Or, is a court free to choose the test it feels will best help it reach its desired result? If state action fails *Lemon's* second prong, does this mean it automatically fails the endorsement test? If so, what is the point of even having the endorsement test? Suppose state activity fails the *Lemon* and endorsement tests but passes the coercion test. Should the law stand or fall? These questions have all been left unanswered by courts, and the Supreme Court has offered no guidance in seeking resolution of these issues. The ambiguous situation created by having the three tests can lead to bad results because a court with a preconceived notion of what it considers to be the right result has too much discretion in choosing the test that best conforms to its ready-made answer. *Freiler v. Tangipahoa Board of Education* is a perfect example of what can go wrong given the confusion surrounding Establishment Clause jurisprudence today.

80. 289 S.W. 363 (Tenn. 1927).

81. Tenn. Anti-Evolution Act, ch. 27, § 1 (1925).

82. *Scopes*, 289 S.W. at 367.

83. 393 U.S. 97, 89 S. Ct. 266 (1968).

84. 1929 Ark. Acts, Initiated Act No. 1; Ark. Stat. Ann. §§ 80-1627, 80-1628 (1960 Repl. Vol.).

85. *Epperson*, 393 U.S. at 103, 89 S. Ct. at 270.

religious theory against another or even against the militant opposite.”<sup>86</sup> Further, quoting from *Everson v. Board of Education*, the Court noted that “[n]either [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”<sup>87</sup> In other words, a state may not create laws or procedures in public schools that “aid or oppose” any religion.<sup>88</sup> In essence, the Court used an approach similar to the endorsement test to strike down the Arkansas statute. Interestingly, in dicta, the Court stated that a study of religions or of the Bible, as part of a literature or history curriculum, presented objectively as secular education, could be presented in public school without violating the Establishment Clause.<sup>89</sup> Thus, a neutral and objective presentation of religion in a public school was said to survive constitutional inquiry.<sup>90</sup>

In its findings of fact, the Court held that the actual purpose of the law at issue was not neutral and objective. Instead, it found that the statute was created to prevent teachers from discussing the theory of evolution because it conflicted with the Biblical version of creation. The motivation behind the statute was to suppress the teaching of evolution.<sup>91</sup> This purpose violated religious neutrality by preferring the religious theory to the scientific theory; thus, the law had to fall.<sup>92</sup>

The next challenge to the Establishment Clause came from “balanced treatment” legislation, a type of law that required equal time be devoted to creationism and evolution theories in public schools. The United States Supreme Court first addressed the issue of “balanced treatment” in *Edwards v. Aguillard*.<sup>93</sup> Louisiana had passed a law called the “Creationism Act,” which forbade “the teaching of the theory of evolution in public schools unless accompanied by instruction in ‘creation science.’”<sup>94</sup> Neither theory was required to be taught; however, if one was taught, the other had to be given equal class time.

The Court decided the case primarily under the *Lemon* test and held that the Louisiana Creationism Act was unconstitutional. The

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86. *Id.* at 104, 89 S. Ct. at 270.

87. *Id.* at 106, 89 S. Ct. at 271 (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15, 67 S. Ct. 504, 511 (1947)).

88. *Id.*

89. *Id.*

90. After *Freiler*, it is not so clear that this is true anymore.

91. *Epperson*, 393 U.S. at 109, 89 S. Ct. at 273.

92. Soon after the *Epperson* decision, a similar statute was declared unconstitutional in the State of Mississippi. See *Smith v. State*, 242 So. 2d 692 (Miss. 1970) (holding unconstitutional under the Establishment Clause a statute making it unlawful for any teacher employed by the state to teach that mankind ascended or descended from a lower order of animals).

93. 482 U.S. 578, 107 S. Ct. 2573 (1987).

94. *Id.* at 581, 107 S. Ct. at 2576.



Court found that the Act lacked a valid secular purpose and, therefore, failed *Lemon's* first prong.<sup>95</sup> In addition, the court also utilized the endorsement test, holding that the Act "endorse[d] religion in violation of the First Amendment."<sup>96</sup>

The first two chapters in the tale of the "monkey trials" prohibit antievolution legislation and balanced treatment legislation respectively. These chapters comport with the purpose of the Establishment Clause—to prohibit the state from taking an active role in advancing religion upon people's lives. It is understandable that legislation forbidding the teaching of evolution is unconstitutional because such legislation actively seeks to turn students away from the theory of evolution and toward the theory of creation. It is even more understandable that legislation forcing students to partake in creationism lectures is unconstitutional because clearly this legislation coerces students to partake in religious education.

A problem exists though with the third chapter recently written by the Fifth Circuit in *Freiler* and acquiesced to by the United States Supreme Court. The *Freiler* chapter poses a problem for our society because it stretches the Establishment Clause to an extreme limit that could not have been contemplated by its Framers. This decision does not merely tell the state that it cannot advance religion; it tells the state that it cannot even acknowledge the existence of a particular religious viewpoint.

#### IV. SUBSTANCE OF THE FIFTH CIRCUIT'S DECISION

The Fifth Circuit's sole inquiry in *Freiler v. Tangipahoa Parish Board of Education* was whether the disclaimer<sup>97</sup> at issue contravened the First Amendment's Establishment Clause.<sup>98</sup> In a decision that looked past the explicit wording of the disclaimer, the court ultimately concluded that the disclaimer had, in fact, breached the wall of separation between church and state.<sup>99</sup>

The court began by recognizing the freedom that states have in prescribing academic curricula in their public schools. Next, relying on the landmark decision of *Epperson v. Arkansas*,<sup>100</sup> the court commented that this freedom is limited in scope by the Constitution such that "[s]tates may not require that teaching and learning be

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95. *Id.* at 591, 107 S. Ct. at 2581 ("The preeminent purpose of the Louisiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind.").

96. *Id.* at 593, 107 S. Ct. at 2583.

97. See *supra* note 9 for the text of the disclaimer.

98. 185 F.3d 337, 342 (5th Cir. 1999).

99. *Id.* at 349.

100. 393 U.S. 97, 89 S. Ct. 266 (1968).

tailored to the principles or prohibitions of any religious sect or dogma.”<sup>101</sup>

The court then discussed the *Lemon*, endorsement, and coercion tests to determine whether certain state action is violative of the Establishment Clause.<sup>102</sup> After commenting on the tests, the court described the state of Establishment Clause jurisprudence as “rife with confusion.”<sup>103</sup> But, noted the court, not all three tests must be employed; any one test could be used in isolation to analyze the state action.<sup>104</sup> According to the court, the choice of which test to employ should not be made arbitrarily; instead, the decision “rests upon the nature of the Establishment Clause violation asserted.”<sup>105</sup> Noting that the state action at issue, the disclaimer, did not force students to participate in a formal religious exercise, the court eliminated from consideration the coercion test.<sup>106</sup> It turned its attention instead to the *Lemon* test.<sup>107</sup>

From the outset of its discussion of the *Lemon* test, the court was quick to point out that the *Lemon* test was “widely criticized and occasionally ignored,” but that it “continue[d] to govern Establishment Clause cases.”<sup>108</sup> Despite doubts about the viability of the *Lemon* test, the court chose to proceed under its guidance.<sup>109</sup>

Beginning with the first prong, the court looked at whether the disclaimer had a truly secular purpose.<sup>110</sup> It noted that “a statute motivated in part by a religious purpose may satisfy *Lemon*’s [secular] purpose prong.”<sup>111</sup> All that is required is that “a sincere secular purpose for the contested state action must exist; even if that secular purpose is but one in a sea of religious purposes.”<sup>112</sup>

The court then turned to the School Board’s professed purposes for mandating the disclaimer.<sup>113</sup> Deferring to the purposes given by

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101. *Freiler*, 185 F.3d at 343 (citations omitted).

102. *Id.*

103. *Id.*

104. *Id.* at 343-44.

105. *Id.* at 344.

106. *Id.*

107. *Id.*

108. *Id.* See *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997 (1997) (*Lemon* test once again employed to analyze a school aid program). This case reaffirmed the continued utility of the *Lemon* test.

109. 185 F.3d at 344.

110. “Secular” purpose is defined as a “[w]orldly, as distinguished from spiritual” purpose. *Black’s Law Dictionary* 1356 (7th ed. 1999).

111. *Freiler*, 185 F.3d at 344. See *Wallace v. Jaffe*, 472 U.S. 38, 56, 105 S. Ct. 2479, 2489 (1985).

112. 185 F.3d at 344.

113. *Id.* The School Board listed three purposes: “(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce

the School Board, yet not blindly relying on them, the court investigated whether the disclaimer actually furthered those articulated reasons.<sup>114</sup> But before deciding whether the Board's purposes were secular, the court had to determine whether they were genuine, or instead, a "sham."<sup>115</sup>

As for the first purpose, that the disclaimer "encourag[ed] informed freedom of belief or critical thinking by the students," the court looked past the text of the disclaimer and found that "the disclaimer as a whole further[ed] a contrary purpose, namely the protection and maintenance of a particular religious viewpoint."<sup>116</sup> It reasoned that the structure of the disclaimer was intended to tell school children "that evolution as taught in the classroom need not affect what they already know," and that this message contradicted the alleged purpose of encouraging critical thinking and keeping an open mind.<sup>117</sup> Thus, the first purpose was found to be a sham.

However, as to the second and third purposes held out by the School Board in support of the disclaimer, the court found them to be genuine. Because the disclaimer acknowledged the existence of the alternative Biblical version of creation and reminded children that they could adopt their parent's views of man's origin, the disclaimer did in fact "disclaim an orthodoxy of belief" that could be implied from the exclusive lessons concerning scientific evolution. It also "reduce[d] offense" to parents and children caused by the teaching of evolution in public schools.<sup>118</sup> Using these two sincere purposes, the court continued its inquiry by determining whether those purposes were permissible secular objectives.<sup>119</sup> Attempting to accommodate the religious viewpoints, and avoiding "callous indifference,"<sup>120</sup> the court found that the School Board's second and third purposes had valid secular objectives.<sup>121</sup> The court acknowledged that "local school boards need not turn a blind eye to

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offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution."

114. *Id.*

115. *Id.*

116. *Id.* at 344-45.

117. 185 F.3d at 345.

118. *Id.*

119. *Id.* The court kept in mind that "a purpose is no less secular simply because it is infused with a religious element" and that the *Lemon* test does not require that "the contested law's purpose be unrelated to religion" since the Constitution requires "accommodation, not merely tolerance, of all religions." *Id.* (citations omitted).

120. See *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S. Ct. 679, 684 (1952) (cautioning that courts must avoid "callous indifference" towards religious objectives).

121. *Freiler*, 185 F.3d at 345.

the concerns of students and parents troubled by the teaching of evolution in public classrooms."<sup>122</sup>

The court next analyzed *Lemon's* second prong:<sup>123</sup> whether, regardless of the state's purpose, the action actually conveyed a message of endorsement or advancement.<sup>124</sup> If the disclaimer was found to endorse, advance, or benefit religion, then it would have to be stricken. However, said the court, "where the benefit to religion . . . [was] no more than *indirect, remote, or incidental*," the contested state action would not be considered an unconstitutional endorsement of religion.<sup>125</sup>

The court then proceeded to decide whether the disclaimer endorsed, advanced, or benefitted religion, and, if it did, whether the effects were merely indirect, remote, or incidental.<sup>126</sup> The court began by focusing on the actual message conveyed by the disclaimer to the students and concluded that its primary effect was to "protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation."<sup>127</sup> It reasoned that: (1) the disclaimer disavowed the endorsement of the scientific theory of evolution and simultaneously urged students to consider alternative theories; (2) reminded students that they were free to adopt their parent's beliefs; and (3) left students with the "Biblical version of creation" as the only alternative theory explicitly recognized.<sup>128</sup> The basic conclusion of the court was that the disclaimer encouraged students to consider, in general, the possibility of alternative theories regarding the origin of man and, in particular, to focus attention on the "Biblical version of creation."<sup>129</sup> According to the Court, to focus students' attention on religion was to unconstitutionally give preference to religion in violation of the Establishment Clause.

To clarify its decision, the court briefly discussed examples of permissible uses of religion in schools.<sup>130</sup> Objective, secular

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122. *Id.* at 346.

123. *Id.* At this point, the court noted that the second prong of the *Lemon* test is quite similar to the inquiry under the endorsement test, and that in performing either inquiry, the court must strike down the legislation if it gives "aid [to] one religion, aid [to] all religions, or favor[s] one religion over another." *Id.*

124. See *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 605, 109 S. Ct. 3086, 3107 (1989) (proposing that the Establishment Clause "certainly means at the very least that government may not demonstrate a *preference* for one particular sect or creed . . .") (emphasis added).

125. 185 F.3d at 346 (emphasis added).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* Because the only example given of alternative, "other concepts" was the "Biblical version of creation," the court felt that this supported its conclusion that "the disclaimer impermissibly advance[d] religion." *Id.* at 346 n.4.

130. 185 F.3d at 347 (quoting *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192,

discussions of religion during lectures on history, literature, or philosophy, are acceptable presentations of religion in public schools and do not violate the Establishment Clause.<sup>131</sup> Instead of using the reference to religion in an objective manner meant to provide context for a discussion of politics, history, art, civilization, or the like, the court concluded that the disclaimer's use of the words "Biblical version of creation" was meant to urge students to think critically about religious theories of man's origin and to draw attention away from the state-mandated evolution curriculum.<sup>132</sup>

Finally, the court addressed the School Board's argument that any advancement of or benefit to religion was purely incidental.<sup>133</sup> Summarily rejecting this argument, the court reasoned that the disclaimer, while simultaneously disavowing the endorsement of evolution and urging students to contemplate alternative religious concepts, "serve[d] only to promote a religious alternative to evolution."<sup>134</sup> Therefore, the effect of the disclaimer was to unconstitutionally advance religion, thereby failing the second prong of the *Lemon* test (and thus the whole test) and the endorsement test as well.<sup>135</sup>

Having failed to defend its disclaimer at the appellate level, the Tangipahoa Parish Board of Education petitioned the United States Supreme Court for a writ of *certiorari*. However, the United States Supreme Court passed on the opportunity to review the Fifth Circuit's decision. Justice Scalia, with whom the Chief Justice and Justice Thomas joined, dissented and articulated reasons why the Supreme Court should have taken the case and how it should have ruled.<sup>136</sup>

#### V. JUSTICE SCALIA'S DISSENT

Justice Scalia began his dissent with a brief summary of the Fifth Circuit's decision and then expressed his disapproval for the *Lemon* test employed by that court.<sup>137</sup> He noted that not only himself, but a majority of the members of the Supreme Court, disapproved of the

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194 (1980)) ("[T]here is a fundamental difference between introducing religion and religious concepts in 'an appropriate study of history, civilization, ethics, comparative religion, or the like' and the reading of the School Board-mandated disclaimer now before us.").

131. *Id.*

132. 185 F.3d at 347.

133. *Id.*

134. *Id.* at 348.

135. *Id.*

136. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 120 S. Ct. 2706 (2000).

137. *Id.* at 1252-55, 120 S. Ct. at 2708.

*Lemon* test, and thus, *certiorari* should have been granted, even if only “to inter the *Lemon* test once and for all.”<sup>138</sup>

Putting his dissatisfaction with the *Lemon* test aside, Justice Scalia began to analyze whether the Fifth Circuit had even applied the test properly in the *Freiler* case. He concluded that it had not.<sup>139</sup> Justice Scalia pointed out that this erroneous application alone should have warranted the granting of *certiorari*.<sup>140</sup> Because the Fifth Circuit found a genuine secular purpose in the School Board’s disclaimer, there was no need to reconsider the first prong of the *Lemon* test. Therefore, Justice Scalia moved straight to a close examination of the second prong—deciding whether the principal or primary effect of the state’s action either advanced or inhibited religion.<sup>141</sup>

Looking to the plain text of the disclaimer, Justice Scalia observed that, far from advancing religion, the “‘principal or primary effect’ of the disclaimer at issue here is merely to advance freedom of thought.”<sup>142</sup> He first noted that the disclaimer operated to repudiate the School Board’s endorsement of any single theory regarding the origin of life, and that it did not affirmatively endorse any religious theory of man’s origin.<sup>143</sup> Next, he explained that the only reference to religion in the entire disclaimer was the phrase “Biblical version of creation,” and that this phrase was simply the most obvious example of an alternative “concept” that the teaching of evolution was “not intended to influence or dissuade.”<sup>144</sup> In Justice Scalia’s opinion, because the disclaimer never again referred to the “Biblical version of creation,” never elaborated on what this phrase meant, affirmed that “it [was] the basic right and privilege of each student to form his/her own opinion,” and concluded by encouraging each student to “closely examine each alternative” before forming an opinion, the disclaimer was sufficiently neutral to comport with the Constitution and in no way advanced or showed preferential treatment towards a religion.<sup>145</sup>

Justice Scalia next turned to the Fifth Circuit’s conclusion<sup>146</sup> and noted that it “lack[ed] any support in the text of the invalidated

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138. *Id.* at 1253, 120 S. Ct. at 2708.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1253, 120 S. Ct. at 2708.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5th 1999) (“The disclaimer . . . encourages students to read and meditate upon religion in general and the ‘Biblical version of creation’ in particular.”)

[disclaimer].”<sup>147</sup> To Justice Scalia, the disclaimer merely reminded students of their right to maintain their own beliefs or their parent’s beliefs regarding the origin of mankind.<sup>148</sup> The School Board was not endorsing religion; “[a]t bottom, the disclaimer constitut[ed] nothing more than ‘simply a tolerable acknowledgment of beliefs widely held among the people of this country.’”<sup>149</sup> Meant only to inform students that the theory of evolution is not the sole explanation of the origin of life and to remind them of their right to follow their own religious principles instead, the disclaimer should have survived constitutional inquiry.

Justice Scalia could find only one conceivable reason for the Fifth Circuit’s decision—the phrase “Biblical version of creation.” But said Justice Scalia, “[t]o think that this reference to (and plainly not endorsement of) a reality of religious literature—and this use of an example . . . most likely to come into play—somehow converts the otherwise innocuous disclaimer into an establishment of religion is quite simply absurd.”<sup>150</sup>

The dissent closes with a succinct summary of the slippery slope that Establishment Clause jurisprudence is hurdling down. Justice Scalia first mentioned *Epperson v. Arkansas*<sup>151</sup> where the Supreme Court struck down a statute that forbade any teaching of the theory of evolution in public schools. Next, he cited *Edwards v. Aguillard*,<sup>152</sup> where the Supreme Court invalidated a statute that required balanced time for teaching the theories of evolution and creationism in public schools. Finally, he acknowledged the extreme step the Supreme Court had just taken by refusing to grant *certiorari*. Justice Scalia expressed disapproval of the Fifth Circuit’s decision barring a school district from “even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration.”<sup>153</sup>

## VI. THE FIFTH CIRCUIT MISAPPLIED THE *LEMON* TEST

Justice Scalia was correct to point out the Fifth Circuit’s erroneous conclusion based on its application of the *Lemon* test. However, given the “criticized” and “ignored” status of the *Lemon*

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147. 530 U.S. at 1254, 120 S. Ct. at 2708.

148. *Id.*

149. *Id.* at 1254, 120 S. Ct. at 2709 (quoting *Marsh v. Chambers*, 463 U.S. 783, 792, 103 S. Ct. 3330, 3336 (1983)).

150. *Id.* at 1255, 120 S. Ct. at 2709.

151. 393 U.S. 97, 89 S. Ct. 266 (1968).

152. 482 U.S. 578, 107 S. Ct. 2573 (1987).

153. 530 U.S. at 1255, 120 S. Ct. at 2709.

test,<sup>154</sup> it is not surprising that a court might reach such an incorrect conclusion. In all fairness to the Fifth Circuit, one could argue that it did the best it could with such an inadequate test.<sup>155</sup> But, even if one was to assume that the *Lemon* test was the proper test to apply, the Fifth Circuit was still mistaken in its application of that test.

The first inquiry of the *Lemon* test asks whether the controversial state activity has a secular purpose. In *Freiler*, the Fifth Circuit correctly found that the second and third purposes<sup>156</sup> advanced by the School Board in support of the disclaimer were valid secular purposes. But, the court was incorrect in finding that the School Board's first stated purpose was a sham and, thus, without a secular purpose. As its first articulated reason, the School Board stated that the disclaimer served "to encourage informed freedom of belief."<sup>157</sup> Taking into account the actual text of the disclaimer, it is amazing that the Fifth Circuit could deny the sincerity of this statement, for it plainly states that "[s]tudents are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion."<sup>158</sup>

The Fifth Circuit reasoned that the disclaimer as a *whole* had a contrary purpose: "the protection and maintenance of a particular religious viewpoint."<sup>159</sup> However, the court's conclusion did not come from reading the *whole* disclaimer. The court first noted the School Board's statement disclaiming the theory of evolution as being the sole theory of man's origin and then focused on the School Board's reassurance to children that the lesson on evolution was not intended to "influence or dissuade the Biblical version of Creation or any other concept."<sup>160</sup> From these two clauses, the court gathered that the disclaimer as a *whole* told children "that evolution as taught in the classroom need not affect what they already [knew]."<sup>161</sup> This conclusion may be correct, but absent a more careful reading of the disclaimer's second half, the court stretched it into an incorrect decision that the disclaimer did not actually encourage critical thinking.

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154. See *Freiler v. Tangipahoa Parish Bd. of Educ.* 185 F.3d 337, 344 (5th 1999) (referring to the *Lemon* test as "widely criticized and occasionally ignored").

155. Under the principle of precedent, the Fifth Circuit was compelled to apply the *Lemon* test to the disclaimer in *Freiler*. As Justice Rehnquist observed, "unless we wish anarchy to prevail within the federal judicial system, a precedent of [the Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 706 (1982). Because the Fifth Circuit was compelled to apply *Lemon*, it is not fair to criticize the court for doing so.

156. See *supra* note 113.

157. *Id.*

158. *Freiler*, 185 F.3d at 341.

159. *Id.* at 344-45.

160. *Id.* at 345.

161. *Id.*



In the second part of the disclaimer, the School Board explicitly wrote, "it is the basic right and privilege of each student to form his/her own opinion," and the students were urged "to *exercise critical thinking* and gather *all* information possible and *closely examine each alternative* toward forming an opinion."<sup>162</sup> The School Board basically told the children to: (1) get all the information they could; (2) examine it all carefully; and (3) use the information to form their own opinions. If, as the Fifth Circuit said, the disclaimer told students that evolution as taught in the classroom did not have to affect what they believed (and it does not), and if students were clearly told to "exercise critical thinking" and to "closely examine each alternative," then the most logical conclusion to be drawn is that the disclaimer did in fact further the School Board's first articulated purpose, namely "to encourage informed freedom of belief." The disclaimer reassured children that the School Board recognized that multiple theories of man's origin exist and encouraged children to examine all the evidence in order to decide for themselves. What else is this if not encouragement of critical thinking?

The Fifth Circuit also erred when it evaluated the second prong of the *Lemon* test. This prong analyzes whether, irrespective of purpose, "the practice under review in fact conveys a message of endorsement."<sup>163</sup> The School Board said that its disclaimer advanced "freedom of thought"<sup>164</sup> as opposed to religion. The Fifth Circuit disagreed, and instead found that the disclaimer impermissibly advanced religion.<sup>165</sup>

As Justice Scalia pointed out, the only possible justification for the Fifth Circuit's decision rests in the use of the phrase "Biblical version of Creation."<sup>166</sup> If not for this poignant little phrase, there would be no controversy here. However, courts have held that mere objective reference to religion or a religious topic is not an Establishment Clause violation *per se*.<sup>167</sup> According to the Supreme Court, a big difference exists between advancing religion in schools and introducing religion or religious concepts in "an appropriate study of history, civilization, ethics, comparative religion, or the like."<sup>168</sup> Quite often, a study of religion or religious ideas is critical

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162. 185 F.3d at 341 (emphasis added).

163. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817 (5th Cir. 1999).

164. *Freiler*, 185 F.3d at 346.

165. *Id.* at 348.

166. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1255, 120 S. Ct. 2706, 2709 (2000).

167. *Stone v. Graham*, 449 U.S. 39, 42, 101 S. Ct. 192, 194 (1980); *Edwards v. Aguillard*, 482 U.S. 578, 606-07, 107 S. Ct. 2573, 2590 (1987) (Powell, J., concurring); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 300, 83 S. Ct. 1560, 1612 (1963) (Brennan, J., concurring).

168. *Stone*, 449 U.S. at 42, 101 S. Ct. at 194.

to understanding the subject matter of courses like history, philosophy, art, literature, or politics.

Why then should things be any different in the context of studying the origins of man? It is appropriate when introducing a scientific theory (such as evolution) to at least acknowledge the existence of other, competing theories (like creationism). As long as the Biblical version of creation is neutrally and objectively presented as a viable alternative for students to consider after gathering all of the facts, and not actively endorsed or taught as being the sole truth, there should be no Establishment Clause violation.

Unfortunately, the Fifth Circuit did not view the phrase “Biblical version of creation” as an acceptable, neutral exposition of a competing theory; instead, it viewed it as an advancement of religion. The Fifth Circuit’s reasoning can be condensed as follows: (1) the School Board disclaimed that evolution was the single theory of man’s origin while simultaneously setting forth the fact that alternative theories existed; (2) the disclaimer reminded students that they could believe as they wanted to; and (3) the only alternative to evolution explicitly given was the “Biblical version of Creation.” From this, the Fifth Circuit concluded that the disclaimer “encourage[d] students to read and meditate upon religion in general and the ‘Biblical version of Creation’ in particular.”<sup>169</sup> This reasoning is unsound. The Fifth Circuit read more into the text of the disclaimer than was actually there, and it was able to do this by ignoring the disclaimer’s last paragraph.

By looking no further than the text of the disclaimer, it is readily apparent that it did not advance religion, and in no way did it encourage students to “read and meditate upon religion.”<sup>170</sup> The principal effect was simply to explain to students their options and encourage them to think freely about multiple theories of man’s origin. Rather than affirmatively endorsing a religious viewpoint, the disclaimer merely distanced the School Board from an exclusive endorsement of the scientific theory and allowed students to make an informed decision on their own. The School Board did not solely support the scientific theory of evolution and stated that it was fine for students to consider other theories of man’s origin, like, for example, the Biblical version of creation.

At most, reference to the phrase “Biblical version of creation” is an illustrative, neutral reference to the most popular alternative theory of man’s origin. It is highly likely that an average person, if asked to name any alternative theory to evolution, would name

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169. 185 F.3d at 346.

170. See *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253, 120 S. Ct. 2706, 2708 (2000) (Scalia, J., dissenting) (“the ‘principal or primary effect’ of the disclaimer at issue here is merely to advance freedom of thought”).

creationism. By using this phrase as an illustration, the School Board was not giving its endorsement to the Biblical version of creation; instead, it was simply exposing its existence to the students as a competing theory. To merely bring a competing theory to the surface is not the same as affirmatively advancing it. Justice Scalia was correct when he noted that the Fifth Circuit's conclusion "lack[ed] any support in the *text* of the invalidated document."<sup>171</sup>

In the alternative, assuming that the Fifth Circuit was correct to conclude that the disclaimer benefited religion, it would still be incorrect to declare the disclaimer unconstitutional. As previously discussed, "where the benefit to religion . . . is no more than indirect, remote, or incidental,"<sup>172</sup> there is "no realistic danger that the community would think that the [contested state practice] was endorsing religion or any particular creed."<sup>173</sup> The *Freiler* disclaimer simply acknowledged the existence of the creationism alternative and in no way attempted to expand upon this theory. Quite simply, the disclaimer did not actively teach, promote, or advance religion, and any benefit the disclaimer gave to religion through this miniscule publicity was no more than "indirect, remote, or incidental."

The Supreme Court has never before held that the government cannot acknowledge the existence of a religious viewpoint. Instead, the Court has always interpreted the Establishment Clause to accommodate religion.<sup>174</sup> The Constitution does not require complete separation of church and state; the government is not required to acknowledge only the secular "to the exclusion and so to the detriment of the religious."<sup>175</sup> This means that the government can

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171. *Id.* at 1254, 120 S. Ct. at 2708.

172. *Freiler*, 185 F.3d at 346.

173. *Id.* (citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395, 113 S. Ct. 2141, 2148 (1993)).

174. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 657, 109 S. Ct. 3086, 3135 (1989) (Kennedy, J., concurring in part and dissenting in part) ("Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."). *See also* *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 323, 120 S. Ct. 2266, 2286 (2000) (Rehnquist, J., dissenting) ("That a policy tolerates religion does not mean that it improperly endorses it" such that the Establishment Clause is violated.); *Agostini v. Felton*, 521 U.S. 203, 233, 117 S. Ct. 1997, 2015 (1997) ("Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two."); *Wallace v. Jaffree*, 472 U.S. 38, 70, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring) ("The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy."); *Lynch v. Donnelly*, 465 U.S. 668, 673, 104 S. Ct. 1355, 1359 (1984) (The constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

175. *County of Allegheny*, 492 U.S. at 657, 109 S. Ct. at 3135 (Stevens, J.,

acknowledge or even accommodate a religious viewpoint in a public school.<sup>176</sup> Therefore, the Tangipahoa disclaimer that simply acknowledged the existence of the religious theory to mankind's creation should be upheld as constitutional.

There is additional support outside the text of the disclaimer that reinforces the proposition that the School Board was not actively endorsing religion via the disclaimer adopted on April 19, 1994. Prior to the disclaimer, in December 1993, the School Board considered adopting a policy that would have actually allowed the teaching of alternative theories of man's origin, like creationism, in public schools.<sup>177</sup> However, this policy was defeated early on at the committee stage.<sup>178</sup> In March 1994, the School Board again rejected

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concurring in part and dissenting in part).

176. *Id.* at 657, 109 S. Ct. at 3135 ("Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."); *see also* *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679 (1952). Justice Douglas wrote for the Court:

When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

*Id.* at 313-14, 72 S. Ct. at 684. *See also* *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (Blackmun, J., concurring):

In everyday life, we routinely accommodate religious beliefs that we do not share. . . . In so acting, we express respect for, but not endorsement of, the fundamental values of others. We act without expressing a position on the theological merit of those values or of religious belief in general, and no one perceives us to have taken such a position. *The government may act likewise.*

*Id.* at 628, 112 S. Ct. at 2677 (emphasis added). *See also* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 306, 83 S. Ct. 1560, 1615 (1963) (Goldberg, J., concurring) ("Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our . . . legal, political and personal values derive historically from religious teachings. *Government must inevitably take cognizance of the existence of religion.*") (emphasis added); *Griswold*, *supra* note 21, at 174:

It is perfectly true, and highly salutary, that the First Amendment forbade Congress to pass any law "respecting an establishment of religion or prohibiting the free exercise thereof." These are great provisions, of great sweep and basic importance. But to say that they require that all trace of religion be kept out of any sort of public activity is sheer invention. . . . Does our deep-seated tolerance of all religions—or, to the same extent, of no religion—require that we give up all religious observance in public activities? Why should it? It certainly never occurred to the Founders that it would.

177. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 340 n.1 (5th Cir. 1999).

178. *Id.*

a similar, revised policy that would have allowed teachers to teach creation science. Instead, the School Board passed four other items, one of which expressly provided that "no religious belief or non-belief should be promoted or disparaged by the school system."<sup>179</sup> Thus, the School Board twice rejected proposals to advance religion in public schools and instead adopted a resolution expressing an intent to do exactly the opposite by not promoting religion in schools. It is hard to believe that only one month later the School Board could summarily reverse this thinking and adopt a policy that actively advanced religion in the public schools.

The last error in the Fifth Circuit's decision was its statement that "the disclaimer impermissibly advance[d] religion [and] thereby violat[ed] the second prong of the *Lemon* test as well as the endorsement test."<sup>180</sup> As Justice Scalia pointed out, the Fifth Circuit gave absolutely no elaboration as to what they meant by this statement.<sup>181</sup> Because the *Lemon* test and the endorsement test are two separate inquiries, it was error to conclude, without any support for doing so, that by failing the second prong of the *Lemon* test, the state's action automatically failed the endorsement test. If both tests are passed, or failed, based on the same set of facts and circumstances, courts have no reason to make a distinction between the tests in the first place.

#### VII. CHOOSING THE RIGHT TEST: *LEMON*, ENDORSEMENT AND COERCION

Perhaps the most serious error in *Freiler* was that the Fifth Circuit misapplied the *Lemon* test in such a way that the court missed the big picture. Rather than stepping back and viewing the disclaimer as a neutral, modest explanation of choices, the court was jumping at "mere shadows."<sup>182</sup> Though mindful of *Epperson* and *Aguillard*, the Fifth Circuit was not mindful of the purposes woven within the Establishment Clause.<sup>183</sup> Roger Williams, Thomas Jefferson, and

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179. *Id.*

180. *Id.* at 348 (emphasis added).

181. *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1252, 120 S. Ct. 2706, 2708 (2000).

182. As observed by Justice Goldberg, "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 308, 83 S. Ct. 1560, 1616 (1963) (concurring opinion).

183. See *supra* notes 70-71. For more modern interpretations of the purposes behind the Establishment Clause, see *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 646, 109 S. Ct. 3086, 3129 n.1 (Stevens, J., concurring in part and dissenting in part) ("It was . . . nonpreferential assistance to organized churches that constituted 'establishment of

James Madison were all adamant about separating church from state. Williams worried that if the two mixed, the state could persecute religion. Jefferson believed in strict religious liberty and freedom of conscience, and he believed the state had no jurisdiction over religion. Madison was concerned that state involvement in religion would create faction. These ideals are all within the Establishment Clause, and the Framers made the Establishment Clause's purpose clear—to insure that “no man shall be compelled to frequent or support any religious worship, place, or ministry.”<sup>184</sup>

With this purpose behind the Establishment Clause, why was the simple disclaimer declared unconstitutional? It would not have offended Roger Williams, for it favors individual freedom with respect to religion, an ideal embraced by Mr. Williams. And, it would not have bothered Thomas Jefferson, for the disclaimer encourages religious liberty and freedom of conscience by keeping children apprised of all of their options when searching for the truth behind the origin of mankind. Likewise, James Madison would have found no fault in the disclaimer, for it can hardly be argued that it could inspire men to form factions.

In fact, the disclaimer does not upset the purposes within the Establishment Clause. The Fifth Circuit held that it did, but this conclusion was the result of a faulty application of the *Lemon* test. Had the court applied the endorsement and coercion tests instead, it is likely the court would have reached a proper result.

As noted by Chief Justice Rehnquist, the *Lemon* test “has had a checkered career in the decisional law of [the Supreme Court].”<sup>185</sup> Over the years, many Justices have expressed their disapproval of the *Lemon* test.<sup>186</sup> Justice Scalia was prepared to grant *certiorari* in

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religion’ in 1791, and it was this practice that the amendment forbade Congress to adopt.”); *Walz v. Tax Comm’n*, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411 (1970) (The purpose of the Establishment Clause is to prevent the establishment of religion. “[F]or the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.”); *Wallace v. Jaffree*, 472 U.S. 38, 49, 105 S. Ct. 2479, 2485 (1985) (“As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience.”); *id.* at 75, 105 S. Ct. at 2500 (O’Connor, J., concurring) (The purpose of the Establishment Clause is to assure “that government not intentionally endorse religion or a religious practice”).

184. See *supra* note 70.

185. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 319, 120 S. Ct. 2266, 2284 (2000) (Rehnquist, J., dissenting).

186. See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398, 113 S. Ct. 2141, 2149 (1993) (Scalia, J., joined by Thomas, J., concurring) (“Like some ghoulish in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon*

*Freiler* even "if only to take the opportunity to inter the *Lemon* test once for all."<sup>187</sup> On the other hand, many Justices have expressed their approval of the alternative endorsement and coercion tests.<sup>188</sup> Therefore, it is logical to conclude that the Supreme Court should cease using the *Lemon* test and should instead replace this tool with the endorsement and coercion tests when measuring alleged Establishment Clause violations. Given the historical purposes behind the Establishment Clause, these two tests are better at revealing state actions that violate its mandate.

The endorsement test asks if the challenged action "conveys a message that religion is 'favored,' 'preferred,' or 'promote[d]' over other beliefs."<sup>189</sup> If such a message is conveyed, the state action is unconstitutional. This inquiry is a more accurate measure of an Establishment Clause violation than the *Lemon* test. As Roger Williams said, if the government can use religion, then the government can corrupt it.<sup>190</sup> If the government can send a message that religion is "favored, preferred, or promoted," then the government can use this power to corrupt religion. And as Thomas Jefferson and James Madison agreed, the government lacks all jurisdiction to favor, prefer, or promote religion. Therefore, any legislation enacted by a state that favors, prefers, or promotes religion

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stalks our Establishment Clause jurisprudence."); *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 655-657, 109 S. Ct. 3086, 3134-35 (1989) (Kennedy, J., concurring in part and dissenting in part); *Wallace v. Jaffree*, 472 U.S. 38, 68-69, 105 S. Ct. 2479, 2496 (1985) (O'Connor, J., concurring) ("Despite its initial promise, the *Lemon* test has proved problematic . . . the standards announced in *Lemon* should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment."); *id.* at 108-12, 105 S. Ct. at 2516-19 (1985) (Rehnquist, J., dissenting) (Because the *Lemon* test is not grounded in the history surrounding the adoption of the Establishment Clause, this "three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize."); *Committee for Public Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671, 100 S. Ct. 840, 856 (1980) (Stevens, J., dissenting) (deriding "the Sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon*").

187. 530 U.S. 1251, 1253, 120 S. Ct. 2706, 2708 (2000).

188. See *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 627-629, 109 S. Ct. 3086, 3119-3120 (1989) (O'Connor, J., joined by Brennan, J., and Stevens, J., concurring) ("the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred'"); *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992) (the majority adopted the "coercion test" to analyze whether state sponsored prayer at graduation violated the First Amendment).

189. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 594, 109 S. Ct. 2649 (1992). See also *supra* note 75.

190. See *supra* note 42 and accompanying text.

violates the purposes woven into the Establishment Clause and should be declared unconstitutional. This test is also more consistent than the *Lemon* test.<sup>191</sup> The *Lemon* test begins with an inquiry into whether the state's action lacks a secular legislative purpose. This process involves the "sham" inquiry.<sup>192</sup> An investigation into the intent of the drafters of legislation is required, and such investigation cannot be completely accurate. First, such inquiry is fraught with uncertainty and speculation. Second, it is quite easy for legislators to state their purpose while keeping a hidden agenda. Next, the court asks whether the state action "advances" religion.<sup>193</sup> Again, this inquiry is highly subjective and is prone to misinterpretation of legislation, as was done in *Freiler*.

The coercion test<sup>194</sup> is also better at evaluating Establishment Clause violations than the *Lemon* test. It merely analyzes the coercive effect that state-sponsored religious activity has on the public. If government sponsored activity pressures citizens to participate in a religious activity, then that activity is unconstitutional. This test comports exactly with the purposes behind the Establishment Clause—"that no man shall be *compelled* to frequent or support any religious worship, place, or ministry."<sup>195</sup> The Framers of the Establishment Clause did not want the government to compel or to coerce people to participate in religion. Any state activity that does so is unconstitutional. This test is neutral and objective and is a better measure of an Establishment Clause violation than the more subjective *Lemon* test.

#### VIII. FORMING A NEW TEST—REEVALUATING *FREILER*

Because the endorsement and coercion tests are superior to the *Lemon* test, the *Lemon* test should be interred,<sup>196</sup> and a new, simpler

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191. See *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 629, 109 S. Ct. 3086, 3120 (1989) (O'Connor, J., concurring) ("[T]he endorsement test is capable of consistent application."); Tanina Rostain, *Permissible Accommodations of Religion: Reconsidering the New York "Get" Statute*, 96 Yale L.J. 1147, 1160 (1987) (stating that the endorsement test "provides a standard capable of consistent application and avoids the criticism leveled against the *Lemon* test").

192. See *supra* note 74.

193. *Id.*

194. See *supra* note 76.

195. Virginia Bill for Religious Liberty, 12 Hening, Statutes of Virginia 84 (1823) (emphasis added). See also *supra* note 54.

196. As Justice Rehnquist noted, "if a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, [there is] little use in it." *Wallace v. Jaffree*, 472 U.S. 38, 112, 105 S. Ct. 2479, 2519 (1985). Justice Rehnquist made this remark with regards to the *Lemon* test.



test should rise to take its place.<sup>197</sup> The new test should be a two-pronged test comprised of the endorsement and coercion tests.<sup>198</sup> Using it, a court would perform a two-step inquiry to determine the effect of challenged legislation. A court would first ask whether the legislation coerces citizens into participating in religion in any way. If it does, the law is unconstitutional. If not, the court should move to prong two and ask whether the legislation favors, prefers, or promotes religion. If it does, the law must fail. If not, then the law survives and is constitutional. This new test comports well with the true purposes behind the Establishment Clause.

Had *Freiler* been evaluated under the coercion and endorsement tests, the Fifth Circuit would likely have reached a different result. Starting with the coercion test, it is plain to see that the disclaimer does not coerce students to participate in a religious activity. Under the coercion test, a school-sponsored activity contravenes the Establishment Clause when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."<sup>199</sup> By allowing the disclaimer to be read, the Tangipahoa Parish Board of Education was not directing a formal religious exercise that obliged school children to participate. Children were not obliged to learn about the Biblical version of creation; instead, they were simply informed that alternative theories of mankind's

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197. Many members of the Court disagree that a single test should be employed to evaluate alleged Establishment Clause violations. *Lynch v. Donnelly*, 465 U.S. 668, 678-79, 104 S. Ct. 1355, 1362 (1984) ("In each [Establishment Clause] case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed . . . [W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in [the Establishment Clause] area"). However, in virtually every Establishment Clause case decided since *Lemon*, the Court has applied the *Lemon* test to the dissatisfaction of many of its members. Though the Court says it does not want to be tied to a single standard, its pattern in the past has been to use the single *Lemon* test standard. Therefore, the suggestion that the Court adopt a better, all-encompassing standard is not unthinkable.

198. See *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 659, 109 S. Ct. 3086, 3136 (1989). In his concurring and dissenting opinion, Justice Stevens inadvertently recognized this combined test. According to Justice Stevens:

Our cases disclose two limiting principles: government may not *coerce* anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct *benefits* to religion in such a degree that it in fact establishes a [state] religion or religious faith, or tends to do so.

*Id.* (quoting *Lynch*, 465 U.S. at 678, 104 S. Ct. at 1361) (emphasis added). The two limiting principles are basically the coercion and endorsement tests. Therefore, it would not be a stretch to combine these two standards into one workable test for courts to use in the future.

199. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992).

origin exist, such as creationism, and they were told that it was their choice as to which theory they would believe. This message is not coercive.

Having passed the coercion test, the disclaimer should then be analyzed under the endorsement test. In *Freiler*, the Fifth Circuit concluded that because the disclaimer violated the second prong of the *Lemon* test, it simultaneously failed the endorsement test. However, the Fifth Circuit gave no support for this conclusion.

This disclaimer in no way endorses religion. The government violates the endorsement test when it “conveys a message that religion is ‘favored,’ ‘preferred,’ or ‘promoted’ over other beliefs.” The *Freiler* disclaimer sent no such message. Very briefly, the disclaimer informed school children that the theory of evolution was not the only theory of man’s origin, that other theories, such as creationism, existed, and that they were free to explore and contemplate other theories on their own. This message is not one of endorsement; the government is not putting its stamp of approval on the Biblical version of creation. The Tangipahoa Parish Board of Education simply stated a known fact—that religions have alternative views about the creation of mankind. This statement is simply a neutral and objective expression of reality.

In the past, schools could constitutionally tell children of the impact religion had on history, art, philosophy, law, and so forth. Why is the same not true with regard to mankind’s origin? As long as the state neutrally and objectively apprises children of religion’s interplay in other subjects, a neutral and objective statement that religions have various theories for man’s beginnings on Earth should also be allowed. This does not endorse religion; it merely acknowledges the fact that religions exist, and that they do not always agree with scientific theory.

#### IX. CONCLUSION

As recognized by Erwin Griswold, the absolutist viewpoint “is more likely to lead us into darkness than to light.”<sup>200</sup> In *Freiler*, the Fifth Circuit adopted its own false absolute and, as Mr. Griswold could have predicted, reached the wrong result. The Supreme Court

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200. Griswold, *supra* note 21, at 168. According to Mr. Griswold, [A]bsolutes are likely to be phantoms, eluding our grasp. Even if we think we have embraced them, they are likely to be misleading. If we start from absolute premises, we may find that we only oversimplify our problems and thus reach unsound results. It may well be that absolutes are the greatest hindrance to sound and useful thought—in law, as in other fields of human knowledge.

*Id.*

should have caught the Fifth Circuit's mistake, corrected the result, and used *Freiler* as an opportunity to reconcile the inconsistent standards surrounding Establishment Clause jurisprudence today.

The true nature of the issue is whether the disclaimer is a prohibited "law respecting an establishment of religion."<sup>201</sup> This question is the heart of the inquiry. Using the *Lemon* test, the Fifth Circuit answered the question in the affirmative. However, this conclusion was an error, for the *Lemon* test is not as accurate a measure of Establishment Clause violations as are the coercion and endorsement tests—tests which accurately measure up to the principles and purposes framed within the Establishment Clause. When one steps back and looks at the text of the disclaimer, the prohibition in the Establishment Clause, and the intent of the men who drafted it, it is plain to see that the disclaimer is a neutral and objective statement that alternative religious viewpoints do indeed exist. It is by no means a "law respecting an establishment of religion."<sup>202</sup> To conclude otherwise requires the adoption of an absolutist approach. The correct conclusion, on the other hand, requires the more difficult task of construing the text of the Establishment Clause in a way that comports with the history surrounding it and the intent of the men who drafted it.

When the Framers drafted the First Amendment, they contemplated separation between church and state, meaning that the state could not endorse religion or coerce citizens into participation. They never contemplated the direction *Freiler* would take—that the state could no longer even acknowledge religion's existence. There are many instances in daily life where religion and government are allowed to mix: "chaplains in Congress and in the armed forces; chapels in prisons; 'In God We Trust' on our money."<sup>203</sup> There are also more specific examples where religion and government support to schools coincide: public money spent for textbooks supplied throughout the country to students attending church-sponsored schools; public money spent for transportation of students to church-sponsored schools; federal grants for college buildings at church-sponsored institutions; and federal grants to church-sponsored universities.<sup>204</sup> Public schools have even been allowed to release students during the day for religion classes at other institutions.<sup>205</sup>

The disclaimer in *Freiler* is no more a violation of the Constitution than any of these previously tolerated accommodations

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201. U.S. Const. amend. I.

202. *Id.*

203. Griswold, *supra* note 21, at 174.

204. *Lynch v. Donnelly*, 465 U.S. 668, 681-82, 104 S. Ct. 1355, 1363-1364 (1984).

205. *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679 (1952).

of religion. It coerces no one, and it is of no greater aid or benefit to religion than any of the before mentioned practices. Therefore, it should be constitutional. Unless our Supreme Court revises the Establishment Clause standards to comport with the purposes underlying the Establishment Clause, more absolutist decisions like *Freiler* are apt to occur. The wall of separation has been built too high; the time is ripe for the Court to begin lowering it.

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