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Stephen A. Newman

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**EVOLUTION AND THE HOLY GHOST OF *SCOPES*: CAN SCIENCE
LOSE THE NEXT ROUND?**

By: Stephen A. Newman*

The society that allows large numbers of its citizens to remain uneducated, ignorant, or semiliterate squanders its greatest asset, the intelligence of its people.¹

A theory gains acceptance in science not through the power of its adherents to persuade a legislature, but through its intrinsic ability to persuade the discipline at large.²

Today, we are seeing hundreds of years of scientific discovery being challenged by people who simply disregard facts that don't happen to agree with their agenda. Some call it pseudo-science, others call it faith-based science, but when you notice where this negligence tends to take place, you might as well call it "political science."³

I. IGNORANCE IS STRENGTH⁴

Two decades ago, in *Edwards v. Aguillard*, the U.S. Supreme Court ruled unconstitutional a Louisiana law that conditioned the teaching of evolution in the public schools

* Professor of Law, New York Law School

¹ DIANE RAVITCH, *LEFT BACK: A CENTURY OF BATTLES OVER SCHOOL REFORM* 466 (2000).

² Brief of the American Association of University Professors and the American Council on Education as Amici Curiae Supporting Appellees, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (No. 85-1513), 1986 WL 727662, at *14 [hereinafter Brief of AAUP].

³ Diane Cardwell, *In Speech to Medical Graduates, Mayor Diverges from Party Line*, N.Y. TIMES, May 26, 2006, at B1 (quoting Michael R. Bloomberg, Mayor, City of New York).

⁴ GEORGE ORWELL, 1984 17 (Harcourt, Brace & World 1949) (slogan on the Ministry of Truth).

upon the concurrent teaching of creationism, the belief that all life resulted from divine creation.⁵ Almost twenty years before the *Edwards* decision, the Court struck down a statute that prohibited the teaching of evolution in the Arkansas public schools in *Epperson v. Arkansas*.⁶ In both cases the state laws were invalidated as violations of the Establishment Clause of the First Amendment.⁷

In the years since *Edwards*, lower federal courts have given a chilly reception to those religiously-driven anti-evolutionists who have steadfastly battled to limit, condition, or undermine the teaching of Darwin's theory to the nation's schoolchildren. In one widely observed case in Pennsylvania in 2005, a federal judge heard extensive evidence about the allegedly scientific theory of "intelligent design," a version of divine creation that proponents claimed was not religiously based.⁸ The court rejected the local school board's attempt to insert the theory into the Dover, Pennsylvania, schools' science curriculum, identifying it as an effort to propagate religious ideas in the classroom.⁹

Despite repeated setbacks in the lower courts, the politics surrounding anti-evolution efforts have never been more favorable for a renewed legal assault on the teaching of evolution in the nation's schools. The roughly twenty year cycle of Supreme Court evolution cases,¹⁰ the probable dilution by the Roberts Court of the Establishment Clause as a restraining force on government, the strength of the religious right in the American political arena, and the addition of two very conservative justices to the Court, each suggest that we may see a potent new challenge to the teaching of this topic reaching the High Court in the near future.

The challenge may well succeed. Twenty years ago, legal arguments in favor of a Louisiana anti-evolution statute persuaded two Justices of the Supreme Court¹¹ and seven judges of the Fifth Circuit Court of Appeals (sitting en banc)¹² in the *Edwards* case. The dissenting opinion of Justice Scalia in that case might serve as a template for a new Supreme Court majority that appears to think very differently about the separation of church and state than Court

⁵ *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1987).

⁶ *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

⁷ "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

⁸ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 735-36 (M.D. Pa. 2005).

⁹ *Id.* at 765-66.

¹⁰ The Supreme Court decided *Epperson* in 1968 and *Edwards* in 1987.

¹¹ *See Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

¹² *Aguillard v. Edwards*, 778 F.2d 225 (5th Cir. 1985) (dissent from denial of hearing en banc).

majorities in the last half century.¹³

But it is possible that the Establishment Clause may yet maintain sufficient strength to turn back the anti-evolutionists' next challenge. The crusaders against evolution are willing to grant religious proselytizers access to the nation's school children, to promote their particular view of Christian truth. A ruling by the Supreme Court vindicating those who would restrict the teaching of evolution would be a sign that the pluralistic religious freedom so highly valued in American history had become what Justice Robert H. Jackson once called "a mere shadow of freedom."¹⁴ In this article, I will examine in detail the nature of the legal arguments, consider the political surroundings that make this a vulnerable time for evolution's defenders, and identify some factors which suggest how the current battle over evolution may yet be won by the proponents of science and reason. I will pay special attention to the attitudes and views of Justice Anthony Kennedy, who might cast a swing vote in any such case.

One of my premises needs to be made clear. I will not attempt to set forth the arguments for the correctness of Darwin's theory of evolution. That has been done, with painstaking thoroughness, in many books and articles that can only be deemed completely dispositive of the issue. The theory of evolution, with some modern modifications to Darwin's formulation of it ("neo-Darwinism" today), has few peers in science. Darwin's theory ranks with those of Galileo and Newton in the history of scientific thought.¹⁵ One hundred fifty years of research following the 1859 publication of *Origin of Species* has established the theory as a foundational contribution to our understanding of the natural world.¹⁶ Even the White House science advisor

¹³ See *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

¹⁴ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹⁵ Author Jonathan Weiner has written the following:

Once it seemed logical to believe that God shepherds the planets around and around the sun. Regular orbits were said to be proof of the existence of god, a celestial argument from design. Astronomers imagined an invisible hand in constant attendance, pushing and rolling each world through the sky. This vision no longer seemed compelling after Galileo and Newton discovered the celestial laws of motion Darwin discovered laws of terrestrial motion as simple and universal as the physicists'.

JONATHAN WEINER, *THE BEAK OF THE FINCH* 298 (Knopf 1994).

¹⁶ For an expert's readable explanation of the theory of evolution and an accessible (to the non-scientist) critique of the challenge posed to it by anti-evolutionists, see Jerry Coyne, *The Case Against Intelligent Design: The Faith That Dare Not Speak its Name*, *THE NEW REPUBLIC*, Aug. 22, 2005, at 21. Coyne is a professor in the Department of Ecology and Evolution at the University of Chicago. Coyne's essay, along with those of fifteen other distinguished scientists, also appears in *INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT* 3-23 (John Brockman, ed., Vintage 2006). Evolution is constantly being confirmed by new

to President George W. Bush (who supports the teaching of intelligent design along with evolution), John H. Marburger III, concedes that “intelligent design is not a scientific concept” and that evolution is “the cornerstone of modern biology.”¹⁷ In 2005, a federal district court entertained a challenge to the scientific status of the theory of evolution – a modern day replay of the Scopes “monkey trial” in the early twentieth century – and reached the same conclusion.¹⁸ The scientific community’s acceptance of evolution is clear; the concept is supported by the overwhelming consensus of the nation’s scientists and by every major scientific organization.¹⁹

II. HISTORICAL CONTEXT OF THE BATTLE AGAINST EVOLUTION

For many decades, an element of the politically conservative religious right has made opposition to the teaching of evolution in the public schools a special item on its political agenda. They have sought to impose their views through political action aimed at school boards, textbook publishers, and state legislatures. They seek to turn educators away from Darwin’s theory because it conflicts with their religious views on the creation and development of life. Their campaign has proceeded under various banners, from “Biblical creationism” to “creation science” to “intelligent design.” Their crusading mentality calls to mind the trenchant observation of Justice Robert H. Jackson over a half-century ago:

scientific findings. *See, e.g.*, Jerry Adler, *Evolution: If It Walks Like A Fish . . .*, NEWSWEEK, Apr. 17, 2006, at 8 (describing recent discovery of fossil linking fish to land animals); Kenneth Chang, *Study, in a First, Explains Evolution’s Molecular Advance*, N.Y. TIMES, Apr. 7, 2006, at A21 (demonstrating how evolution works to gradually alter processes inside a cell). The editors of Scientific American, in an April Fool’s Day editorial, jokingly apologized for believing in evolution merely because it is “the unifying concept for all of biology and one of the greatest scientific ideas of all time,” supported “by mountains of evidence.” Editorial, *Okay, We Give Up - We Feel So Ashamed*, SCIENTIFIC AMERICAN, Apr. 1, 2005, at 10.

¹⁷ Elisabeth Bumiller, *Bush Remarks Roil Debate Over Teaching of Evolution*, N.Y. TIMES, Aug. 3, 2005, at A14.

¹⁸ *Kitzmiller*, 400 F. Supp. 2d at 765-66 (M.D. Pa. 2005); *see also* *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1273 (E.D. Ark. 1982).

¹⁹ *Kitzmiller*, 400 F. Supp. 2d 707, 743 (M.D. Pa. 2005). The opinion stated:

[W]e initially note that an overwhelming number of scientists, as reflected by every scientific association that has spoken on the matter, have rejected the ID proponents’ challenge to evolution. Moreover, Plaintiffs’ expert in biology . . . provided un rebutted testimony that evolution, including common descent and natural selection, is “overwhelmingly accepted” by the scientific community and that every major scientific association agrees.

Id.; *see also* *McLean*, 529 F. Supp. at 1273.

[W]e must not forget that in our country are evangelists and zealots of many different political, economic and religious persuasions whose fanatical conviction is that all thought is divinely classified into two kinds—that which is their own and that which is false and dangerous.²⁰

In America, the perceived conflict between scientific ideas and religious beliefs is deeply rooted, extending back to the beginning of the Republic. When Benjamin Franklin came up with the idea of putting lightning rods on buildings, a number of churchmen opposed the idea as anti-religious.²¹ They reasoned that it was “as impious to ward off Heaven’s lightnings as for a child to ward off the chastening rod of its father.”²² The pragmatism and self-interest of Americans won over the populace, however, and no one now complains about lightning rods on public buildings.

Evolution, unlike the lightning rod, remains the subject of passionate opposition in America.²³ Apparently it is not perceived as having sufficient practical value, although in fact its practical implications are many, including the creation of life-saving medicines.²⁴ Indeed, one of the supreme ironies of the effort to undermine the teaching of evolution is that many of those most antagonistic to the concept of evolution are precisely those whose economic well being is most dependent upon the application of the theory of evolution to their problems. Scientist Martin Taylor, studying the moth *Heliothis virescens*, a pest that devours cotton in Louisiana and other states in the Bible Belt, discovered how quickly succeeding generations of the moths evolved ways to survive the farmers’ new and powerful chemical pesticides.²⁵ Taylor expressed astonishment at the political opposition to evolution:

Cotton growers are having to deal with these pests in the very states whose legislatures are so hostile to the theory of evolution. Because it is evolution itself they are struggling against in their fields each season. These people are trying to ban the teaching of evolution while their own cotton crops are failing because of

²⁰ *Am. Comm’n Ass’n v. Douds*, 339 U.S. 382, 438 (1950) (Jackson, J., dissenting).

²¹ *See, e.g.*, PHILIP DRAY, *STEALING GOD’S THUNDER: BENJAMIN FRANKLIN’S LIGHTNING ROD AND THE INVENTION OF AMERICA* 96 (Random House 2005).

²² *Id.*

²³ “Since the presidential election [of 2004] . . . evolution has emerged as one of the country’s fiercest cultural battlefronts, with the National Center for Science Education tracking 78 clashes in 31 states, more than twice the typical number of incidents.” Jodi Wilgoren, *Politicized Scholars Put Evolution on the Defensive*, N.Y. TIMES, Aug. 21, 2005, at A1.

²⁴ *See* Holden Thorp, *Evolution’s Bottom Line*, N.Y. TIMES, May 12, 2006, at A33.

²⁵ Weiner, *supra* note 15, at 251-57.

evolution.²⁶

The moth species' natural selection for traits favoring pesticide resistance in fact provides a textbook illustration of the process of evolution.²⁷

The legal battle over the teaching of evolution has raged for over eighty years. Edward J. Larson's panoramic history, *Trial and Error: The American Controversy over Evolution*, published by Oxford University Press, meticulously traces the long campaign in America against the theory of evolution.²⁸ Charles Darwin's *Origin of Species* had appeared in 1859, and within two decades, most American scientists accepted the theory.²⁹ Textbooks in such subjects as botany, zoology, and biology included the theory as the time came to revise the standard editions.³⁰

In the 1920s certain religious groups that regarded evolution as incompatible with their understanding of the Bible pushed public officials to banish evolution from the classroom.³¹ Larson suggests that one of the main reasons this issue moved to the forefront was the rapid expansion of the public high school population at that time.³² As learning shifted from home to school, parents were enlisted in the struggle over the science curriculum. A charismatic leader appeared in the person of William Jennings Bryan, a powerful orator, devout Christian, and major political figure in the Democratic party.³³ Over a ten year period, 45 anti-evolution bills were introduced in twenty states.³⁴

Oklahoma enacted the first statute in 1923, prohibiting the state's use of textbooks that contained the theory of evolution.³⁵ The legislative debate made clear the religious nature of the

²⁶ *Id.* at 255. Taylor wonders: "How can you be a Creationist farmer anymore?" *Id.*

²⁷ *Id.*

²⁸ The book, published in 1985, was cited in brief of the State of Louisiana in *Edwards*, which described it as "the most impartial history of the creation-evolution controversy." Brief of Appellants, *Edwards v. Aguillard*, 482 U.S. 587 (1987) (No. 85-1513), 1986 WL 727653 at *35.

²⁹ EDWARD J. LARSON, *TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER EVOLUTION* 8 (Oxford Univ. Press 1985).

³⁰ *Id.* at 9-15.

³¹ *See id.* at 28-57.

³² *Id.* at 26-27, 210.

³³ *Id.* at 30-33.

³⁴ *Id.* at 48.

³⁵ *Id.* at 49.

objection to evolution.³⁶ As one senator remarked: “I object to Darwin or Spencer or any so-called evolutionists giving our children their spiritual life . . . Let’s leave their hellish teachings out.”³⁷ The level of debate was not always the highest, as one bill supporter replied to an opponent: “If you want to be a monkey, go out and be a monkey, but I am for this amendment and will strike this infernal thing while I can.”³⁸

Florida followed with a resolution deeming it improper “to teach or permit to be taught Atheism, or Agnosticism, or to teach as true Darwinism or any other hypothesis that links man in blood relation to any form of lower life.”³⁹ Then the state of Tennessee weighed in, and the issue exploded onto the national stage. The Tennessee bill declared:

It shall be unlawful for any teacher in any of the Universities, normals and all other public schools of the state . . . to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals.⁴⁰

The Speaker of the Tennessee Senate, himself a fundamentalist Christian, said in defense of the law: “If you take these young tender children from their parents by the compulsory school law and teach them this stuff about man originating from some protoplasm, . . . they will never believe the Bible story of divine creation.”⁴¹ The Governor who signed the bill referred to his concerns about societal morality:

There is a deep and widespread belief that something is shaking the fundamentals of the country, both in religion and morals. It is the opinion of many that an abandonment of the old-fashioned faith and belief in the Bible is our trouble in a large degree. It is my own belief.⁴²

The anti-evolution measure was a “protest against an irreligious tendency to exalt so-called science, and deny the Bible in some schools.”⁴³

³⁶ *Id.* at 49-52.

³⁷ *Id.* at 51.

³⁸ *Id.* at 50-51.

³⁹ *Id.* at 53.

⁴⁰ 1925 Tenn. Pub. Acts 50-51., *quoted in* *Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927).

⁴¹ Larson, *supra* note 29, at 56.

⁴² *Id.* at 57.

⁴³ *Id.*

The law resulted in one of the nation's most famous trials, *Scopes v State*.⁴⁴ The eyes of the nation were drawn to the town of Dayton, Tennessee. Despite the efforts of defense lawyer Clarence Darrow to demonstrate the religious roots and anti-scientific nature of the attack on evolution, a jury found against his client, biology teacher John T. Scopes.⁴⁵ On appeal, the Tennessee Supreme Court could see no constitutional objection to the state statute.⁴⁶ The court declared: "Belief or unbelief in the theory of evolution is no more a characteristic of any religious establishment or mode of worship than is belief or unbelief in the wisdom of the prohibition laws."⁴⁷ Nevertheless, it reversed Scopes's conviction on a legal technicality.⁴⁸ The court then went on to say that instead of further proceedings, the "bizarre" case should be dropped.⁴⁹

Legal activity decreased but did not cease after *Scopes*. Mississippi enacted an anti-evolution law that resembled Tennessee's but left out the reference to the Bible.⁵⁰ Arkansas activists put the issue up for a vote by way of a ballot initiative, which passed by a nearly two-thirds margin.⁵¹ Although the laws were not enforced by prosecutions, the anti-evolutionists made gains in other ways. Most notably, they succeeded in pressuring textbook publishers to diminish the role of evolution in their publications.⁵² According to one study, less than half of texts even used the word "evolution."⁵³ And many public schools simply avoided the controversy by not teaching about evolution at all; by one estimate, seventy percent of high schools eliminated the teaching of evolution.⁵⁴

The lull in legal activities ended in the 1960s. Among other things, the Soviet Union's launch in 1957 of Sputnik, the world's first man-made satellite, galvanized the American public

⁴⁴ *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

⁴⁵ *Id.* at 363.

⁴⁶ *Id.*

⁴⁷ *Id.* at 367.

⁴⁸ The error was that the judge, instead of the jury, had imposed the \$100 fine in the case. *Id.*

⁴⁹ *Id.*

⁵⁰ Larson, *supra* note 29, at 75-79.

⁵¹ *Id.* at 79-81.

⁵² *Id.* at 84-88.

⁵³ *Id.* at 87.

⁵⁴ *Id.* at 85.

into supporting more rigorous science education.⁵⁵ Textbooks in all the sciences were revised, and biology texts highlighted what scientists had long regarded as a bed-rock of scientific knowledge: evolution.⁵⁶ A high school teacher in Little Rock named Susan Epperson, at the behest of a professional teachers' group, brought suit against the state of Arkansas to have its 1929 ballot initiative declared invalid.⁵⁷ The law deemed it "unlawful for any teacher or other instructor in any University, College, Normal, Public School, or other institution of the State . . . to teach the theory or doctrine that mankind ascended or descended from a lower order of animals."⁵⁸ It further banned use of any textbook that contained information about such a theory.⁵⁹

Susan Epperson lost her case in the Arkansas Supreme Court, which found the matter so legally straightforward that it decided the case in just two sentences.⁶⁰ Epperson appealed to the U.S. Supreme Court, which ruled 9-0 that the law was unconstitutional.⁶¹ Justice Fortas's opinion for the Court found history to be a useful guide to understanding the Arkansas legislature's intent:

It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's "monkey law," candidly stated its purpose: to make it unlawful "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to "the story of the Divine creation of man" as taught in the Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.⁶²

The Tennessee legislature reentered the fray in 1973 with a statute that required any

⁵⁵ *Id.* at 91.

⁵⁶ *Id.*

⁵⁷ *Id.* at 99.

⁵⁸ 1929 Ark. Acts 1518-1519.

⁵⁹ *Id.*

⁶⁰ *State v. Epperson*, 416 S.W.2d 322 (Ark. 1967), *rev'd*, 393 U.S. 97 (1968).

⁶¹ *Epperson*, 393 U.S. at 109.

⁶² *Id.* at 108-109 (1968) (citations omitted).

biology textbook used in the public schools that “expresses an opinion of, or relates a theory about origins or creation of man and his world” to state that “it is a theory . . . and is not represented to be scientific fact.”⁶³ Further the textbook was required to “give . . . commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible.”⁶⁴ The Act excluded the teaching of “all occult or satanical beliefs of human origin” from its terms.⁶⁵ Finally, it stated that “the Holy Bible shall not be defined as a textbook, but is hereby declared to be a reference work . . . not . . . required to carry the disclaimer provided for textbooks.”⁶⁶ The Sixth Circuit, in *Daniel v. Waters*, had little difficulty in finding an Establishment Clause violation: “The result of this legislation is a clearly defined preferential position for the Biblical version of creation as opposed to any account of the development of man based upon scientific research and reasoning.”⁶⁷

Despite their defeats in *Epperson* and *Waters*, the anti-evolutionists did not give up their crusade. Instead, they organized more intensively, funded groups to continue the campaign, and plotted for the hoped-for overthrow of evolution. Their fervor stemmed from a demonization of Darwin’s theory. Federal district judge William Overton, writing in *McLean* in 1982, quoted a typical creationist text:

Creationists view evolution as a source of society's ills, and the writings of [creationists] Morris and Clark are typical expressions of that view. “Evolution is thus not only anti-Biblical and anti-Christian, but it is utterly unscientific and impossible as well. But it has served effectively as the pseudo-scientific basis of atheism, agnosticism, socialism, fascism, and numerous other false and dangerous philosophies over the past century.”⁶⁸

The creationists re-labeled their enterprise “creation-science,” and drafted a new model statute calling for balancing evolution with creation-science.⁶⁹ The Arkansas legislature passed

⁶³ 1973 Tenn. Pub. Acts ch. 377, § 1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at § 2.

⁶⁷ *Daniel v. Waters*, 515 F.2d 485, 489 (6th Cir. 1975).

⁶⁸ *McLean*, 529 F. Supp. at 1260 (quoting HENRY M. MORRIS & MARTIN E. CLARK, *THE BIBLE HAS THE ANSWER* (1976)).

⁶⁹ Larson, *supra* note 29, at 147-50.

it in 1981⁷⁰ and the Louisiana legislature adopted it in 1981,⁷¹ setting the stage for the legal challenges in *McLean* and *Edwards*. Both states had the same key provision:

Public schools within this state shall give balanced treatment to creation-science and to evolution-science. Balanced treatment of these two models shall be given in classroom lectures taken as a whole for each course, in textbook materials taken as a whole for each course, in library materials taken as a whole for the sciences and taken as a whole for the humanities, and in other educational programs in public schools, to the extent that such lectures, textbooks, library materials, or educational programs deal in any way with the subject of the origin of man, life, the earth, or the universe.⁷²

A group of plaintiffs, including some religious leaders, challenged the Arkansas law in *McLean*.⁷³ Judge William Overton noted that the model act's author, a creationist activist named Paul Ellwanger, had some difficulty in keeping up the pretense of creationism as science:

Mr. Ellwanger's views on the nature of creation science are entitled to some weight since he personally drafted the model act which became Act 590. His evidentiary deposition with exhibits and unnumbered attachments (produced in response to a subpoena duces tecum) speaks to both the intent of the Act and the scientific merits of creation science. Mr. Ellwanger does not believe creation science is a science. In a letter to Pastor Robert E. Hays he states, "While neither evolution nor creation can qualify as a scientific theory, and since it is virtually impossible at this point to educate the whole world that evolution is not a true scientific theory, we have freely used these terms—the evolution theory and the theory of scientific creationism—in the bill's text." He further states in a letter to Mr. Tom Bethell, "As we examine evolution (remember, we're not making any scientific claims for creation, but we are challenging evolution's claim to be scientific)."⁷⁴

Judge Overton found Ellwanger's own letters "show[ed] that [the Act] is a religious

⁷⁰ 1981 ARK. ACTS 1231-1237.

⁷¹ 1981 LA. ACTS 1313-1315.

⁷² ARK. CODE ANN. § 80-1663 (West 1981); *accord* LA. REV. STAT. ANN. §§ 17:286.1- 17-286.7 (1982).

⁷³ *McLean*, 529 F. Supp. at 1257.

⁷⁴ *Id.* at 1261 (citation omitted).

crusade, coupled with a desire to conceal this fact.”⁷⁵ Concealment was evident in several letters urging the bill supporters to keep ministers at “work from behind the scenes” and not “out there in the public forum.”⁷⁶ Additionally, letters advised fellow activists to “exclude our own personal testimony and/or witness for Christ” from public discussions.⁷⁷ Ellwanger conceded as well that the model act had substituted “creation science” for creationism because people thought the latter was too religious a term.⁷⁸ His bill defined “creation science” to contain the essential elements of the creation story in Genesis (the obviousness of this connection led the Louisiana legislature to drop the specific definitions and vaguely define creation science as “the scientific evidences for creation and inferences from those scientific evidences.”)⁷⁹

After exhaustively reviewing all the evidence bearing on the nature of the law, the court found that creation science “fails to follow the canons defining scientific theory” and failed to use scientific methodology.⁸⁰ “A theory that is by its own terms dogmatic, absolutist and never subject to revision is not a scientific theory.”⁸¹ The judge called the efforts to discredit evolution a “rehash of data and theories which have been before the scientific community for decades.”⁸² He added that “creation science” was a set of religious, non-scientific ideas, and “[n]o group, no matter how large or small, may use the organs of government, of which the public schools are the most conspicuous and influential, to foist its religious beliefs on others.”⁸³

The Supreme Court decided *Edwards* five years after *McLean*.⁸⁴ The state statute in *Edwards* was based upon the same concept of “balanced treatment” that animated the Arkansas statute in *McLean*.⁸⁵ Justice Powell’s separate opinion in *Edwards* referred to the historical

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 1261-62.

⁷⁸ *Id.* at 1274 n.12.

⁷⁹ *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 at 1264-65 (1982) (quoting Ark. Stat. Ann. § 80-1663 (1981 Supp.)).

⁸⁰ *McLean*, 529 F. Supp. at 1268.

⁸¹ *Id.* at 1269.

⁸² *Id.* at 1270.

⁸³ *Id.* at 1274.

⁸⁴ *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁸⁵ *See* LA. REV. STAT. ANN. §§ 17:286.1 - 17:286.7 (1982).

record and provided a telling account of the organizations that the creationists founded for their “scientific” research to counter the theory of evolution:

The Institute for Creation Research is an affiliate of the Christian Heritage College in San Diego, California. The Institute was established to address the "urgent need for our nation to return to belief in a personal, omnipotent Creator, who has a purpose for His creation and to whom all people must eventually give account." A goal of the Institute is "a revival of belief in special creation as the true explanation of the origin of the world." Therefore, the Institute currently is working on the "development of new methods for teaching scientific creationism in public schools." The Creation Research Society (CRS) is located in Ann Arbor, Michigan. A member must subscribe to the following statement of belief: "The Bible is the written word of God, and because it is inspired throughout, all of its assertions are historically and scientifically true." To study creation science at the CRS, a member must accept "that the account of origins in Genesis is a factual presentation of simple historical truth."⁸⁶

These “creation scientists” were thus committed to their findings in advance; their research and their scientific knowledge were employed only to confirm their religious commitments.

Justice Brennan, writing for a majority in *Edwards*, struck down the Louisiana "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act.⁸⁷ Like its model in Arkansas, the Act required science teachers who taught the theory of evolution to also teach the theory of “creation science,” mandating balance in classroom lectures, textbooks,

⁸⁶ *Edwards*, 482 U.S. 578, 602 (1987) (Powell, J., concurring). Powell also quoted three other elements of the CRS statement of belief to which members must subscribe:

[i] All basic types of living things, including man, were made by direct creative acts of God during Creation Week as described in Genesis. Whatever biological changes have occurred since Creation have accomplished only changes within the original created kinds. [ii] The great Flood described in Genesis, commonly referred to as the Noachian Deluge, was an historical event, world-wide in its extent and effect. [iii] Finally, we are an organization of Christian men of science, who accept Jesus Christ as our Lord and Savior. The account of the special creation of Adam and Eve as one man and one woman, and their subsequent Fall into sin, is the basis for our belief in the necessity of a Savior for all mankind. Therefore, salvation can come only thru (sic) accepting Jesus Christ as our Savior.

Id. (citing *McLean*, 529 F. Supp. at 1260 n.7).

⁸⁷ *Edwards*, 482 U.S. at 596-97 (striking down LA. REV. STAT. ANN. § 17:286.1 (1982)).

and library collections.⁸⁸ In addition, the bill called for curriculum guides to be written for creation science, and directed the appointment of a panel composed solely of creation scientists to supply resource services for teachers.⁸⁹ Schools were also prohibited from discriminating against any teacher who “chooses to be a creation scientist.”⁹⁰

The legislature defined "creation-science" as "the scientific evidences for creation and inferences from those scientific evidences."⁹¹ "Evolution-science" meant "the scientific evidences for evolution and inferences from those scientific evidences."⁹² When creation or evolution was taught, each had to “be taught as a theory, rather than as proven scientific fact.”⁹³

The district court for the Eastern District of Louisiana granted the plaintiffs’ motion for summary judgment, holding the statute violated the Establishment Clause of the First Amendment.⁹⁴ A panel of the Court of Appeals for the Fifth Circuit affirmed,⁹⁵ a motion for hearing en banc was denied with seven judges dissenting,⁹⁶ and the Supreme Court granted certiorari.⁹⁷ Justice Brennan concluded that the state legislature sought to advance religious views in exercising its authority over the public school science curriculum.⁹⁸ Invoking the Establishment Clause test enunciated in *Lemon v. Kurtzman*,⁹⁹ Brennan wrote that legislation must have a “preeminent” secular purpose.¹⁰⁰ Examining the legislative history leading up to the

⁸⁸ LA. REV. STAT. ANN. § 17:286.4 (1982).

⁸⁹ *Id.* at § 17:286.7.

⁹⁰ *Id.* at § 17:286.4.

⁹¹ *Id.* at § 17:286.3(2).

⁹² *Id.* at § 17:286.3(3).

⁹³ *Id.* at § 17:286.1.

⁹⁴ *Edwards*, 482 U.S. at 581-82.

⁹⁵ *Aguillard v. Edwards*, 765 F.2d 1251, 1258 (5th Cir. 1985).

⁹⁶ *Aguillard v. Edwards*, 778 F.2d 225 (5th Cir. 1985) (Gee, J., dissenting).

⁹⁷ *Edwards*, 482 U.S. at 582.

⁹⁸ *Id.* at 608.

⁹⁹ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally the statute must not foster an excessive government entanglement with religion.” (citations omitted)).

¹⁰⁰ *Edwards*, 482 U.S. at 583.

enactment of the statute, he found this law's "preeminent purpose . . . was clearly to advance the religious viewpoint that a supernatural being created humankind."¹⁰¹ This conclusion was bolstered by the historical context that showed a longstanding effort by religious fundamentalist groups to attack the teaching of evolution.¹⁰² The Court also agreed with the district and circuit courts that the Act did not further the law's purported goal of protecting academic freedom.¹⁰³ Its real goal was "discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism."¹⁰⁴

After *Edwards*, anti-evolution forces suffered more defeats in the lower federal courts. In *Freiler v. Tangipahoa Parish Board of Education*,¹⁰⁵ a Louisiana parish school board required that a specific disclaimer be read to students before the presentation of the theory of evolution in public school classes.¹⁰⁶ The disclaimer's purpose was to communicate that the School Board did not endorse evolution.¹⁰⁷ The disclaimer stated:

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

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.¹⁰⁸

The Fifth Circuit credited the secular purposes of the Board, namely "disclaiming orthodoxy of

¹⁰¹ *Id.* at 591.

¹⁰² *Id.* at 590-93.

¹⁰³ *Id.* at 586-87.

¹⁰⁴ *Id.* at 589 (citation omitted).

¹⁰⁵ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999), *reh. en banc denied*, 201 F.3d 602 (5th Cir. 2000), *cert. denied*, 530 U.S. 1251 (2000).

¹⁰⁶ *Freiler*, 185 F.3d at 341.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

belief and reducing parent/student offense.”¹⁰⁹ The Board could consider the concerns of students and parents about the teaching of evolution.¹¹⁰ But the court found the Board’s chosen action had the primary effect of advancing religion in school.¹¹¹ The Board’s statement, the court held, encouraged students to think about a specific religious alternative to evolution, and to maintain beliefs contrary to whatever they might learn about evolution.¹¹² Ultimately, the court found, the Board’s disclaimer served to “protect and maintain a particular viewpoint, namely belief in the Biblical version of creation.”¹¹³

A variant on the *Freiler* disclaimer appeared in the 2005 case of *Selman v. Cobb County School District*.¹¹⁴ A Georgia school board required the placement of stickers on high school science textbooks, which cautioned students: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.”¹¹⁵ The federal district court recognized that the reason for singling out evolution was the religious opposition to its teaching by many residents of the local community.¹¹⁶ The purpose of the School Board, to encourage critical thinking and to avoid giving unnecessary offense to the community while still teaching about evolution, was found to be sufficiently secular to satisfy the “purpose” prong of *Lemon*.¹¹⁷ But the sticker policy failed the “effects” prong of the *Lemon* test.¹¹⁸ “By denigrating evolution, the School Board appears to be endorsing the well-known prevailing alternative theory, creationism or variations thereof, even though the Sticker does not specifically reference any alternative theories.”¹¹⁹ Because the Sticker’s primary effect was to endorse a religious

¹⁰⁹ *Id.* at 345.

¹¹⁰ *Id.* at 345-46.

¹¹¹ *Id.* at 346.

¹¹² *Freiler*, 185 F.3d at 346.

¹¹³ *Id.*

¹¹⁴ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated and remanded*, 49 F.3d 1320 (11th Cir. 2006) (record on appeal contained evidentiary gaps that prevented proper appellate review; case remanded for further fact finding).

¹¹⁵ *Id.* at 1292.

¹¹⁶ *Id.* at 1292-97.

¹¹⁷ *Id.* at 1305.

¹¹⁸ *Id.* at 1306.

¹¹⁹ *Id.* at 1309.

view, it was deemed to be a violation of the Establishment Clause of the Federal Constitution and of a provision in the state constitution banning the use of state funds in aid of any church.¹²⁰

The end of 2005 brought a decision in a much-watched trial, *Kitzmiller v. Dover Area School District*, involving the school board of Dover, Pennsylvania.¹²¹ At issue was a requirement by the Board that teachers read the following ten-sentence statement to ninth grade biology students:

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

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations. Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.¹²²

The statement was similar to those in other cases in that it singled out the theory of evolution, required that it be called a theory rather than a fact, and encouraged students to keep an open mind about the topic.¹²³ It added a specific recommendation that the students consider the idea of intelligent design and suggested a specific text to study it, which had to be made available to the students.¹²⁴

The local science teachers rebelled.¹²⁵ They refused to read the statement to their classes on the grounds that intelligent design is not true science and that the book *Of Pandas and People*

¹²⁰ *Selman*, 390 F. Supp. 2d at 1288.

¹²¹ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

¹²² *Id.* at 708-09.

¹²³ *See id.* at 726.

¹²⁴ *Id.* at 709.

¹²⁵ *Id.* at 761.

is not a valid scientific resource.¹²⁶ In a letter addressed to the Board they wrote, “[It is] our considered opinion that reading the statement violates our responsibilities as professional educators as set forth in the Code of Professional Practice and Conduct for Educators.”¹²⁷ Due to the teachers’ refusal, administrators at the high school read the statement to the students.¹²⁸

In court, defense experts who supported intelligent design had to concede that one of their primary goals was to broaden the definition of science to include supernatural forces.¹²⁹ One defense witness agreed that his broadened definition would allow astrology to be deemed a science.¹³⁰ After a thorough inquiry, the court found that intelligent design could not be deemed science, finding that:

(1) ID [intelligent design] violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that doomed creation science in the 1980's; and (3) ID's negative attacks on evolution have been refuted by the scientific community. . . . [I]t is additionally important to note that ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research.¹³¹

As for the book *Of Pandas and People*, the court found it to be a re-drafting of a text the creationist movement had written before the Supreme Court’s decision in *Edwards*.¹³² When that Court found “creation science” unacceptable, the text writers simply replaced the term “creation science” with “intelligent design,” without changing the substance of the book.¹³³ It was published by a Christian group as part of the anti-evolutionist campaign to insinuate theistic teachings into the nation’s science classrooms.¹³⁴ After examining the history, practices, and

¹²⁶ *Id.*

¹²⁷ *Kitzmiller*, 400 F. Supp. 2d at 761.

¹²⁸ *Id.*

¹²⁹ *Id.* at 736.

¹³⁰ *Id.*

¹³¹ *Id.* at 735.

¹³² *Id.* at 722.

¹³³ *Kitzmiller*, 400 F. Supp. 2d at 722.

¹³⁴ *Id.* at 721.

goals of the anti-evolution organizations behind the intelligent design movement, the court concluded that the School Board's policy had violated both the Establishment Clause and the Pennsylvania state constitution.¹³⁵

III. THE NEW POLITICS OF SOCIAL CONSERVATISM

Despite this impressive set of precedents rejecting attempts to ban or undermine the teaching of evolution, the effort to protect the teaching of evolutionary theory is not assured of continuing success. The attack on evolution is carried on by determined campaigners who have kept up their effort consistently over eighty years, probing for vulnerable points in the educational systems of the individual states. Undeterred by judicial setbacks, they have increased their agitation against evolution. Since the 2004 presidential election, "evolution has emerged as one of the country's fiercest cultural battlefronts, with the National Center for Science Education tracking 78 clashes in 31 states, more than twice the typical number of incidents."¹³⁶

At the heart of the campaign lies a mix of religious think tanks,¹³⁷ publishers,¹³⁸ funding sources,¹³⁹ evangelical Christian colleges,¹⁴⁰ and conservative law centers.¹⁴¹ This network of

¹³⁵ *Id.* at 766.

¹³⁶ Wilgoren, *supra* note 23, at A1.

¹³⁷ *See, e.g.*, The Discovery Institute, available at <http://www.discovery.org>; *see also Edwards*, 482 U.S. at 602 (Powell, J. concurring); *Edwards*, 482 U.S. at 589.

¹³⁸ *E.g.*, Laurie Goodstein, *Evolution Lawsuit Opens with Broadside Against Intelligent Design*, N.Y. TIMES, Sept. 27, 2005, at A21 (explaining that the Foundation for Thought and Ethics produced the creationist book *Of Pandas and People* that played a role in the anti-evolutionist campaign in Dover, Pennsylvania).

¹³⁹ *See, e.g.*, Thomas Doran, Letter to the Editor, N.Y. TIMES, Sept. 28, 2005, at A26 (explaining that the Ave Maria Foundation provides financing for Thomas More Law Center); *see also, e.g.*, Gordy Slack, *Intelligent Designer: The Chief Defender of Intelligent Design in the Dover Evolution Trial Insists he has Science and God on his Side*, SALON.COM, Oct. 20, 2005, http://dir/salon.com/story/news/feature/2005/10/20/dover_trial/index.html (noting that the Thomas More Law Center represented the Dover School Board pro bono in the Kitzmiller case).

¹⁴⁰ *E.g.*, Christian Heritage College in San Diego, California, *identified in Edwards*, 482 U.S. at 602 (Powell, J. concurring).

¹⁴¹ *See e.g.*, Laurie Goodstein, *In Intelligent Design Case, a Cause in Search of a Lawsuit*, N.Y. TIMES, Nov. 4, 2005, at A16 (noting that the Thomas More Law Center sees its mission "to protect Christians and their religious beliefs in the public square," and that it searched for years to find a school board client willing to challenge evolution).

organizations can bring economic, political, legal, and academic resources to bear whenever an opportunity exists in the nation's vast array of school systems to introduce an anti-evolution bias.¹⁴² These groups prepare their own textbooks and articles (avoiding the peer review process of science publication), draft legislation (and lobby for it), and offer to defend lawsuits that might arise if a school board adopted a policy slighting evolution in the curriculum.¹⁴³

The campaign draws upon considerable popular support among Americans. Polls show a divided nation, with substantial numbers of Americans believing in the Biblical version of creation and rejecting evolution.¹⁴⁴ In a 2005 poll,

[Forty-two] percent of Americans held strict creationist views, agreeing that "living things have existed in their present form since the beginning of time." In contrast, 48 percent said they believed that humans had evolved over time. But of those, 18 percent said that evolution was "guided by a supreme being," and 26 percent said that evolution occurred through natural selection. In all, 64 percent said they were open to the idea of teaching creationism in addition to evolution, while 38 percent favored replacing evolution with creationism.¹⁴⁵

This popular support translates into political influence that reaches into the highest places of government. Politicians who see political advantage in taking sides in the modern day religious culture wars gladly exploit anti-evolutionist dogma. In the hands of Tom DeLay, former Republican House Majority Leader, evolution can be blamed for just about any social ill. After two students killed their classmates and teachers at Columbine High School in April, 1999, DeLay said the roots of the crime could be laid at evolution's door, "because our school systems teach our children that they are nothing but glorified apes who have evolutionized out of some primordial mud."¹⁴⁶

Conservative Presidents Ronald Reagan and George W. Bush, and former Senate Majority Leader Bill Frist, have endorsed the teaching of alternatives to evolution by lending their prestige to the anti-evolution campaign and by issuing statements recommending that

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Laurie Goodstein, *Teaching of Creationism is Endorsed in New Survey*, N.Y. TIMES, Aug. 31, 2005, at A9.

¹⁴⁵ *Id.*; see also *Poll: Majority Reject Evolution: 51 Percent Believe God Created Humans*, CBSNEWS, Oct. 23, 2005, <http://www.cbsnews.com/stories/2005/10/22/opinion/polls/main965223.shtml?CMP=ILC-SearchStories>.

¹⁴⁶ Lawrence M. Krauss, *School Boards Want to 'Teach the Controversy.'* *What Controversy?* N.Y. TIMES May 17, 2005, at F3.

“creationism” or its later incarnation, “intelligent design,” be taught alongside evolution.¹⁴⁷ While these officials do not act directly to change school policies, their words of encouragement embolden school boards to take anti-evolution actions.¹⁴⁸ When the religious right speaks against evolution, today’s conservative politicians listen.

The anti-evolutionist campaign works at the local level assiduously. It has an array of targets—teachers, school librarians, principals and other school administrators—who may be willing to participate in the effort to suppress Darwinian theory or who may be intimidated by the persistent pressure the religious crusaders can bring to bear. Consider the experience of two librarians who received copies of two intelligent design books, *Darwin’s Black Box* by Michael Behe and *Darwin on Trial* by Philip Johnson, as donations to their high school collections.¹⁴⁹ When the librarians refused to put the books on the school library shelves, they were accused of censorship.¹⁵⁰ In fact, exercising their professional judgment, they concluded that these books had “little or no value to our students and come from those with ulterior motives.”¹⁵¹ The books did not meet the usual selection criteria, which required that books “support the curriculum, receive favorable reviews from professional journals, and be age-appropriate.”¹⁵² Noting that intelligent design theory had been “repudiated by every leading scientific organization, including the American Association for the Advancement of Sciences and the National Academy of Sciences,” the librarians determined that teaching intelligent design “would be tantamount to

¹⁴⁷ David Stout, *Frist Urges 2 Teachings on Life Origin*, N.Y. TIMES, Aug. 20, 2005, at A10 (noting that Frist’s statement echoes Bush’s that both evolution and intelligent design should be taught “so people can understand what the debate is about.”); see also Hendrik Hertzberg, *The Talk of the Town, Mired*, THE NEW YORKER, Aug. 22, 2005, at 21-22 (quoting Bush and Reagan and concluding that anti-evolutionists’ “misguided war against reason . . . cannot be won, and for religion’s sake as well as science’s, should not be fought.”).

¹⁴⁸ See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) (requiring teacher statements that discount evolution’s scientific standing); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005) (placing stickers on biology textbooks urging students to be critical of evolution), *vacated and remanded*, 49 F.3d 1320 (11th Cir. 2006) (record on appeal contained evidentiary gaps that prevented proper appellate review; case remanded for further fact finding).

¹⁴⁹ Connie O’Sullivan & Michael O’Sullivan, *Monkey Business: The Intelligent Design War Has Come to the School Library*, SCHOOL LIBRARY JOURNAL, Nov. 1, 2005, at 42, available at <http://www.schoollibraryjournal.com/article/CA6277831.html?q=connie+and+michael+o%27sullivan>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

teaching about the existence of Santa Claus.”¹⁵³

The donor complained to the School Board, which appointed a committee to investigate the matter.¹⁵⁴ The committee recommended that one book be accepted by the library.¹⁵⁵ It deadlocked on the other book.¹⁵⁶ The Board of Education then heard from a variety of people, including scientists, parents, teachers, and ministers, who explained the difference between censorship and legitimate selection processes.¹⁵⁷ Ultimately, after a three month battle, the Board supported the librarians and voted to reject both books.¹⁵⁸ The librarians wrote about their experience in order to warn others in the field about the conflicts they might face from this sort of book donation tactic by anti-evolutionists. One wonders how often local librarians elsewhere yield to such pressure and quietly add these volumes to their school collections.

Teachers also encounter community opposition to the teaching of evolution. “Perhaps the most insidious effect of the campaign against evolution,” writes author Susan Jacoby, “has been avoidance of the subject by teachers, who, whatever their convictions, want to forestall trouble with fundamentalist parents. Recent surveys of high school biology teachers have found that avoidance of evolution is common among instructors throughout the nation.”¹⁵⁹ A reporter who recently visited Dayton, Tennessee, site of the *Scopes* trial, found that “one thing about Dayton has not changed and probably never will: its bedrock fundamentalism. Even now, it’s hard to find a teacher who goes along with Darwin. ‘We all basically believe in the God of creation,’ says the head of the high school science department.”¹⁶⁰ Even college science departments are not immune. A professor at the local college in Dayton, Bryan College, succinctly stated his view: “Scripture trumps interpretations of physical data.”¹⁶¹

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Susan Jacoby, Op-Ed., *Caught Between Church and State*, N.Y. TIMES, Jan. 19, 2005, at A19.

¹⁶⁰ Steve Kemper, *Evolution on Trial*, SMITHSONIAN MAGAZINE, Apr. 2005, at 52.

¹⁶¹ *Id.* The professor expanded his view to include all subjects:

All the stars of the universe, all the rocks of the earth, all the organisms on its surface must be reinterpreted, as well as all the world’s literature, philosophies, and religions. They can and should be reinterpreted from a Christian perspective so all these things can be taken captive under the mind of Christ.

Many teachers resist the anti-evolution campaign. The court in *Kitzmiller* noted that science teachers in Dover, Pennsylvania, refused to read a statement that the School Board had prepared for them, designed to persuade their students to challenge or reject evolution.¹⁶² The teachers felt that to do so would violate their commitment to teach only valid science, and they refused to even stay in the room when the statement was being read by school administrators to ensure that students did not think they endorsed its message.¹⁶³ Other teachers fight singlehandedly against those hostile to evolution. One Georgia middle school teacher battled parents, teachers, students, and administrators who “sent her email messages and letters, stopped her in the hall, called board members, demanded meetings, and requested copies of the PBS videos she showed in class,” all in an effort to induce her to revise her science lessons on evolution.¹⁶⁴ She refused and eventually won the support of important state officials and of former governor and President Jimmy Carter.¹⁶⁵ But the stress of the confrontations led her to accelerate her planned retirement date.¹⁶⁶

Other targets have included textbook publishers, who take account of marketing realities to sell their products. Following the Scopes trial, anti-evolutionists pursued publishers and persuaded them to limit discussions of the topic in their course textbooks. As Susan Jacoby observes:

Texas, then as now one of the largest textbook purchasers, led the drive to extirpate evolution. ‘I am a Christian mother,’ said Gov. Miriam Ferguson of Texas [She] personally censored textbooks while presiding over the statehouse from 1924 to 1926. Censorship was soon institutionalized in a state commission that scrutinized all potential textbooks.¹⁶⁷

Id.

¹⁶² *Kitzmiller*, 400 F. Supp. 2d at 761.

¹⁶³ *Id.*

¹⁶⁴ See Michael Winerip, *Evolution’s Lonely Battle in a Georgia Classroom*, N.Y. TIMES, June 28, 2006, at B9.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Susan Jacoby, *supra* note 159, at A19. She added that after the Scopes trial:

Fundamentalists pressured publishers into excising discussions of evolution—and often the word itself—from biology textbooks. The nature of that success is literally illustrated by a change between the 1921 first edition of “Biology for Beginners,” a standard text by Truman Moon, and the second edition, published in 1926. The 1921 edition appeared with a portrait of Darwin on the frontispiece.

Another tactic was employed in Kansas, where the State Board of Education amended curriculum rules to allow supernatural causes to be included in the definition of science.¹⁶⁸ Scientists who had appeared in court cases refused to testify in the Kansas administrative proceedings, sensing that the politicians' minds had already been made up and that their hearings would be arranged so as to portray the theory of intelligent design as on a par with or superior to the theory of evolution.

Another part of the anti-evolution strategy is to join in right wing political attacks against the judiciary. These attacks, focusing on judges who do not subscribe to the conservative religious agenda, have been strident, coupling charges of "judicial tyranny" and a judicial "war on faith"¹⁶⁹ with demands for impeachment of judges and threats of reprisals.¹⁷⁰ Judges deciding such issues as religion in school, public display of the Ten Commandments, and withdrawal of medical treatment for the terminally ill, must prepare for hostile reactions. The district judge in *Kitzmilller*, John E. Jones III, anticipating that he would be accused of "judicial activism" for rejecting a school board's anti-evolution policy, answered the charge in his opinion in this way:

Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID [intelligent design], who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy. The breathtaking inanity of the Board's decision is evident when considered against the factual backdrop which has now been fully revealed through this trial. The students, parents, and teachers of the Dover Area School District deserved better than to be dragged into this legal maelstrom, with its resulting utter waste

Five years later, Darwin had been replaced by a drawing of the human digestive tract.

Id.

¹⁶⁸ Jodi Wilgoren, *Kansas Board Approves Challenges to Evolution; New Standards also Redefine Science*, N.Y. TIMES, Nov. 9, 2005, at A14; Dennis Overbye, *Philosophers Notwithstanding, Kansas School Board Redefines Science*, N.Y. TIMES, Nov. 15, 2005, at F3.

¹⁶⁹ Dana Milbank, *And the Verdict on Justice Kennedy is Guilty*, WASH. POST, Apr. 9, 2005, at A3.

¹⁷⁰ *Id.*; Peter Wallsten, *Evangelicals Want to Strip Courts' Funds: Taped at a Private Conference, the Leaders Outline Ways to Punish Jurists they Oppose*, L.A. TIMES, Apr. 22, 2005, at A22.

of monetary and personal resources.¹⁷¹

The judge's sharp words notwithstanding, the mislabeling of judges as "activist" when they fail to adhere to social conservative causes will no doubt persist in the divided and divisive political culture that now prevails in the nation. What may deter some school boards tempted to sign on to the anti-evolutionist campaign is the expense of litigation, particularly the threat of having to pay the prevailing party's reasonable attorney fees.¹⁷² It appears that some boards are shying away from adopting anti-evolution policies because of the threat of costly lawsuits like *Kitzmilller*.¹⁷³

For district court judges, it takes courage to stand up to the considerable anger stirred up against them in their own communities. The public flogging of judges by politicians and right wing activists may work eventually, either by wearing down the judges' resolve or by inducing them to leave the bench for more peaceful and lucrative legal work. Bar associations across the country have reacted to the attacks with public statements criticizing intimidation tactics. At a recent annual meeting, the American Bar Association felt it imperative to condemn the persistent harsh attacks on the judiciary. As a result, its House of Delegates unanimously adopted a resolution decrying "attacks on the independence of the judiciary that demean the judiciary as a separate and co-equal branch of government."¹⁷⁴ A report submitted by the State Bar of Texas noted the "severe and unprecedented attacks" on judges whose decisions are unpopular. "Judges have been the target of unjustified criticism simply because decisions conflict with the personal philosophies and beliefs of those who attack them."¹⁷⁵ A former president of the ABA, Robert J. Grey Jr., observed that in the midst of the national focus on the Terri Schiavo case:

[M]any commentators and observers . . . crossed the line in using this tragedy to needlessly, gratuitously, and viciously attack the dedicated men and women who serve as America's judges While it is appropriate . . . to debate the dilemmas brought to light by Terri Schiavo's case, there is no need for personal attacks on the judges in this case. They are not killers as some have called them, nor are they activists bent on pushing an ideological agenda."¹⁷⁶

¹⁷¹ *Kitzmilller*, 400 F. Supp. 2d at 765.

¹⁷² *Id.* at 707. Another setback to the campaign against evolution occurred in Utah, when the legislature rejected a bill to require teachers to tell students that not all scientists agree about evolution. Kirk Johnson, *Anti-Darwin Bill Fails in Utah*, N.Y. TIMES, Feb. 28, 2006, at A15.

¹⁷³ Jodi Rudoren, *Ohio Board Undoes Stand on Evolution*, N.Y. TIMES, Feb. 15, 2006, at A14.

¹⁷⁴ Conference Report, *ABA Annual Meeting*, 74 U.S.L.W. 2091, 2092 (Aug. 16, 2005).

¹⁷⁵ *Id.*

¹⁷⁶ Statement of Robert J. Grey Jr., President, American Bar Association, Re: attacks on the judiciary in the Terri Schiavo case (Mar. 25, 2005),

IV. THE CURRENT SUPREME COURT

The political environment described above could hardly be more favorable to the anti-evolutionists' cause, with the highest political figure in the land calling for teaching both sides of the controversy, the ruling Republican party catering to its theocratic elements,¹⁷⁷ and two new Justices appointed with right wing activist support. The Supreme Court bench that ruled against the State of Louisiana in 1987 has changed dramatically in twenty years. The Court that ruled the anti-evolution statute unconstitutional in *Edwards* did so by a 7-2 margin.¹⁷⁸ Of the seven Justices in the majority, only Justice Stevens remains on the Court.¹⁷⁹ Of the two dissenters (Rehnquist and Scalia), only Justice Scalia remains.

Five potential votes for a challenge to evolution on today's Court are those of Justices Scalia, Thomas, Alito, Roberts, and Kennedy. Based upon their records in Establishment Clause cases, Justices Stevens, Souter, Breyer and Ginsburg seem most dedicated to a substantial separation of church and state, and they are highly unlikely to uphold any anti-evolution statute or state school board policy.¹⁸⁰

<http://www.abanet.org/media/statementsletters/sttjudiciary.html>.

¹⁷⁷ Rep. Christopher Shays of Connecticut, a Republican, said bluntly: "This Republican Party of Lincoln has become a party of theocracy." Adam Nagourney, *GOP Right is Splintered on Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at 14. Former Republican Senator John C. Danforth complained in an op-ed piece that "Republicans have transformed our party into the political arm of conservative Christians." John C. Danforth, Op-Ed., *In the Name of Politics*, N.Y. TIMES, Mar. 30, 2005, at 17. See generally KEVIN PHILLIPS, *AMERICAN THEOCRACY* (2006). Phillips writes:

Such mingling of theology, popular culture, and theocracy has already brought about aspects of an American Disenlightenment Effects can be seen in science, climatology, federal drug approval, biological research, disease control, and not least in the tension between evolution theory and the religious alternatives—creationism and so-called intelligent design.

Id. at 217.

¹⁷⁸ *Edwards*, 482 U.S. at 579.

¹⁷⁹ The other six majority justices in *Edwards* were Brennan, Marshall, Blackmun, Powell, O'Connor, and White.

¹⁸⁰ Generally, these four have voted for a strong Establishment Clause that prohibits public funding of religious groups and keeps a sharp line separating church and state. See Eduardo Moises Penalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 FORDHAM L. REV. 2241, 2242-44 (2006). Stevens joined the majority in *Edwards* and wrote

Scalia, of course, is the likeliest vote in favor of such a challenge, having aligned himself with the anti-evolution forces in his strongly worded dissenting opinion in *Edwards*.¹⁸¹ Thomas, who joined the Court four years after *Edwards*, has made clear his desire to do away with the barriers that have kept religion and government carefully separated in public life. He has written or joined opinions in a raft of cases that set forth an unmistakably narrow view of the Establishment Clause.¹⁸² Recently he advocated the idea that nothing less than the presence of legal coercion by the government in advancing religion should be the “touchstone” for an Establishment Clause violation.¹⁸³ He also wrote the majority opinion in a case allowing a frankly evangelical group access to public school facilities after school hours.¹⁸⁴ While these opinions indicate a very limited role for the Establishment Clause, it is still possible, if not very likely, that Thomas could find the classroom setting coercive enough, and an anti-evolution rule religiously oriented enough, that he might not side against evolution. Most likely he would vote with Scalia, his regular ally in Establishment Clause cases.¹⁸⁵

President George W. Bush has made two Supreme Court appointments, those of Chief Justice John Roberts, Jr. and Associate Justice Samuel Alito. Both drew the intense attention of the right wing of the Republican party, which had carefully strategized to fill Court vacancies with ideologically acceptable jurists.¹⁸⁶ Ultimately the right wing pronounced itself satisfied with the choices of Roberts and Alito. The two do seem likely to vote together: in the 2005-06 Court term, they were in agreement in non-unanimous cases 91% of the time, more often than any other pairs of justices.¹⁸⁷

the Court’s opinion striking down silent prayer in the Alabama schools, *Wallace v. Jaffree*, 472 U.S. 38 (1985). Souter, joined by the other three, has written several opinions supporting a strong Establishment Clause. *See, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 863 (1995) (Souter, J., dissenting) (Stevens, J., Ginsburg, J., and Breyer, J., joining in dissent).

¹⁸¹ *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

¹⁸² *E.g.*, *Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Thomas, J., concurring); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (Rehnquist, C.J., dissenting); *Rosenberger*, 515 U.S. at 852; (Thomas, J., concurring); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (Scalia, J., concurring).

¹⁸³ *Van Orden*, 545 U.S. at 697 (2005) (Thomas, J., concurring).

¹⁸⁴ *Good News Club*, 533 U.S. 98 (2001).

¹⁸⁵ *See, e.g.*, cases cited *supra* note 182.

¹⁸⁶ David D. Kirkpatrick, *Team Fueled Effort to Shift Court to Right*, N.Y. TIMES, Jan. 30, 2006, at A1.

¹⁸⁷ Linda Greenhouse, *Roberts Is at Court’s Helm, But He Isn’t Yet in Control*, N.Y. TIMES, July

The new Chief Justice has not yet written an opinion on the Establishment Clause. Justice Alito, as a Third Circuit judge, wrote a major opinion upholding a claim by a religious organization for access to school space in a New Jersey public school for after school activities, as well as access to school bulletin boards and help from teachers to distribute flyers to students to bring home.¹⁸⁸ The judge indicated, however, that as a member of an inferior appellate court, he was merely adhering to the reasoning of the Supreme Court in its Establishment Clause cases.¹⁸⁹ Nevertheless, his opinion gives the impression he is perfectly at ease with expanded support for religious expression in the public school environment. The primary purpose of the organization was to proselytize,¹⁹⁰ and the school's concern for keeping its after school community activities free of divisiveness and religious recruitment was dismissed with dispatch and without sympathy from Alito.

Another hint of Alito's future Establishment Clause views appeared in interviews with senators after his Supreme Court nomination, in which he indicated his belief that the Court's precedents were too heavily weighted toward separating church and state.¹⁹¹ Leaders of the religious right have expressed some anger at Republicans for not pressing their issues more zealously. One reply party leaders have offered is the great expectation they have for the advancement of the conservative agenda by the President's two Supreme Court appointments. While these indications can by no means predict votes of confirmed justices in future cases, it does seem likely that Alito and Roberts will be receptive to a trimming of the Establishment Clause in the direction of allowing a more ubiquitous religious presence in the public sphere. How this would play out in a future evolution case is uncertain, but it is at the least conceivable that both men would lend a receptive ear to an argument, such as that made by Scalia in his *Edwards* dissent described *infra*, that accepts the constitutionality of some anti-evolution efforts.

Exactly how the national political environment affects the justices in their decision making is difficult, if not impossible, to specify. Judge Richard Posner has written that the Supreme Court is a "political court" whose opinions can only be understood in terms of political values.¹⁹² Just about any decision on a matter of controversy can be justified by some legal theory; in Posner's words, "[t]here is almost no legal outcome that a really skillful legal analyst

2, 2006, at 1 (chart).

¹⁸⁸ *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004).

¹⁸⁹ *Id.* at 535.

¹⁹⁰ *Id.* at 521.

¹⁹¹ David D. Kirkpatrick, *Nominee is Said to Question Church-State Rulings*, N.Y. TIMES, Nov. 4, 2005, at A22.

¹⁹² Richard Posner, *The Supreme Court, 2004 Term: Foreword: A Political Court*, 119 HARV. L. REV. 32 (2005).

cannot cover with a professional varnish.”¹⁹³ In constitutional decision making, it often seems as if the legal theory chosen is a surface phenomenon rather than a true insight into the reasons for a decision.

Nevertheless, political preferences alone seem inadequate to explain Supreme Court decision making. The willingness of conservative judges to uphold an anti-evolution law probably depends upon numerous factors, including the usual legal craft, matters of the specific factual context in which the issue arises, the nature and persuasiveness of the legal arguments presented, and the pull of stare decisis. Perhaps equally significant are the elusive and intangible factors that may influence judicial behavior in particular kinds of cases. In an evolution case, I suggest two such factors are the judge’s commitment to the integrity of intellectual life and his commitment to educational values in American society. I now turn to a discussion of these factors. I will then consider the impact of these factors on the potential swing justice on the current court, Justice Anthony Kennedy, whose Establishment Clause views and attitudes may be key to the outcome of any evolution case.

(A) The Factual Context of the Next Evolution Challenge

The facts of the next major evolution case are subject to the designing efforts of lawyers and others engaged in the anti-evolution movement. These actors may shape legislative history by advising legislators and proponents about how to discuss a proposed bill in committee hearings and reports so as to minimize the use of religious references and emphasize secular educational goals.¹⁹⁴ Their experts, though motivated by religious commitments, may studiously avoid any allusion to a divine creator.¹⁹⁵ Hearings can achieve a false sense of “balance” when committees schedule an equal number of evolution scientists and creation advocates.

A common tactic to influence factfinding is the invention of new labels to make an anti-evolution proposal sound more scientific than religious. After the Supreme Court’s ruling in *Epperson*, the term “creationism” was replaced by the newly minted “creation science.” When this renaming failed in *McLean* and in *Edwards*, the reference to “creation” was jettisoned in favor of the next theoretical term, “intelligent design.” This designation, however, failed to persuade the district court in *Kitzmiller* that it was different in kind from creation science.¹⁹⁶ The term itself invited the question, who is the intelligent designer? At least some defense witnesses admitted that it was God.¹⁹⁷

¹⁹³ *Id.* at 52.

¹⁹⁴ See *supra* text accompanying notes 52-56; Jodi Wilgoren, *In Kansas, Darwinism Goes on Trial Once More*, N.Y. TIMES, May 6, 2005, at A18 (experts in testimony “described their own questioning of evolution as triggered by religious conversion, . . . [but] avoided mention of a divine creator”).

¹⁹⁵ Wilgoren, *supra* note 194, at A18.

¹⁹⁶ *Kitzmiller*, 400 F. Supp. 2d at 735.

¹⁹⁷ Gordy Slack, *Intelligent Designer*, SALON.COM, Oct. 20, 2005, http://dir/salon.com/story/news/feature/2005/10/20/dover_trial/index.html (testimony of Michael

In the midst of the *Kitzmiller* trial yet a new label materialized. A draft of a future edition of an intelligent design text substituted the term “sudden emergence theory” for “intelligent design.”¹⁹⁸ This new term has the advantage of making no reference to a supernatural creator. But its substance seems likely to be no different from “creation science.” Justice Scalia, in defending the anti-evolution statute in *Edwards*, described creation science as “essentially a collection of scientific data supporting the theory that the physical universe and life within it appeared suddenly and have not changed substantially since appearing.”¹⁹⁹ It seems a safe bet that this will also be the essence of any re-labeled “sudden emergence theory.”

As for the text of the laws themselves, legislators and school boards leave drafting of laws and policies to lawyers, and lawyers in this movement will probably try to use language different from that in the failed regulations in *McLean*, *Kitzmiller*, and *Edwards*. The challenge for them will be to avoid the suspicion that their goal, to counter the teaching of evolution with Biblical doctrine, remains the same. The most recent cases in the lower courts indicate that the next challenge will not likely be in the form of a law drafted to eliminate or severely restrict the teaching of evolution. Rather the laws will “merely” insist that evolution not be described as a scientific fact, and that students have access to other ideas about the development of life.

If laws or policies are worded in this way, judges inclined to indulge religious groups might adopt the reasoning articulated in the *Edwards* case in the Fifth Circuit by Judge Thomas Gibbs Gee, that the effect of such laws is only to insist that the “whole truth be taught.”²⁰⁰ Judge Gee claimed that “[b]y requiring that the whole truth be taught, Louisiana aligned itself with Darrow”²⁰¹ The reference was to Clarence Darrow, who had defended the teaching of evolution in the *Scopes* case. During that trial, Darrow derided the Biblical version of creation as lacking scientific logic, and were he alive today he surely would side with the scientific community in its condemnation of “creation science.” Gee’s preposterous idea that Louisiana’s endorsement of “creation science” advanced the kind of “truth” that *Scopes* and Darrow were fighting for might prove too much for a justice who places a high value on historical truth and intellectual honesty, however politically conservative he may be.²⁰²

Behe).

¹⁹⁸ Laurie Goodstein, *Evolution Trial in Hands of Willing Judge*, N.Y. TIMES, Dec. 18, 2005, at 41. In court, a lawyer for the plaintiffs asked a witness, “We won’t be back in a couple of years for the sudden emergence trial, will we?” *Id.*

¹⁹⁹ *Edwards*, 482 U.S. at 612.

²⁰⁰ See *Aguillard v. Edwards*, 778 F.2d 225, 226 (5th Cir. 1985) (Gee, J., dissenting).

²⁰¹ *Id.*

²⁰² Justice Scalia, it must be noted, accepted Judge Gee’s view of the matter, dubbing the Supreme Court majority opinion in *Edwards* “repressive” and a “*Scopes*-in-reverse.” *Edwards*, 482 U.S. at 634. John G. West of the creationist Discovery Institute echoed Gee and Scalia when he commented in 2006: “The effort to try to suppress ideas that you dislike, to use the

(B) The Legal Arguments

With the current Court's strong conservative tilt, Justice Scalia's forcefully worded dissenting opinion in *Edwards*²⁰³ could become a possible rationale for a new majority, and so is worth a close examination. The opinion, though showing the way to an anti-evolution victory, suffers from some fundamental analytical weaknesses that should generate serious concerns in the minds of the other conservative justices now on the Court.

The Scalia dissent makes four key points: (1) that the *Lemon* test's "purpose" element (i.e., that a law must have a secular purpose) requires only that a law not be enacted for a *wholly* religious purpose; (2) that sufficient evidence of a non-religious purpose appeared in the statements of legislators and in testimony from experts in the intelligent design movement; (3) that the Louisiana law's requirement of balanced treatment for creation science and evolution was motivated by a concern to promote academic freedom; and (4) that the entire legal framework established by *Lemon* should be discarded.²⁰⁴ He did not discuss *stare decisis*, and he generally ignored the Court's evolution precedent, *Epperson v. Arkansas*.

(1) Secular Purpose

Scalia asserted that the purpose of the Louisiana law was sufficiently secular to satisfy the requirement set forth in *Lemon v. Kurtzman* that laws not be enacted for a religious purpose.²⁰⁵ He first contended that past cases prove that finding a secular purpose is easy: "Almost invariably, we have effortlessly discovered a secular purpose for measures challenged under the Establishment Clause"²⁰⁶ After citing several cases to support this claim, he conceded that in three cases the Court did find a lack of secular purpose.²⁰⁷ He omitted the important information that all three of those cases, like *Edwards* itself, involved the public schools, where the Court has been particularly vigilant in guarding against attempts at religious encroachment.²⁰⁸ Further, he failed to note that one of the three, *Epperson v. Arkansas*, struck down an anti-evolution statute on the ground that its purpose was to advance religion,²⁰⁹ making

government to suppress ideas you dislike, has a failed history. Do they really want to be on the side of the people who didn't want to let John Scopes talk or who tried to censor Galileo?" Jodi Rudoren, *supra* note 173, at A14.

²⁰³ *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

²⁰⁴ *Id.* at 610-40.

²⁰⁵ *Id.* at 613-18.

²⁰⁶ *Id.* at 613.

²⁰⁷ *Id.*

²⁰⁸ The three cases were *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); and *Epperson v. Arkansas*, 393 U.S. 97 (1968).

²⁰⁹ *Epperson*, 393 U.S. at 107-08.

it both the most relevant case to his point and the one that most clearly refuted it in a factual context most resembling the case under adjudication.

Next, in an effort to narrow the *Lemon* purpose test, Scalia claimed that past cases held that to offend the Establishment Clause, a statute must have a *wholly* religious purpose.²¹⁰ But an examination of the cases reveals descriptions of laws that violate the clause by having a “pre-eminent” religious purpose²¹¹ or by having implausible, inadequate secular purposes.²¹² *Stone v. Graham*, a case that overturned a Kentucky law requiring the posting of the Ten Commandments in public school classrooms, noted that an avowed secular purpose (to help teach students about a “fundamental legal code”) would not always suffice.²¹³ As the *Stone* court observed, it is too easy for states to find some secular purpose for any religious imposition; even the daily reading of Bible verses could be justified in secular terms as the “promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature.”²¹⁴ Scalia’s characterization of past precedent on this point was inaccurate (and has been rendered more untenable by the *Edwards* majority opinion, which used the term “preeminent” to describe the statute’s religious purpose).

Scalia attempted to bolster his argument about legislative purpose with an astonishing claim about political behavior: The Louisiana legislators, he observed, had all “sworn to support the Constitution.”²¹⁵ For the Court to adjudge its purpose in enacting the law as religious, he maintained, would be tantamount to saying that “the members of the Louisiana legislature knowingly violated their oaths.”²¹⁶ Scalia thus affected to be shocked at the idea that a group of Louisiana politicians might pass an unconstitutional law based upon the religious politics of their state. Such a naive faith in the integrity of state legislators would be touching if it were at all convincing. But for one who is so deeply cynical about the integrity of others, including his own colleagues on the Court,²¹⁷ this supposed innocence of commonplace political behavior lacks all credibility. As one scholar puts it, the “tendency of politicians to play fast and loose with constitutional guarantees to satisfy what they perceive to be majority will” is an unfortunate but

²¹⁰ *Edwards*, 482 U.S. at 614 (Scalia, J., dissenting).

²¹¹ *Stone*, 449 U.S. at 41.

²¹² *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223-24 (1963).

²¹³ *Stone*, 449 U.S. at 41.

²¹⁴ *Id.* (quoting *Schempp*, 374 U.S. at 223).

²¹⁵ *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

²¹⁶ *Id.*

²¹⁷ *Id.* at 618-19.

well-known feature of our political system.²¹⁸ Surely, no one familiar with the role state legislatures played in the southern states' massive resistance to the Supreme Court's school desegregation decisions could ever doubt the willingness of state legislatures to enact politically popular but thoroughly unconstitutional laws.²¹⁹ Here again the Scalia opinion in *Edwards* may not convince even his most conservative-minded colleagues.

(2) Analysis of Legislative History

Justice Scalia claimed that the Louisiana state legislature had abundant evidence of the scientific value of creationism.²²⁰ He cited the fact that a handful of creation science experts had testified in legislative hearings that “‘hundreds and hundreds’ of highly respected, internationally renowned scientists believed in creation science”; that “[t]here are two and only two scientific explanations for the beginning of life - evolution and creation science”; that “any evidence that tends to disprove the theory of evolution necessarily tends to prove the theory of creation science”; that “[t]he body of scientific evidence supporting creation science is as strong as that supporting evolution” and “may be stronger”; that “evolution is not a scientific ‘fact’ . . . [but] merely a scientific theory or ‘guess’” and “a very bad guess at that”; that the “problems with evolution are so serious that it could accurately be termed a ‘myth’”; that “[t]eachers have been brainwashed by an entrenched scientific establishment composed almost exclusively of scientists to whom evolution is like a ‘religion’”; and that “secular humanism is a religion” and “evolution is a central tenet of that religion.”²²¹ If the legislators believed these things, Scalia concluded, then they had formed their positive view of creation science and their skepticism about evolution on other than religious grounds, and thus the state legitimately could claim its law was not motivated by a wholly sectarian purpose.²²²

Scalia noted that the experts in creation science possessed “impressive” academic credentials.²²³ Unfortunately, experts can be found in any field who propound groundless theories that are rejected by their own profession. That is just an indication of the power of ideology over an otherwise sound mind.²²⁴ The amicus brief filed by the American Association

²¹⁸ TINSLEY E. YARBROUGH, *THE REHNQUIST COURT AND THE CONSTITUTION* 164 (2000).

²¹⁹ Louisiana's legislature actively participated in the resistance to *Brown v. Board of Education*. See NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* 335 (1969). The Louisiana legislature “made a mockery of the legislative process” in its resistance to school desegregation. *Id.*

²²⁰ *Edwards*, 482 U.S. at 622-24 (Scalia, J., dissenting).

²²¹ *Id.*

²²² *Id.* at 620.

²²³ *Id.* at 621.

²²⁴ Indeed, one might conclude this is Scalia's own problem—being a Justice with impressive credentials who is unable to overcome his ideological preferences in cases like *Edwards*.

of University Professors (AAUP) in *Edwards* provided a powerful reminder of how far astray well-credentialed but politically motivated academics can go:

The fact that several individuals with academic credentials support “creation-science” as scientific does not diminish the academic freedom violation arising from legislative fiat. Nazi Germany endeavored to supplant “Jewish physics,” meaning relativity theory and quantum mechanics, with “Aryan physics,” meaning the unverifiable theory of meta-aether. The foremost proponents of Aryan physics, Phillip Lenard and Johannes Stark, were holders of the Nobel prize.²²⁵

Scalia went on to find places in the legislative history where the bill’s sponsor denied that there was a religious motive behind his bill.²²⁶ The effort by the state legislature to hide its true purpose and to justify its religious invasion of the science curriculum was painfully inept. The suddenly politically naive Scalia, however, professed to be convinced by Senator Bill Keith’s (the bill’s sponsor) bald denials of the religious intent behind the Act.²²⁷ Keith’s self-contradictions, however, are evident throughout the hearings on the bill; at one point, for example, he told the Louisiana Senate Committee on Education:

Gentlemen, let me tell you this. There are two religions in this world and secular humanism is one of them. And on three different occasions the U.S. Supreme Court has declared secular humanism to be a bonafide religion. Religious humanism is actually entitled, in the state of Illinois, as a religion. And I would only remind you gentlemen that evolution is the cornerstone of that religion.²²⁸

Putting aside Senator Keith’s lack of awareness of most religions of the world, this statement shows that the heart of the matter for the bill’s sponsor lay in a battle for religious supremacy between the “two religions” that Senator Keith did recognize.²²⁹

Senator Keith’s allies also found it impossible to suppress their religious motivations.²³⁰

²²⁵ Brief of AAUP, *supra* note 2, at *14 n.7.

²²⁶ *Edwards*, 482 U.S. at 620-21 (Scalia, J., dissenting).

²²⁷ *Id.*

²²⁸ Brief for National Academy of Sciences as Amici Curiae Supporting Appellant, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (No. 85-1513), 1986 WL 727667, at *17 [hereinafter Brief for Academy].

²²⁹ *Id.*

²³⁰ *See supra* pp. 15-16.

The Louisiana Act, like a similar Arkansas law struck down in *McLean v. Arkansas*,²³¹ stemmed from a model creationism act drafted by anti-evolution activist Paul Ellwanger.²³² The record on appeal in *Edwards* contained a letter Ellwanger wrote to Senator Keith that put the anti-evolution effort in starkly religious terms:

I view this whole battle as one between God and anti-God forces [T]he crux of the matter is that if evolution is permitted to continue with its monopoly in public education then, in effect, it will continue to be made to appear that a Supreme Being is unnecessary So it behooves Satan to do all he can to thwart our efforts and confuse the issue at every turn.²³³

Keith's initial version of the bill could hardly be more explicit in its religiosity.²³⁴ For an honest account of the bill's history, we must turn from the Scalia dissent to Justice Powell's *Edwards* concurrence.²³⁵ Powell carefully describes the contents of and changes in the various bill drafts.²³⁶ It appears that Keith's initial bill called for teaching of "theory of creation ex nihilo in all public schools where the theory of evolution is taught."²³⁷ The "theory of creation ex nihilo" meant "the belief that the origin of the elements, the galaxy, the solar system, of life, of all the species of plants and animals, the origin of man, and the origin of all things and their processes and relationships were created ex nihilo and fixed by God."²³⁸ Senator Keith indicated that this theory was what he meant by the term "scientific creationism."²³⁹

Keith's second draft of his bill defined "creation-science" to include "the scientific evidences and related inferences that indicate (a) sudden creation of the universe, energy, and life from nothing; (b) the insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (c) changes only within fixed limits [of]

²³¹ See *supra* pp. 15-16.

²³² See *supra* pp. 15-16.

²³³ Brief for Academy, *supra* note 228, at *17.

²³⁴ *Edwards*, 482 U.S. at 600 (Powell, J., concurring).

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

originally created kinds of plants and animals; (d) separate ancestry for man and apes; (e) explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (f) a relatively recent inception of the earth and living kinds."²⁴⁰ Powell noted this definition tracked the language in the Arkansas act challenged in *McLean*, and observed:

The District Court in *McLean* carefully examined this model Act, particularly the section defining creation science, and concluded that "[b]oth [its] concepts and wording . . . convey an inescapable religiosity." The court found that "[t]he ideas of [this section] are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation."²⁴¹

Powell noted the effect of the litigation in Arkansas on events in Louisiana:

The complaint in *McLean* was filed on May 27, 1981. On May 28, the Louisiana Senate committee amended the Keith bill to delete the illustrative list of scientific evidences. According to the legislator who proposed the amendment, it was "not intended to try to gut [the bill] in any way, or defeat the purpose [for] which Senator Keith introduced [it]," and was not viewed as working "any violence to the bill." Instead, the concern was "whether this should be an all inclusive list."²⁴²

For Powell, the legislative history was all too clear, and he drew the inevitable conclusion, that the bill was drafted and redrafted with the goal of preserving its religious objectives while trying to make it litigation-proof.²⁴³ Scalia's inquiry into the legislative history avoided this conclusion by the simple expedient of neglecting to mention all of this evidence.²⁴⁴

(3) Promoting "Academic Freedom" through Anti-Evolution Laws

Scalia credited the law's statement that its purpose was to advance "academic freedom."²⁴⁵ He explains what academic freedom means in this context, arguing that the term has nothing to do with the freedom of the teacher to teach the subject according to his or her best academic judgment.²⁴⁶ Rather, the legislature's use of the term was meant to denote a right of

²⁴⁰ Brief for Academy, *supra* note 228, at *10.

²⁴¹ *Edwards*, 482 U.S. at 600 (Powell, J., concurring).

²⁴² *Id.*

²⁴³ *Id.* at 604.

²⁴⁴ *See supra* pp. 46-48.

²⁴⁵ *Edwards*, 482 U.S. at 628 (Scalia, J., dissenting) (discussing The Balanced Treatment for Creation-Science and Evolution-Science Act, LA. REV. STAT. ANN. § 17:286.2 (1982)).

²⁴⁶ *Edwards*, 482 U.S. at 628-30 (Scalia, J., dissenting).

students to avoid “indoctrination” by their teachers in their science classes. In his words:

The legislature wanted to ensure that students would be free to decide for themselves how life began, based upon a fair and balanced presentation of the scientific evidence—that is, to protect “the right of each [student] voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State.”²⁴⁷

The confusion of science education and religious belief here is striking, especially in the misleading quotation from the *Grand Rapids* case.²⁴⁸ The quoted passage refers to the need to protect public school students in that case from coerced “indoctrination into the beliefs of a particular religious faith.”²⁴⁹ Scalia turns a statement about the student’s freedom from religious coercion into one that appears to endorse the student’s right to decide whether to believe or disbelieve the teacher’s instruction in science.

Scalia’s choice of the word “indoctrination” itself confuses science with religion.²⁵⁰ Religious training does “indoctrinate” children with the prescribed tenets of the particular sect. In academic science classes, students are given information, not “indoctrinated” with religious doctrines. Students in science classes are not afforded the freedom to disbelieve the best thinking biology or genetics or zoology has to offer (at least not if they want to earn a high grade). In confusing science teaching with religious catechism, and referring to the teaching of evolution as “indoctrination,” Scalia apes (so to speak) the advocacy that his favored parties, the anti-evolutionists, have employed to undermine science and mislabel evolution as some sort of improperly imposed religious belief.

One wonders what Scalia, famous for his poison-penned sarcastic dissents, might have said about all this had his sympathies been on the other side. Targets for his sarcasm abounded. Here were politicians voting against one of the foundational ideas of science; enacting a disreputable alternative to “balance” it; encouraging elementary and high school students to decide whether to believe their science textbooks and their science teachers; and approving the work of a bill draftsman who feels he is doing battle with Satan. A derisive Scalia lampoon was clearly in order.

Scalia’s strange definition of academic freedom had little to do with the quality of education. Education could hardly survive in his looking-glass world. As the federal district court in *McLean* had found in 1982:

²⁴⁷ *Id.* at 627-28 (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 385 (1985)).

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 628 (quoting *Grand Rapids*, 473 U.S. at 385).

²⁵⁰ *Edwards*, 482 U.S. at 628 (Scalia, J., dissenting).

[I]f Act 590 [the balanced treatment law enacted in Arkansas] is implemented, many teachers will be required to teach material in support of creation science which they do not consider academically sound. Many teachers will simply forego teaching subjects which might trigger the "balanced treatment" aspects of Act 590 even though they think the subjects are important to a proper presentation of a course.

Implementation of Act 590 will have serious and untoward consequences for students, particularly those planning to attend college. Evolution is the cornerstone of modern biology, and many courses in public schools contain subject matter relating to such varied topics as the age of the earth, geology and relationships among living things. Any student who is deprived of instruction as to the prevailing scientific thought on these topics will be denied a significant part of science education. Such a deprivation through the high school level would undoubtedly have an impact upon the quality of education in the State's colleges and universities, especially including the pre-professional and professional programs in the health sciences.²⁵¹

Even if the well educated and academically accomplished Scalia (once a professor himself) had some difficulty puncturing the legislative claim that creation science was a meritorious balance to the theory of evolution, he had available two amicus briefs—one from the National Academy of Sciences²⁵² and one from “72 Nobel Laureates, 17 State Academies of Science, and 7 Other Scientific Organizations”²⁵³ that spelled out the specious nature of the creationists’ claim to scientific legitimacy. And he had available to him the valuable and at times eloquent amicus brief of the American Association of University Professors and the American Council on Education²⁵⁴ (AAUP brief), which focused exclusively on the Louisiana law’s false claim about protecting academic freedom.

The AAUP brief noted that the association had already gone on record at its 1981 annual meeting condemning anti-evolution statutes, adopting a resolution denouncing the “balanced treatment” legislation first enacted in Arkansas:

The Sixty-seventh Annual Meeting of the American Association of University Professors declares its firm opposition to legislation, recently adopted by the State

²⁵¹ McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1273 (E.D. Ark. 1982).

²⁵² Brief for Academy, *supra* note 228, at *17.

²⁵³ Brief of 72 Nobel Laureates, 17 State Academies of Science, and 7 Other Scientific Organizations as Amici Curiae Supporting Appellees, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (No. 85-1513), 1986 WL 727658.

²⁵⁴ Brief of AAUP, *supra* note 2 (Professor Robert Cover was one of the principal authors).

of Arkansas and pending before other state legislatures, that requires "balanced treatment" of "creation science" and evolution in public schools. This legislation, by requiring that a religious doctrine (sometimes disguised) be taught as a condition for the teaching of science, serves to impair the soundness of scientific education preparatory for college study and to violate the academic freedom of public school teachers. The potential consequences of this legislation for higher education science curricula are of particular concern to this Meeting. Faculty members who educate public school teachers would presumably have to be trained in "creation science" so that they can educate their students accordingly. Members of college and university faculties in Arkansas and elsewhere should be able to teach and criticize freely in accord with professional standards. "Creation science" legislation would impose an unacceptable limitation upon the faculty member's ability to carry out these obligations.

The Sixty-seventh Annual Meeting of the American Association of University Professors calls on state governments to reject "creation science" legislation as utterly inconsistent with the principles of academic freedom.²⁵⁵

The brief went on to demonstrate how putting evolution and creation science up for a vote by politicians trespassed upon the freedom of the academy.²⁵⁶ The statute, by mandating the teaching of creation science to counterbalance evolution, authorizing the preparation of creationism curriculum guides, empaneling a group of experts in creation science as curriculum advisors, and barring schools from discriminating against creation scientists, clearly expressed the state's favorable judgment on the validity of creation science.²⁵⁷ But it is the scientific community that must determine what theories are acceptable as valid science, as the AAUP rightly pointed out.²⁵⁸ It is "the traditional function of the community of scholars, in the exercise of their academic freedom, to determine what is or is not authentic to their disciplines."²⁵⁹ The statute would force Louisiana's public schools and colleges "to accord scientific legitimacy to a doctrine, the merit of which is established by legislative fiat rather than by scholarly discussion and consensus which are central to academic freedom."²⁶⁰

Interestingly, Scalia acknowledges that "[t]he Louisiana legislators had been told

²⁵⁵ *Id.* at *2-*3.

²⁵⁶ *Id.* at *13.

²⁵⁷ *Id.* at *16.

²⁵⁸ *Id.* at *5.

²⁵⁹ Brief of AAUP, *supra* note 2.

²⁶⁰ *Id.* at *6.

repeatedly that creation scientists were scorned by most educators and scientists.”²⁶¹ He uses this information not to question the validity of this “science” but to justify the state law’s provision barring “discrimination” against any “teacher in public elementary or secondary school or instructor in any state-supported university in Louisiana, who chooses to be a creation-scientist or to teach scientific data which points to creationism.”²⁶² If those unfortunate creation scientists were scorned by the profession, then according to Scalia, the legislators were acting perfectly properly in protecting them from “discrimination.”²⁶³ But non-discrimination is the language of civil rights, of equal treatment in the face of unreasoning prejudice. Transferring this wholesome principle to the effort to provide protection for academically unsound theories is an Orwellian rhetorical maneuver, whose logic falls apart upon reasoned analysis. In this context nondiscrimination means that academic institutions must accept proponents of a professionally rejected doctrine. Creation science’s rejection is not based upon prejudice, but upon its lack of merit. In truth, the nondiscrimination section of the Louisiana law orders academics not to make distinctions based on scientific merit.²⁶⁴ Prohibiting “discrimination” against creationists is thus merely a cover for the legislature’s effort to facilitate the introduction into academic science departments of a group of faculty judged incompetent by their peers, so they may teach their politically approved religious doctrines.²⁶⁵ The law’s protection of creation scientists subverts both academic freedom and the education of students in science.

(4) Lemon's Effects Prong; Discarding the Lemon test; Stare Decisis

Scalia’s dissenting opinion aimed to rebut the majority’s conclusion that the Louisiana law failed the “purpose” prong of the *Lemon* test.²⁶⁶ He did not analyze whether the law might fail the “effects” test of *Lemon* (which asks whether the law would have the primary effect of advancing religion). But it is not hard to garner from Scalia’s “purpose” analysis what his take on the “effects” prong would be. His opinion made clear his conclusion that the law’s principal effects were to advance scientific truth and to serve students’ academic interests by introducing a balance of ideas into the science curriculum.²⁶⁷ The majority’s invalidation of the statute he called “repressive”²⁶⁸ and detrimental to the law’s goal of advancing not religion but “academic

²⁶¹ *Edwards*, 482 U.S. at 630 (Scalia, J., dissenting).

²⁶² The Balanced Treatment for Creation-Science and Evolution-Science Act, LA. REV. STAT. ANN. § 17:286.4(C) (1982).

²⁶³ *Edwards*, 482 U.S. at 630 (Scalia, J., dissenting).

²⁶⁴ *See id.* at 586-97 (majority opinion).

²⁶⁵ *See id.*

²⁶⁶ *Id.* at 610 (Scalia, J., dissenting).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 634.

freedom.”²⁶⁹ The effect of the creation science law, in his view, would be to avoid the “indoctrination” of students with the theory of evolution.²⁷⁰ Scalia’s inevitable conclusion would be that the law had, as its primary effect, the improvement of the education of the students in the state of Louisiana. No other conclusion is consistent with Scalia’s comment that the majority view amounted to a “Scopes-in-reverse” ruling that harmed students the Louisiana legislature had sought to protect with its creationist law.²⁷¹

Scalia questioned the *Lemon* purpose test generally, arguing that it is “far from an inevitable reading of the Establishment Clause that it forbids all government action intended to advance religion.”²⁷² Later, in *Lamb’s Chapel v. Center Moriches Union Free School District*, Scalia argued that the entire *Lemon* test should be scrapped.²⁷³ Using one of his more colorful metaphors, Scalia wrote, “[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys I will decline to apply *Lemon*.”²⁷⁴

An anti-evolution case could be a vehicle for the abandonment of the *Lemon* test. Several other Justices have expressed reservations about *Lemon* over the course of its existence, although the case has not been disavowed by a Supreme Court majority up to this point.²⁷⁵ Lower courts regard it as binding authority,²⁷⁶ even though, as one circuit court put it, it has been “widely criticized and occasionally ignored.”²⁷⁷

What Scalia would replace *Lemon* with is not clear, but it certainly would be a more pliant test permitting considerable latitude to government to recognize, encourage, and even

²⁶⁹ *Edwards*, 482 U.S. at 628.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 634.

²⁷² *Id.* at 639.

²⁷³ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring, joined by Thomas, J.).

²⁷⁴ *Id.* at 398-99.

²⁷⁵ *Lamb’s Chapel*, 508 U.S. at 398-99 (providing citations to other Justices’ criticisms of *Lemon*).

²⁷⁶ *E.g.*, *Skoros v. New York*, 437 F.3d 1 (2d Cir. 2006) (applying *Lemon* analysis to New York City schools’ policy on end of year holiday displays).

²⁷⁷ *Freiler*, 185 F.3d at 344.

promote religion. Even such a test, however, if adopted by a new conservative majority, might not lead to an anti-evolution victory. A narrow test, for example, based upon Justice Kennedy's idea that an Establishment Clause violation occurs when coercive government action forces a religious doctrine upon individuals, might still result in a ruling striking down a statute interfering with the teaching of evolution in the public schools, because of the coercive nature of the school environment, as discussed below.²⁷⁸

A final concern with the Scalia dissent concerns a matter he simply ignores: *stare decisis*. Whatever the fate of the *Lemon* test, the fact remains that twice the Supreme Court has ruled anti-evolution statutes to be unconstitutional.²⁷⁹ Both cases were decided by substantial majorities.²⁸⁰ The history of the campaign against evolution was clearly shown in these cases to be religiously based²⁸¹; it continues to be religiously based today.²⁸² Nothing has occurred since *Edwards* to undermine its factual underpinnings. Evolutionary theory is still the formidable cornerstone of the life sciences; scientific advances only confirm its truth. Keeping religious dogma out of science classrooms has been both principled and pragmatic, a means of preventing the coercion of religious belief and of preserving the educational worth of science instruction. A reversal in course by the Court would be a sign not that the earlier decisions were wrong, but that the shifting political views of the Court's membership enabled a new majority to assert its will. The doctrine of *stare decisis*, which has at its core the "very concept of the rule of law,"²⁸³ may appeal to some conservative justices as a ground on which to base a ruling in favor of the unimpeded teaching of evolution. While invocation of *stare decisis* is difficult to predict, at least three of the Court's more conservative justices, Kennedy, Alito and Roberts, have indicated it is an important consideration in constitutional adjudication, raising the possibility that they might vote in accord with the *Edwards* holding in a future evolution case on *stare decisis* grounds.²⁸⁴

(C) Background Influences: the Commitment to Intellectual Life

Justice Holmes famously observed that the law is more than a set of syllogisms, and that

²⁷⁸ See discussion *infra* Part IV(e) (discussing Justice Kennedy's views).

²⁷⁹ *Edwards*, 482 U.S. at 578; *Epperson v. Arkansas*, 393 U.S. 97 (1968).

²⁸⁰ See cases cited *supra* note 279.

²⁸¹ See cases cited *supra* note 279.

²⁸² The matter was exhaustively examined in *Kitzmiller* in 2005. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). See *supra* note 121 and accompanying text.

²⁸³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (joint opinion of Souter, J., O'Connor, J., and Kennedy, J.) (expressing need for vigorous *stare decisis* doctrine in constitutional decision making).

²⁸⁴ See *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (plurality opinion of Breyer, J. joined by Roberts, C.J. and Alito, J.) (describing Justice Alito's and Roberts's concern for *stare decisis*).

varied influences, “avowed or unconscious,” play a role in its development.²⁸⁵ One unspoken influence in an evolution case is the intellectual sensibility of judges, and their commitment to intellectual life. Justices of the Supreme Court are, among other things, public intellectuals. Reason plays a central role in their professional lives. Their work product is founded upon reason; at their best, they employ the tools of reasoning to produce written opinions that are scholarly and persuasive analyses of the reach of past precedent, the proper understanding of legal doctrines, and the relevance of the nation’s history and traditions.

Challenges to the teaching of evolution are challenges to reason itself—in science, the theory of evolution has unquestioned primacy.²⁸⁶ One preeminent twentieth century geneticist’s statement, quoted in recent literature, succinctly sums up academic sentiment: “Nothing in biology makes sense except in the light of evolution.”²⁸⁷ Evolution, academics say, is not a theory in the commonplace sense of that term; it is so well documented that it is a scientific fact.²⁸⁸ Professor Jerry Coyne states:

[E]vidence supporting [the modern theory of evolution] began to accumulate starting with Darwin’s 1859 *On the Origin of Species* and continues to inundate us today. Every bit of information we have gathered about nature is consonant with the theory of evolution, and there is not one whit of evidence contradicting it. Neo-Darwinism, like the theory of chemical bonds, has graduated from theory to fact.²⁸⁹

He concludes: “What a remarkably elegant theory it is, and what a vast body of evidence it explains! It makes sense of data from fields as diverse as paleontology, biogeography, embryology, anatomy, and molecular biology.”²⁹⁰ Leonard Susskind, professor of theoretical physics at Stanford University, notes the “silly spectacle of the Kansas school board . . . debating the scientific merits of one of the greatest products of the human intellect: Darwin’s theory of

²⁸⁵ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown and Company 1984) (1881).

²⁸⁶ *See infra* note 287.

²⁸⁷ Jerry Coyne, *The Faith that Dare Not Speak Its Name*, *THE NEW REPUBLIC*, August 22 & 29, 2005, at 25; Scott D. Sampson, *Evoliteracy*, in *INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT* 11, 216 (John Brockman ed., 2006) (quoting geneticist Theodosius Dobzhansky).

²⁸⁸ *See supra* note 287.

²⁸⁹ Coyne, *supra* note 287, at 6.

²⁹⁰ *Id.*

natural selection.”²⁹¹

Intelligent design, on the other hand, has been roundly repudiated. Professor Daniel C. Dennett calls intelligent design “one of the most ingenious hoaxes in the history of science.”²⁹² He describes this “ploy” to work as follows: “First you misuse or misdescribe some scientist’s work, provoking an angry rebuttal. Then, instead of dealing forthrightly with the charges leveled, you cite the rebuttal as evidence that there is a ‘controversy’ to teach.”²⁹³ Paleontologist Tim D. White at the University of California at Berkeley says simply, “A denial of evolution—however motivated—is a denial of evidence, a retreat from reason to ignorance.”²⁹⁴

Consciously favoring ignorance over reason might, and should, grate on anyone who values knowledge and uses his brains for a living. From judicial findings in past cases, from briefs of the parties and amici, and from their own knowledge, the members of the Supreme Court would be aware of the stature of evolutionary theory and its scientific ascendancy in the explanation of the development and diversity of life on earth. Scientific knowledge can be ignored, of course; Justice Scalia proved that in his dissent in *Edwards*.²⁹⁵ But other justices may value their (highly evolved) intelligence, and strongly resist the triumph of ignorance over reason that a ruling undermining the teaching of evolution would represent.

The justices are also lawyers; they are trained to look for evidence, to weigh and assess the facts, and to use the facts as a basis for legal conclusions. Science also deals with the facts, particularly those of the natural world. Supernatural explanations do not constitute evidence, either in the laboratory or the courtroom. If they did, one observer suggests, courts would allow various “explanations of culpability, including demons, angels, ghosts, goblins, trolls, vampires and aliens.”²⁹⁶ Fundamental to the enterprise of law is the commitment to reason, to evidence, and to intellectual honesty. It is these virtues that must guide the work of legal decision makers. These are the virtues that are threatened in anti-evolution cases, where mankind’s hard-won knowledge and the gift of reason are under attack.

(D) Background Influences: the Commitment to Educational Values

²⁹¹ Leonard Susskind, *The Good Fight*, in INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 24, 25 (John Brockman ed., 2006).

²⁹² Daniel C. Dennett, *The Hoax of Intelligent Design and How it was Perpetrated*, in INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 33 (John Brockman ed., 2006). Dennett is University Professor and Director of the Center for Cognitive Studies at Tufts University.

²⁹³ *Id.* at 41.

²⁹⁴ Tim D. White, *Human Evolution: The Evidence*, in INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 65, 80 (John Brockman ed., 2006).

²⁹⁵ See *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

²⁹⁶ Peter Dawson Buck, Letter to the Editor, N.Y. TIMES, Oct. 10, 2005, at A18.

Preserving the integrity of science education is a related background factor at work in the adjudication of anti-evolution laws. It is hard for the well-educated judge to ignore the deleterious effect of undermining the teaching of evolution, and of incorporating invalid pseudo-science into the nation's classrooms. Respected academics in the sciences have been outspoken in their concern about the teaching of science in America. Harvard physicist Lisa Randall bluntly states: "The current 'debate' over what to teach in science class is just embarrassing."²⁹⁷ Professor Scott Sampson writes of the special importance of scientific education today: in "a world . . . plagued by such ills as global warming, overpopulation, habitat destruction and rampant species loss, it is imperative" that people understand science and its principal ideas, such as evolution.²⁹⁸ Judge Jones in *Kitzmiller* noted the disadvantage students, deprived of a proper educational foundation in biology, would suffer in loss of career choices in the life sciences.²⁹⁹

Considering the educational effects of the anti-evolution campaign, Harvard professor Marc Hauser concludes: "Supporters of this movement [intelligent design] are functionally harming their own children as well as the children of dissenting parents."³⁰⁰ Hauser makes clear that he does not object to classroom discussion of controversial issues in science, but he refers to *legitimate* challenges within science, such as the current debate over the evolution of language, where scientific issues are unsettled and theories compete.³⁰¹ But education is undermined when politics is allowed to define the content of what counts as legitimate scientific debate. As expressed by Hauser, the critical distinction here is "between scientific challenges and sociopolitical ones."³⁰² The former are welcome in science class; the latter are illegitimate intrusions.

The values of education and academic inquiry are especially likely to be respected by members of the nation's highest court. Few government institutions rely as heavily on personnel who have attended the nation's foremost universities as does the U.S. Supreme Court. Five of the nine justices are Harvard Law School graduates (Roberts, Kennedy, Souter, Breyer, and Scalia), two graduated from Yale Law School (Alito and Thomas), and one each from Columbia (Ginsberg) and Northwestern (Stevens). The colleges they attended are similarly elite: Harvard, Princeton, Stanford, Cornell, the University of Chicago, Georgetown, and Holy Cross. Some

²⁹⁷ Lisa Randall, *Designing Words*, in INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 192, 203 (John Brockman ed., 2006).

²⁹⁸ Scott D. Sampson, *Evoliteracy*, in INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 216, 230-31 (John Brockman ed., 2006).

²⁹⁹ *Kitzmiller*, 400 F. Supp. 2d at 707. *See supra* note 121 and accompanying text.

³⁰⁰ Marc D. Hauser, *Parental Guidance Required*, in INTELLIGENT THOUGHT: SCIENCE VERSUS THE INTELLIGENT DESIGN MOVEMENT 205, 210 (John Brockman ed., 2006).

³⁰¹ *Id.*

³⁰² *Id.* at 209.

have served as law school faculty members.³⁰³ Allowing the teaching of evolution to be undermined betrays the academic values—values widely shared in society—that helped the Justices to attain their present status atop the nation’s legal pyramid. Again, it is not impossible to ignore these values: Justice Scalia has distanced himself from his own academic roots³⁰⁴ by his dissent in *Edwards* and by denigrating his highly educated and professionally trained judicial colleagues as merely part of a ruling professional “elite.”³⁰⁵

Proper education of children is a longstanding value in Supreme Court jurisprudence. In 1983, Justice Rehnquist, writing for the Court in *Mueller v. Allen*, acknowledged that “[a]n educated populace is essential to the political and economic health of any community.”³⁰⁶ The Court in *Griswold v. Connecticut* recognized that it is wrong for a state to deliberately “contract the spectrum of available knowledge.”³⁰⁷ Students must have access to ideas, to prepare “for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”³⁰⁸ Perhaps equally important, education expands the freedom of students to choose for themselves among artistic preferences, careers, avocations, religious dogmas, and the many life choices that each individual must face. To prepare young people to exercise this freedom, they must have access to the basic understandings that science, religion, the humanities, and the arts have to offer. Undermining the teaching of evolution deprives them of access to the best ideas in science, a classic example of “contract[ing] the spectrum of available knowledge.”³⁰⁹ Justices who themselves have benefited so greatly from high quality education, and who, as parents, have shared the concern of all parents about the best education for their children, may respond in a profound and personal way to the threat posed by the anti-evolution campaign to education.

³⁰³ Kennedy was an adjunct professor at McGeorge School of Law before his appointment to the Court. See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 191 (2005) (linking Kennedy’s academic experience to his belief in *stare decisis*). Justice Scalia, despite his support for the anti-intellectualism of those fighting evolution, taught at the law schools of the University of Virginia and the University of Chicago.

³⁰⁴ *Id.* Scalia graduated from Harvard Law School.

³⁰⁵ *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting); *Romer v. Evans*, 517 U.S. 620, 652 (1995) (Scalia, J., dissenting) (opposing the values of the “lawyer class from which the Court’s Members are drawn”).

³⁰⁶ *Mueller v. Allen*, 463 U.S. 388, 395 (1983).

³⁰⁷ *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

³⁰⁸ *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982) (Brennan, J., plurality opinion).

³⁰⁹ *Id.* at 866 (citing *Griswold*, 381 U.S. at 482).

(E) The Critical Vote of Justice Anthony Kennedy

Anthony Kennedy joined the Court in 1988, one year after *Edwards* was decided. After the retirement of Sandra Day O'Connor, he has been considered the new swing justice.³¹⁰ His views on the Establishment Clause assume great significance because of the possibility that he will be a fifth vote to undo prior jurisprudence under the Clause.³¹¹

Kennedy once expressed the view that the majority of the Court was guilty of “an unjustified hostility toward religion” because it held that a Christmas display of a crèche in a county courthouse violated the Establishment Clause.³¹² In the same opinion he aligned himself with Justice Scalia in stating that “[p]ersuasive criticism of *Lemon* has emerged.”³¹³ He also joined most of Scalia’s dissent in the 2005 case of *McCreary County v. ACLU of Kentucky*,³¹⁴ which insisted that the placement of the Ten Commandments in a county courthouse did not violate the Establishment Clause.³¹⁵ That dissent also charged that the effect of the majority opinion was “to ratchet up the Court’s hostility to religion.”³¹⁶

Kennedy made clear in his separate opinion in *County of Allegheny*³¹⁷ that he believed the Establishment Clause “permits government some latitude in recognizing the central role of religion in society.”³¹⁸ Practices that are within the nation’s cultural traditions, Kennedy maintained, cannot be barred by the Court under the Clause.³¹⁹ These include the ubiquitous

³¹⁰ During the 2005-06 term of the Court, Kennedy often cast the deciding vote in key cases. *Greenhouse*, *supra* note 187, at 1.

³¹¹ *Id.*

³¹² *County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part). Justice Harry Blackmun, author of the majority opinion, replied that “nothing could be further from the truth Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion.” *Id.* at 610.

³¹³ *Id.* at 655 (citing Justice Scalia’s dissent in *Edwards*, 482 U.S. at 636-40, along with other cases).

³¹⁴ *McCreary County v. ACLU*, 545 U.S. 844 (2005).

³¹⁵ *Id.* at 885 (Scalia, J., dissenting).

³¹⁶ *Id.* at 900.

³¹⁷ *County of Allegheny*, 492 U.S. at 573.

³¹⁸ *Id.* at 576.

³¹⁹ *Id.* at 673-74.

references to religion in Presidential proclamations and inaugurations, in courtrooms and on coins that proclaim “In God We Trust,” in the Pledge of Allegiance (“one nation, under God”), in prayers that open legislative sessions, and in city hall holiday displays adorned with religious symbols.³²⁰ Kennedy would allow religion a goodly share of the public space, enabling government to express its support and endorsement of religious belief. He has explicitly rejected the “endorsement test” in Establishment Clause jurisprudence because it would eliminate traditional government recognition and acknowledgment of religion.³²¹

However, Kennedy’s view of the correct application of the Establishment Clause is more subtle than Scalia’s. Alongside his expansive view of religious expression in public life is his commitment to a significant limiting principle, that “government may not coerce anyone to support or participate in any religion or its exercise.”³²² He has stated that unconstitutional coercion can be subtle and indirect, as well as obvious and direct. In *Lee v. Weisman*, Kennedy wrote an opinion for the Court striking down a policy permitting clergy-delivered prayers at Rhode Island public middle and high school graduations.³²³ Despite his stated respect for traditions of religious expression in *County of Allegheny*, Kennedy drew a line at school prayer, even in the context of a voluntary, traditional graduation ceremony.³²⁴ The graduation exercises, he wrote, were “in a fair and real sense, obligatory” for any student who felt the strong desire to attend the signature celebratory event marking the successful completion of school.³²⁵ Once present, the student would have to resist both group social pressure and adolescent peer pressure in order not to participate, or appear to participate, in the prayers occurring at the beginning and end of the ceremony.³²⁶ Kennedy deemed this unacceptable coercion, and therefore a violation of the Establishment Clause.³²⁷ Scalia, in dissent, rejected the notion of psychological coercion as a basis for finding a constitutional violation.³²⁸

³²⁰ *Id.*

³²¹ *Id.* at 674. *See also* Board of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

³²² *County of Allegheny*, 492 U.S. at 659. A decade later, Kennedy confirmed this belief, in joining the majority opinion in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), which invalidated a prayer at a public school sponsored football game, delivered by a student elected for the purpose by the high school student body.

³²³ *Lee v. Weisman*, 505 U.S. 577 (1992).

³²⁴ *Id.*

³²⁵ *Id.* at 586.

³²⁶ *Id.*

³²⁷ *Id.* at 587.

³²⁸ *Id.* at 642 (Scalia, J., dissenting). “I see no warrant for expanding the concept of coercion

Most significantly for the evolution cases to come, Kennedy identified the school setting as one requiring the heightened protection of the Establishment Clause.³²⁹ The “risk of indirect coercion” was “most pronounced” in school.³³⁰ He wrote that the classroom, though not the location of the event at issue in *Lee*, should be accorded even more constitutional concern than the graduation: “To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high.”³³¹

The teaching of evolution highlights the compulsions of the classroom and the need to free it of subtle or overt religious influence. The teacher controls the presentation and discussion of the topic; the instructional texts and assignments are chosen for the student; mandatory attendance laws compel the student’s presence; and tests and grading practices require the student to study and absorb the material presented. Unlike public holiday displays or graduation day prayers, the student cannot ignore what he sees or hears. If religious content is injected into the lesson, the student is compelled to learn it, study it, and even to repeat it if tested on the matter. The imposition of state-determined religious teaching could not be greater. Thus, if Kennedy were convinced that a school policy to subvert or undercut the theory of evolution was in reality an attempt to convey a religious doctrine in the classroom, whether done overtly or disguised as “creation science,” he likely would deem it a violation of the Establishment Clause.

Children in the classroom cannot be expected to protect themselves from arbitrary curricular decisions that affect their basic education. They, and their teachers, can easily fall victim to political decision making that responds to well-organized groups, driven by the desire to impose a religious ideology upon the science curriculum. The realities of power politics and education may appear clear to a justice like Anthony Kennedy, whose opinion for the Court in *Romer v. Evans* showed sensitivity to the need to restrain the use of raw political power to advance illegitimate ends.³³² Writing for the Court in another context, Kennedy expressed

beyond acts backed by threat of penalty—a brand of coercion that . . . is readily discernible to those of us who have made a career of reading the disciples of Blackstone rather than of Freud.” *Id.* Justice Thomas joined this opinion, as did Justice White and Chief Justice Rehnquist.

³²⁹ *Lee*, 505 U.S. at 592 (majority opinion). The school setting referred to here excludes activities after school hours. Kennedy joined the opinion of Justice Thomas for the Court in *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), which allowed a non-school sponsored evangelical club to operate after regular school hours, with parental permission required for student participation. *See also* Justice Kennedy’s opinion for the Court in *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

³³⁰ *Lee*, 505 U.S. at 592.

³³¹ *Id.* at 596.

³³² *Romer v. Evans*, 517 U.S. 620 (1996) (use of state power to make rights for homosexuals more difficult to enact into law).

concern about protecting freedom of thought from “repressive force[s]” in the law.³³³ Examples of the repressive use of political power are firmly lodged in the lineaments of the anti-evolution cases.

Kennedy’s willingness to look beyond the surface argument to the reality beneath is indicated in *Lee*.³³⁴ The United States as *amicus* had relied heavily on the supposed voluntary nature of the graduation exercises.³³⁵ Kennedy rejected this view, countering with the pithy observation: “Law reaches past formalism.”³³⁶ This is some evidence, at least, that he would not uncritically accept a state’s assertion that “creation science” was really science, or that the state’s manipulation of the science curriculum was just an exercise of academic freedom. With his belief in the notion that the classroom setting calls for careful Establishment Clause scrutiny and his commitment to an analysis that goes beyond the merely formalistic, Kennedy appears to be open to a full examination of the history behind the attempt to subvert the teaching of evolution in science classes. This sort of examination, undertaken in *Edwards* by Justice Lewis Powell, another moderate conservative, culminated in Powell’s finding that religious content infused “creation science” and that academic freedom was a sham defense of it.³³⁷

In *Lee*, Kennedy recognized that students’ experience in the classroom might entail being exposed “to ideas they find distasteful or immoral or absurd or all of these.”³³⁸ Certain ideas might be deemed by them “offensive and irreligious.”³³⁹ All this he accepted as part of the school experience for at least some students. It is a small step from this to surmise that he would reject the argument that justified the teaching of a religious view in the classroom, like the Biblical view of creation, in order to balance the presentation of scientific ideas that might offend certain students. Rather, Kennedy seems committed to the idea that religion must teach its tenets in the private sphere, not in state-run schools.

It is noteworthy in *Lee* that Kennedy was willing to rule against the administration of President George H.W. Bush, whose solicitor general argued in favor of the graduation prayers, as well as against several religious right activists filing *amicus* briefs, including Focus on the Family, the Southern Baptist Convention, the U.S. Catholic Conference, and the Christian Legal

³³³ *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

³³⁴ *Lee*, 505 U.S. at 577.

³³⁵ *Id.* at 594-595. Justice Scalia accepted the argument, while deriding Kennedy’s concern for subtle coercion as “incoherent” and “psychology practiced by amateurs.” *Id.* at 636 (Scalia, J., dissenting).

³³⁶ *Id.* at 595 (majority opinion).

³³⁷ *Edwards*, 482 U.S. at 597 (Powell, J., concurring).

³³⁸ *Lee*, 505 U.S. at 591.

³³⁹ *Id.*

Society.³⁴⁰ In recent times, he has incurred the ire of the religious right as a result of his opinions for the Court in *Lawrence v. Texas*³⁴¹ and *Roper v. Simmons*.³⁴² Some of these critics have even called for his impeachment.³⁴³ Given his independent nature, Kennedy is not likely to be concerned about incurring religious activists' displeasure with a ruling in the next evolution case.

IV. CONCLUSION

In 1968 and 1987, the Supreme Court decided two cases challenging the teaching of evolution in the public schools.³⁴⁴ Although the teaching of evolution was vindicated in both instances, it is possible that science will lose the next evolution case in the Supreme Court. Evolution is not vulnerable as a scientific theory, but it is vulnerable to political power. The strength of the religious right in the nation's politics, and two new appointments to the Court, raise the possibility that the precedent that last supported the teaching of evolution, *Edwards v. Aguillard*, will not survive. A new ultraconservative set of justices, including Justices Thomas,

³⁴⁰ *Id.* at 579.

³⁴¹ *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a criminal sodomy statute).

³⁴² *Roper v. Simmons*, 543 U.S. 551 (2005) (forbidding capital punishment for juveniles).

³⁴³ Dana Milbank, *And the Verdict on Justice Kennedy Is: Guilty*, WASH. POST, April 9, 2005, at A3:

To cheers and applause from those gathered at a downtown Marriott for a conference on "Confronting the Judicial War on Faith," [conservative activist Phyllis] Schlafly said that Kennedy had not met the "good behavior" requirement for office and that "Congress ought to talk about impeachment."

Next, Michael P. Farris, chairman of the Home School Legal Defense Association, said Kennedy "should be the poster boy for impeachment" for citing international norms in his opinions. "If our congressmen and senators do not have the courage to impeach and remove from office Justice Kennedy, they ought to be impeached as well."

Not to be outdone, lawyer-author Edwin Vieira told the gathering that Kennedy should be impeached because his philosophy, evidenced in his opinion striking down an anti-sodomy statute, "upholds Marxist, Leninist, satanic principles drawn from foreign law."

Id.

³⁴⁴ *Edwards*, 482 U.S. at 578; *Epperson*, 393 U.S. at 97.

Alito, Roberts, and Scalia, forms a block that might adhere to Justice Scalia's dissenting opinion in *Edwards*.³⁴⁵

Justice Kennedy is a possible fifth vote, although his position is far from certain. Kennedy's past opinions indicate he does not seek to limit the Establishment Clause as drastically as Scalia does. Further, he may not be persuaded by the Scalia dissent because of its many serious analytical flaws. In particular, Scalia's opinion strains to find a secular legislative purpose amid the religion-drenched history of the anti-evolution movement and the religious fervor behind the specific bill in Louisiana. He ignores the glaring appearance of references to God, and of religious objections to evolution in the debate leading to the passage of the Louisiana Act. He manages to write his opinion without any inquiry at all into the historical context of the law, and he fails to discuss the case of *Epperson v. Arkansas*, decided nineteen years before and ruling a similar statute unconstitutional.³⁴⁶ Reputable scientific opinion is cast aside, precedent is ignored, and religious indoctrination is confused with the academic teaching of science. Scalia's opinion seems designed to reach the result he prefers rather than the result precedent, history, and science all indicate. Justice Kennedy, likely to be concerned about these matters, and about the implications of an anti-evolution case for integrity of intellectual life and for the quality of public education in the nation, may be persuaded to adhere to the precedents set by *Epperson* and *Edwards*. If this is so, the next Supreme Court challenge to the teaching of evolution may yet favor evolution, and protect science teachers from involuntary enlistment into the ranks of proselytizers of the Christian faith.

³⁴⁵ *Edwards*, 482 U.S. at 610 (Scalia, J., dissenting).

³⁴⁶ *Epperson*, 393 U.S. at 97.