

# TEACHING EVOLUTION AFTER *KENNEDY* AND *MAHMOUD*

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*One of the longest running disputes at the intersection of education law and the First Amendment has involved conflict over evolutionary biology in American public schools. Through a century of nearly continuous litigation, creationist legislation and parental demands to exempt students from science instruction have been constrained by longstanding First Amendment doctrines.*

*That settlement is now unraveling. In *Kennedy v. Bremerton School District*, the Supreme Court abandoned its prior approach to the Establishment Clause in favor of a history-and-tradition analysis that is ill-suited to questions about modern scientific education. And in *Mahmoud v. Taylor*, the Court held that students' compulsory exposure to ideas conflicting with their parents' faith burdens religious exercise rights and triggers strict scrutiny.*

*This Essay provides the first comprehensive account of how these twin doctrinal shifts imperil the teaching of evolution. By tracing conflicts over evolution through three different eras—before, during, and after the regime ushered in by *Lemon v. Kurtzman*—this Essay shows how prior First Amendment doctrine cabined antievolution strategies, which included criminal statutes, “balanced-treatment” mandates, teacher-speech claims, and parental-rights suits. The Essay then evaluates *Mahmoud*, identifying two doctrinal disruptions: (1) exposure to disfavored ideas now constitutes a burden on religious exercise, and (2) strict scrutiny now reaches a broader swath of curricular challenges. Finally, the Essay forecasts the fallout: a surge in opt-out demands, heightened litigation risk, and an administrative chilling effect likely to erode already fragile scientific instruction.*

*As the first piece to frame *Kennedy* and *Mahmoud* as pivotal developments in the ongoing contest over science education, this Essay illuminates the doctrinal and institutional stakes of the Court's Religion Clause revisionism. It also offers a roadmap for those seeking to preserve evidence-based curricula in the face of resurgent antievolution advocacy and a decline in the public acceptance of scientific consensus.*

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INTRODUCTION

American public schools double as culture-war battlegrounds.<sup>1</sup> Political and legal clashes over LGBTQ inclusivity, vaccination mandates, climate change, and instruction on the history of racism have become regular and divisive features of public-school life in the past decade.<sup>2</sup>

This phenomenon has deep historical antecedents. Litigation over the role of evolution in the public-school curriculum has been a near-constant

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<sup>1</sup> See LaToya Baldwin Clark, *The Critical Racialization of Parents’ Rights*, 132 YALE L.J. 2139, 2176 (2023) (discussing the anti-critical race theory movement); Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461, 1477 (2017) (summarizing three waves of anti-gay curriculum laws, beginning in the late 1970s); Elizabeth Chu, James S. Liebman, Madeline Sims & Tim Wang, *Family Moves and the Future of Public Education*, 54 COLUM. HUM. RTS. L. REV. 469, 476 (2023) (describing challenges to public education on religious and parental rights grounds).

<sup>2</sup> See, e.g., Caroline Mala Corbin, *The Government Speech Doctrine Ate My Class: First Amendment Capture and Curriculum Bans*, 76 STAN. L. REV. 1473, 1480 (2024); Dorit Rubinstein Reiss, *Litigating Alternative Facts: School Vaccine Mandates in the Courts*, 21 U. PA. J. CONST. L. 207, 208–09 (2018); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 129 (2007).

feature of American law since the era-defining *Scopes* trial of 1925.<sup>3</sup> Even after the Supreme Court held, in 1968, that a statute barring instruction on evolution violated the Establishment Clause of the First Amendment,<sup>4</sup> over a dozen cases have addressed legal theories seeking to remove, limit, or obfuscate public instruction on evolutionary biology.<sup>5</sup>

Historically, these efforts have consistently failed. But First Amendment law has shifted dramatically in a short period of time, with the Supreme Court simultaneously narrowing the application of the Establishment Clause while expanding the reach of the Free Exercise Clause.<sup>6</sup>

In *Kennedy v. Bremerton School District*, the Supreme Court replaced the venerable test established in *Lemon v. Kurtzman* with a history-and-tradition methodology as the primary mechanism for resolving Establishment Clause issues.<sup>7</sup> While the *Lemon* precedent had supported evidence-based instruction on evolution, it is unclear how a history-and-tradition analysis will apply to future cases.<sup>8</sup>

Most recently, in *Mahmoud v. Taylor*, the Supreme Court sided with parents demanding opt-outs from curricular content that they believed would undermine their children's religious beliefs.<sup>9</sup> That specific content involved reading materials with themes that promoted acceptance of the LGBTQ community, marriage equality, and non-binary identity.<sup>10</sup> But writing in dissent, Justice Sotomayor warned that the “[n]ext to go could be teaching

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<sup>3</sup> See Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 781 (2003); see also Edward J. Larson, *The Scopes Trial and the Evolving Concept of Freedom*, 85 VA. L. REV. 503, 524–25 (1999).

<sup>4</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

<sup>5</sup> See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708–09 (M.D. Pa. 2005) (striking down district policy that mandated classroom disclaimers around evolution); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 520–21 (9th Cir. 1994) (rejecting teacher's challenge to the curricular inclusion of evolution); *Edwards v. Aguillard*, 482 U.S. 578, 582–83 (1987) (striking down law requiring classroom balance between creationism and evolution).

<sup>6</sup> See Justin Driver, *Three Hail Marys: Carson, Kennedy, and the Fractured Détente Over Religion and Education*, 136 HARV. L. REV. 208, 209–10 (2022) (“[A]s recently as the turn of the century, it seemed virtually unimaginable that the Supreme Court would have voted to grant certiorari in either *Carson* or *Kennedy*, let alone that it would find the underlying claims of religious infringement meritorious.”); Frank S. Ravitch, *Unprincipled*, 61 HOU. L. REV. 517, 519 (2024) (arguing that the Court has “render[ed] the Establishment Clause subservient to the Free Exercise Clause and the Free Speech Clause”).

<sup>7</sup> *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

<sup>8</sup> See Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 75 (2023) (explaining that a history-and-tradition test has implications for other areas of law); Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479 (2023) (noting the Court's reliance on “‘living traditionalism’: ‘traditionalist’ because it looks to political traditions, and ‘living’ because the traditions postdate ratification”).

<sup>9</sup> 145 S. Ct. 2332, 2342 (2025).

<sup>10</sup> *Id.* at 2343–44.

on evolution.”<sup>11</sup>

The consequences of decisions like *Mahmoud* on the LGBTQ community have been analyzed by other authors in a robust and still-developing literature.<sup>12</sup> The impact of the Supreme Court’s recent First Amendment jurisprudence on science education has been less well studied, despite general interest in the declining influence of scientific expertise.<sup>13</sup> This Essay is the first to analyze *Kennedy*’s and *Mahmoud*’s implications for instruction on evolution, and it anticipates a significant chilling effect.

The consequences may be enormous. Evolution is a foundational component of modern biology.<sup>14</sup> It is profoundly relevant to important research in applied fields as diverse as medicine (how to address antibiotic resistance), agriculture (how to preserve diversity in populations of crops and pollinators), and environmental science (how to anticipate invasive species and predict the consequences of climate change on biodiversity).<sup>15</sup> Opponents of evolution have also targeted other key scientific fields when those fields produce data that support evolutionary accounts (such as carbon dating, used to establish the age of fossils).<sup>16</sup>

More broadly, a retreat from teaching well-established scientific conclusions couples with other contemporary “post-truth” trends, such as

<sup>11</sup> *Id.* at 2395 (Sotomayor, J., dissenting).

<sup>12</sup> *See, e.g.*, Jordan Blair Woods, *The New Sexual Deviancy*, 113 GEO. L.J. 911, 916 (2025) (arguing that “the erosion of U.S. democratic institutions and norms have fueled conditions in recent years for opponents of LGBTQ+ rights to weaponize moral panics as a means of executing right-wing populist and Christian nationalist agendas”); Luke A. Boso, *Exclusionary Expressive Conduct*, 66 B.C. L. REV. 295, 299 (2025) (“[I]n disputes about LGBTQ rights and antidiscrimination principles, the Court has either . . . applied a deferential [review] to claims rooted in queer exclusion, or applied a rigorous version to claims rooted in queer inclusion.”); Kate Redburn, *The Equal Right to Exclude: Religious Speech and the Road to 303 Creative LLC v. Elenis*, 112 CALIF. L. REV. 1879, 1938 (2024) (documenting history and success of advocacy groups arguing “that religious freedom authorized excluding gays and lesbians from places of public accommodation”).

<sup>13</sup> *See, e.g.*, Sapna Kumar, *Scientific and Technical Expertise After Loper Bright*, 74 DUKE L.J. 1749, 1754 (2025) (noting that “agencies are now under significant control by generalist judges who neither possess scientific backgrounds nor have access to relevant experts,” and arguing that “judges [may thus] make major errors regarding science and technology”).

<sup>14</sup> *See, e.g.*, Stephen Jay Gould, *Justice Scalia’s Misunderstanding*, 5 CONST. COMMENTARY 1, 9–11 (1988); Theodosius Dobzhansky, *Nothing in Biology Makes Sense Except in Light of Evolution*, 35.3 AM. BIOLOGY TEACHER 125, 125–29 (1973); Amicus Curiae Brief of 72 Nobel Laureates, 17 State Academies of Science, and 7 Other Scientific Organizations, in Support of Appellees at 25–26, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (No. 85-1513) [hereinafter Amicus Curiae Brief]. *See generally* DOUGLAS J. FUTUYMA, *EVOLUTIONARY BIOLOGY* (3d ed. 1998).

<sup>15</sup> *See, e.g.*, NORMAN A. JOHNSON, *DARWIN’S REACH: 21ST CENTURY APPLICATIONS OF EVOLUTIONARY BIOLOGY* 8–35, 173, 225–28 (2021).

<sup>16</sup> *See* Michael Brant Shermer, *Science Defended, Science Defined: The Louisiana Creationism Case*, 16 SCI., TECH., & HUM. VALUES 517, 517–38 (1991) (arguing that nuclear physics is challenged by “creation scientists” only because it is used to date the earth); *see also* Amicus Curiae Brief *supra* note 14, at 16 n.19, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (No. 85-1513) (attacking arguments that use the fossil record to support creation theories).

climate denialism and vaccine skepticism.<sup>17</sup> In a democratic system that depends on informed self-governance, antiscience trends and a rejection of evidence-based curricula may further degrade the public's capacity to educate itself and perform civic duties.<sup>18</sup>

This Essay begins by providing an overview of the history of evolution in the public schools, litigation challenging its curricular inclusion, and the legal system's responses. Part I explains that, in decades following previous controversies over evolution, such as the 1925 *Scopes* trial, a chilling effect resulted in the de-emphasis of science instruction in schools. The Essay then divides later antievolution legal challenges into three eras: cases preceding *Lemon v. Kurtzman*'s articulation of a general Establishment Clause test, those decided when the *Lemon* test governed cases involving the separation of church and state, and the current era following *Lemon*'s implicit reversal. It observes that key precedents are newly vulnerable after the fall of *Lemon*.

Part II analyzes the Court's *Mahmoud* decision. It notes similarities, and certain important differences, between litigation over LGBTQ inclusion and scientific instruction. It then identifies two significant doctrinal disruptions flowing from *Mahmoud*. First, it highlights the novel principle that student exposure to contrary ideas may burden parents' religious exercise rights, predicting that principle will greatly impact the administration of public schools. Second, it explores how *Mahmoud*'s application of strict scrutiny rather than rational basis review reflects a new limitation on *Employment Division v. Smith*.<sup>19</sup> This Essay notes that the Court has been reluctant to apply *Smith* in recent years, suggesting that *Smith* may be undergoing stealth reversal.<sup>20</sup>

Part III then examines the implications of these developments for scientific education on evolution. It contends that, even following the Court's extensive revision of case law involving the Religion Clauses of the

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<sup>17</sup> See Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 181, 241 (2018) (pointing to a rise in climate and vaccine skepticism); Sarah C. Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351, 1355–62 (2019) (defining post-truth trends); Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 570 (2020) (identifying a pattern of indifference to the truth in politics); Joëlle Anne Moreno, *Extralegal Supreme Court Policy-Making*, 24 WM. & MARY BILL RTS. J. 451, 459 (2015) (shifting some blame for misinformation onto the Supreme Court).

<sup>18</sup> See Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348, 2386 (2017) (noting “areas in which each ‘side’ has its own ‘facts’” and observing that “the rise of ‘truthiness,’ though the subject of late-night comedy, is a serious threat to sustaining a working social order in a constitutional democracy”); see also Maureen Edobor, *The Right to Truth*, 72 UCLA L. REV. 962, 1013 (2025) (arguing that “a commitment to truth in public education is foundational—a constitutional and moral necessity that transcends transient political winds”).

<sup>19</sup> 494 U.S. 872 (1990).

<sup>20</sup> See Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 3 (2010).

First Amendment, instruction relating to evolutionary biology should formally withstand new legal challenges.

However, clear historical parallels suggest that *Mahmoud* will nonetheless lead to a decline in the quality of scientific instruction. The prominence of *Mahmoud* is all but certain to lead to increasing opt-out requests. Schools will likely respond by de-emphasizing content, including scientific education, that might otherwise result in burdensome litigation or administratively challenging opt-outs.<sup>21</sup> The antievolution movement may thus achieve, through a chilling effect, a result that it has been unable to achieve through decades of litigation.

## I

### EVOLUTION IN CLASSROOMS AND COURTROOMS

#### A. *Evolution's Place in American Schools*

Charles Darwin published his seminal and transformative work, widely known today as *The Origin of Species*, in 1859.<sup>22</sup> The centerpiece of *Origin* was its explanation of natural selection as a vehicle for producing biological change—and new species—over generations of reproducing organisms.<sup>23</sup> Although Darwin was not the first to propose that organisms change over generational time,<sup>24</sup> his ideas were transformative and came to dominate the field of biology.<sup>25</sup>

The theological implications of natural selection were quickly contested. Asa Gray, a Harvard botanist and friend of Darwin's, reconciled natural selection with his own deep Christian faith and introduced evolution to American scientific audiences.<sup>26</sup> Today, the mainstream philosophical

<sup>21</sup> See Ira C. Lupu, *The Centennial of Meyer and Pierce: Parents' Rights, Gender-Affirming Care, and Issues in Education*, 26 J. CONTEMP. LEGAL ISSUES 147, 216 (2025) ("Monitoring the allegedly objectionable content of public education will be intrusive at best, and a chronic administrative nightmare for judges and schools at worst.")

<sup>22</sup> CHARLES DARWIN, *ON THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION, OR THE PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE* (1859). Six editions were published during Darwin's lifetime, with the leading "On" dropped from the title in the sixth and final publication.

<sup>23</sup> See NORMAN A. JOHNSON, *DARWINIAN DETECTIVES: REVEALING THE NATURAL HISTORY OF GENES AND GENOMES* 1–20 (2007); FUTUYMA, *supra* note 14, at 15.

<sup>24</sup> See, e.g., James T. Costa, *Wallace, Darwin, and Natural Selection*, in AN ALFRED WALLACE COMPANION 19 (Charles H. Smith, James T. Costa & David Collard eds., 2019) (comparing Darwin's theory with that of his contemporary, Alfred Wallace); DAVID SEDLEY, *CREATIONISM AND ITS CRITICS IN ANTIQUITY* (2008) (examining ancient theories of evolutionary change).

<sup>25</sup> See JONATHAN WEINER, *THE BEAK OF THE FINCH: A STORY OF EVOLUTION IN OUR TIME* 128 (2014) ("Probably no other major branch of science today is so haunted, dominated, and driven by the thoughts of one man.")

<sup>26</sup> See Janet Browne, *Asa Gray and Charles Darwin: Corresponding Naturalists*, 15.2 HARV. PAPERS IN BOTANY 209, 209–10 (2010).

consensus has been that religion and science are “non-overlapping magisteria” that are separate and compatible, rather than conflicting.<sup>27</sup>

Nevertheless, many were troubled by the conflict between Darwin’s theory and a literal interpretation of the Biblical creation account.<sup>28</sup> In the decades that followed, scientists developed ever greater understandings of evolutionary mechanisms, but religious objections remained profound among substantial sections of the American public.<sup>29</sup>

The increasing prominence of evolutionary theory within the scientific community, the rise of compulsory public education, and strong opposition by religious fundamentalists exploded into fierce cultural conflict in the early twentieth century.<sup>30</sup> This conflict culminated in the passage of the Butler Act, a novel Tennessee law criminalizing the teaching of evolution in public schools.<sup>31</sup> That law was quickly challenged by the ACLU in the famous 1925 *Scopes* trial, after high school teacher John Scopes volunteered to be arrested for a test case.<sup>32</sup>

The *Scopes* trial itself has been covered extensively (by this author<sup>33</sup> and others<sup>34</sup>) elsewhere in the literature. Though arguably the most famous case involving evolution<sup>35</sup> (in part due to subsequent Broadway and

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<sup>27</sup> See Caleb E. Mason, *What Is Truth? Setting the Bounds of Justiciability in Religiously-Infllected Fact Disputes*, 26 J.L. & RELIGION 91, 102–03 (2011) (“[There is] consensus surrounding the distinction between propositions of which ‘true’ and ‘false’ may properly be predicated, and propositions to which those predicates do not apply. Religious beliefs . . . are uniformly in the latter category. This model . . . has famously been called the ‘non-overlapping magisteria’ model.”); Stephen Jay Gould, *Nonoverlapping Magisteria*, 106 NAT. HIST. 16, 16 (1997) (recognizing that evolution and creationism can coexist).

<sup>28</sup> See PETER BOWLER, *DARWIN DELETED: IMAGINING A WORLD WITHOUT DARWIN* 23 (2013) (“Darwinism became a kind of bogeyman, an image invoked to frighten the faithful by highlighting how easy it was for science to undermine faith.”); A. Hunter Dupree, *The First Darwinian Debate in America: Gray Versus Agassiz*, 88 DAEDALUS 560, 560–62 (1959) (discussing early public debates between Gray, who reconciled evolution with religion, and fellow scientist Louis Agassiz, who rejected the theory in part on religious grounds).

<sup>29</sup> See Ruth C. Stern & J. Herbie DiFonzo, *Dogging Darwin: America’s Revolt Against the Teaching of Evolution*, 36 N. ILL. U. L. REV. 33, 35 (2016).

<sup>30</sup> See Larson, *supra* note 3, at 509–12 (explaining majoritarian and religious justifications for anti-evolution lawmaking); Randy Moore, *Creationism in the United States: I. Banning Evolution from the Classroom*, 60 AM. BIOLOGY TEACHER 486, 491 (1998) (describing supporters and opponents of Scopes’s challenge to the Butler Law in Tennessee).

<sup>31</sup> *Scopes v. State*, 289 S.W. 363, 363 (Tenn. 1927).

<sup>32</sup> *Id.*

<sup>33</sup> See ALEXANDER GOUZOULES & HAROLD GOUZOULES, *THE HUNDRED YEARS’ TRIAL: LAW, EVOLUTION, AND THE LONG SHADOW OF SCOPES V. TENNESSEE* (2025).

<sup>34</sup> See, e.g., EDWARD J. LARSON, *SUMMER FOR THE GODS: THE SCOPES TRIAL AND AMERICA’S CONTINUING DEBATE OVER SCIENCE AND RELIGION* 89–110 (1997); Jonathan K. Van Patten, *The Trial of John Scopes*, 66 S.D. L. REV. 273 (2021); Kevin P. Lee, *Inherit the Myth: How William Jennings Bryan’s Struggle with Social Darwinism and Legal Formalism Demythologize the Scopes Monkey Trial*, 33 CAPITOL U. L. REV. 347 (2004).

<sup>35</sup> See Tom Arnold-Forster, *Rethinking the Scopes Trial: Cultural Conflict, Media Spectacle, and Circus Politics*, 56 J. AM. STUD. 142, 142 (2022).

Hollywood dramatizations<sup>36</sup>), debates over evolution and education in the 1920s were conceptually distinct from later ones that began in the 1960s for at least three reasons.

For one, scientific understanding of evolutionary processes underwent dramatic advancement from the 1930s through the 1950s—a period of discovery known as the Modern Synthesis.<sup>37</sup> Though the vast majority of scientists during the 1920s agreed that evolution took place, at that point there was widespread disagreement about the mechanisms through which it occurred.<sup>38</sup> In later decades, these questions were answered by a complex and intricate body of evidence, including genetic data not previously available and quantitative models that addressed concerns about the significance of natural selection as an evolutionary mechanism.<sup>39</sup>

And, critically, pseudo-scientific applications of evolutionary theory, such as eugenics, social Darwinism, and scientific racism, were gradually rejected and discredited by scientists through the early and middle periods of the twentieth century.<sup>40</sup> These views had never been exclusively held by, or universally held among, evolutionary biologists.<sup>41</sup> But their prominence among researchers of the 1920s lent some legitimacy to morality-based critiques of scientific theories.<sup>42</sup> By the 1960s, advancements in the field and a new consensus made those arguments obsolete.<sup>43</sup>

Finally, governing constitutional doctrines at the time of the *Scopes* trial were profoundly different from later iterations. Critically, the Establishment

<sup>36</sup> See Gad Guterman, *Field Tripping: The Power of Inherit the Wind*, 60 THEATRE J. 563, 564 (2008) (analyzing the play *Inherit the Wind*, which is based on the *Scopes* trial).

<sup>37</sup> Philippe Huneman, *Special Issue Editor's Introduction: "Revisiting the Modern Synthesis,"* 52 J. HIST. BIOLOGY 509 (2019). See generally ERNST MAYR & WILLIAM B. PROVINE, THE EVOLUTIONARY SYNTHESIS: PERSPECTIVES ON THE UNIFICATION OF BIOLOGY (1980).

<sup>38</sup> See, e.g., Edward L. Rice, *Darwin and Bryan—A Study in Method*, 61 SCIENCE 243, 245 (1925) (arguing that sexual selection, a theory introduced by Darwin to explain extravagant traits like the peacock's tail, had been "relegated by many to the rank of a somewhat doubtful hypothesis"); THE WORLD'S MOST FAMOUS COURT TRIAL: THE TENNESSEE EVOLUTION CASE 154–55 (National Book Co. ed. 1925) (presenting expert testimony that the "general principle of evolution has nothing to do with natural selection").

<sup>39</sup> See STEPHEN JAY GOULD, THE STRUCTURE OF EVOLUTIONARY THEORY 508–11 (2002).

<sup>40</sup> See *id.* at 512; Walter Bodmer, R. A. Bailey, Brian Charlesworth, Adam Eyre-Walker, Vernon Farewell, Andrew Mead & Stephen Senn, *The Outstanding Scientist, R.A. Fisher: His Views on Eugenics and Race*, 126 HEREDITY 565 (2021) (recounting the views of a prominent scientist that supported eugenics); Paul A. Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL'Y 57, 65 (2008) (citing instances of public rejection of eugenics).

<sup>41</sup> See generally PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* (2008) (documenting arguments involving eugenics at the Supreme Court).

<sup>42</sup> See, e.g., Lee, *supra* note 34 (documenting and contextualizing William Jennings Bryan's opposition to the teaching of evolution).

<sup>43</sup> See, e.g., GOULD, *supra* note 39, at 512.

Clause had not yet been incorporated against the states in 1925.<sup>44</sup> Many of the arguments in *Scopes* thus turned on provisions of the Tennessee state constitution.<sup>45</sup> Later cases would almost all turn on the U.S. Constitution.<sup>46</sup>

The *Scopes* trial did, however, have a pronounced impact on American education that remains highly relevant. Schools and textbook publishers, anxious to avoid another media circus and courtroom drama, deemphasized evolutionary theory after 1925.<sup>47</sup> As Judge William Overton summarized in a later case: “Between the 1920’s and early 1960’s, anti-evolutionary sentiment had a subtle but pervasive influence on the teaching of biology in public schools. Generally, textbooks avoided the topic of evolution and did not mention the name of Darwin.”<sup>48</sup>

Evolution’s return to American classrooms in the 1950s and 60s was prompted by an unlikely catalyst: the Soviet space program.<sup>49</sup> In October 1957, after the launch of the satellite Sputnik, the USSR appeared to take a commanding lead in the budding space race.<sup>50</sup> The federal government committed itself to investing in American science, and its efforts to modernize education included implementation of biology curricula that incorporated the post-Synthesis understanding of evolution.<sup>51</sup>

The silence between *Scopes* and Sputnik demonstrates the power of litigation to deter curricular choices, even when direct efforts fail in courtrooms or state houses. John Scopes was not ultimately convicted of violating the Butler Act.<sup>52</sup> His trial was generally regarded as embarrassing for the prosecution, and especially for its central figure, William Jennings

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<sup>44</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (analyzing the Establishment Clause as incorporated against the states).

<sup>45</sup> *Scopes v. State*, 289 S.W. 363, 364–66 (Tenn. 1927).

<sup>46</sup> See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 709 (M.D. Pa. 2005) (holding that a local school district policy violates the federal Establishment Clause).

<sup>47</sup> Analysis of historical high school biology textbooks reveals a contraction in the explicit treatment of evolution after 1925. See *20th Century High School Biology Textbooks Reviewed and Ranked*, TEXTBOOK HIST. (Dec. 19, 2020), <https://textbookhistory.org/20th> [<https://perma.cc/G283-CC59>]. Texts from the late 1920s were most likely to limit or omit evolutionary concepts. See *id.* Those concepts began to reappear during the 1940s and 1950s, and by the 1960s evolution had largely returned to biology instruction. See *id.* The most widely adopted book remained largely silent until late in this period. See Stephen Jay Gould, *Moon, Mann, and Otto*, 91 NAT. HIST. 4 (Dec. 10, 1981). *Modern Biology*, authored by Truman J. Moon and his co-authors, reached a large portion of American high school students. See *id.* Moon’s text euphemized its presentation of evolution, omitted human evolution altogether, and avoided mention of Darwin’s name until the early 1960s. See *id.*

<sup>48</sup> *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1259 (E.D. Ark. 1982).

<sup>49</sup> *Id.*; Stern & DiFonzo, *supra* note 29, at 59–61.

<sup>50</sup> See *McLean*, 529 F. Supp. at 1259.

<sup>51</sup> See *id.*; Gerald Skoog, *Topic of Evolution in Secondary School Biology Textbooks: 1900-1977*, 63 SCI. EDUC. 621, 635–36 (1979) (explaining that biology curriculum neglected the study of evolution until the development of federally funded BSCS textbooks in the 1960s); Stern & DiFonzo, *supra* note 29, at 59–60.

<sup>52</sup> See *Scopes v. State*, 289 S.W. 363, 367 (Tenn. 1927).

Bryan.<sup>53</sup> Relatively few states followed Tennessee's lead in banishing evolution from public schools.<sup>54</sup> And by 1960, two legal scholars wrote that it would be "inconceivable" for a state legislature to attempt to ban evolution again in their "more sophisticated" age.<sup>55</sup> Yet despite all that, fear of another *Scopes* trial deterred schools from providing meaningful instruction on evolution for decades. Only a national security crisis and federal intervention changed this unsettling dynamic.

## B. Legal Challenges to Evolution

### I. The Pre-Lemon Era

Modern biology materials, informed by the Modern Synthesis and reflecting the growing consensus among biologists about the mechanisms of evolutionary change,<sup>56</sup> set the stage for legal conflict in the three states that retained antievolution laws: Tennessee, Arkansas, and Mississippi. Tennessee's Butler Act was the first to fall. Wary of an embarrassing repetition of the *Scopes* trial, the state legislature simply repealed the law when it was challenged again in the 1960s.<sup>57</sup>

A more consequential case was then brought by Susan Epperson against Arkansas's law forbidding state instructors to teach, or select textbooks teaching, "the theory or doctrine that mankind ascended or descended from a lower order of animals."<sup>58</sup> Epperson's suit was successful at the trial level and then rejected by the state supreme court<sup>59</sup> before the U.S. Supreme Court granted certiorari.

In an opinion authored by Justice Abe Fortas, the Court held that Arkansas's antievolution law violated the First Amendment's Establishment Clause.<sup>60</sup> Fortas's reasoning presaged later Establishment Clause holdings—specifically the subsequent opinion in *Lemon v. Kurtzman*.<sup>61</sup> He explained that governmental actions must be neutral toward religion: Laws that either

<sup>53</sup> See RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 198–202 (1948).

<sup>54</sup> See Stern & DiFonzo, *supra* note 29, at 61–62 ("Anti-evolution statutes were as dead as dinosaurs.").

<sup>55</sup> Thomas I. Emerson & David Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522, 522, 525 (1960).

<sup>56</sup> See John L. Rudolph, *Teaching Materials and the Fate of Dynamic Biology in American Classrooms after Sputnik*, 53 TECH. & CULTURE 1, 4–36 (2012) (explaining that the Biological Sciences Curriculum Study project revolutionized the field of biology, introducing a more "modern, dynamic biology").

<sup>57</sup> See Arnold B. Grobman, *Editorial: Issues in Science Education*, 35 SCI. TCHR. 18 (1968).

<sup>58</sup> *Epperson v. Arkansas*, 393 U.S. 97, 98–99 (1968).

<sup>59</sup> *State v. Epperson*, 416 S.W.2d 322, 322 (Ark. 1967), *rev'd sub nom.*, 393 U.S. 97 (1968).

<sup>60</sup> *Epperson*, 393 U.S. at 103.

<sup>61</sup> 403 U.S. 602 (1971); see William M. Janssen, *Toiling in the Lemon Groves: Prelude to the Endorsement Test*, 7 CHARLESTON L. REV. 691, 698 n.32 (2013).

aid religion or exhibit hostility toward it violate the First Amendment.<sup>62</sup> Quoting an earlier decision, Fortas observed that “the state has no legitimate interest in protecting . . . religions from views distasteful to them,”<sup>63</sup> helping to distinguish conflicts over curricular *ideas* from conflicts over compulsory *actions*, such as school prayer or recitations of the Pledge of Allegiance.<sup>64</sup>

Fortas also looked to the purpose of the challenged law, explaining that Arkansas had sought to “blot out a particular theory because of its supposed conflict with the Biblical account, literally read.”<sup>65</sup> He noted that Arkansas’s law was less candid about its purpose than the Butler Act had been; nevertheless, its intent was beyond dispute.<sup>66</sup>

Though no justice dissented, Justice Hugo Black penned a negative concurrence.<sup>67</sup> Black conceded that the challenged statute might be too vague to enforce, but he was not convinced that it violated the First Amendment and expressed his own doubts about evolution.<sup>68</sup> Black also questioned whether the Court’s decision “infringes the religious freedom of those who consider evolution an anti-religious doctrine,”<sup>69</sup> mirroring the *Mahmoud* decision’s reasoning roughly fifty years later.<sup>70</sup>

With *Epperson* standing as an unambiguous and controlling precedent, Mississippi’s Supreme Court struck down the final *Scopes*-era antievolution law in 1970.<sup>71</sup> For the first time since the 1920s, no states criminalized the teaching of scientific doctrine in public schools.<sup>72</sup>

## 2. *The Era of Lemon*

One year after the fall of the final antievolution criminal statute, the

<sup>62</sup> *Epperson*, 393 U.S. at 106.

<sup>63</sup> *Id.* at 107 (quoting *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)).

<sup>64</sup> See Kristi L. Bowman, *The Government Speech Doctrine and Speech in Schools*, 48 WAKE FOREST L. REV. 211, 243 (2013) (“The two antievolution cases are the exceptions to this rule, and perhaps that is because they focused squarely on conflicts about the academic curriculum as opposed to daily mandatory practices that were not studied or tested.”). Compare *Epperson*, 393 U.S. 97 (1968) (ruling against a ban on teaching evolution and addressing a conflict over a curricular idea), with *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (ruling against the requirement for students to salute the flag and pledge allegiance and addressing a conflict over a compulsory action), and *Engel v. Vitale*, 370 U.S. 421 (1962) (ruling against state-sponsored school prayer and addressing a conflict over a compulsory action).

<sup>65</sup> *Epperson*, 393 U.S. at 109.

<sup>66</sup> *Id.* at 108–09.

<sup>67</sup> *Id.* at 109 (Black, J., concurring).

<sup>68</sup> *Id.* at 114.

<sup>69</sup> *Id.* at 113.

<sup>70</sup> Compare *id.* (noting uncertainty regarding whether the court’s decision is truly a “neutral” one), with *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2342 (2025) (“[G]overnment burdens the religious exercise of parents when it requires them to submit their children to instruction that poses ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill.”).

<sup>71</sup> *Smith v. State*, 242 So. 2d 692, 698 (Miss. 1970).

<sup>72</sup> See Stern & DiFonzo, *supra* note 29, at 61–62.

Supreme Court entrenched similar reasoning in the hugely influential decision *Lemon v. Kurtzman*.<sup>73</sup> The *Lemon* plaintiffs challenged the constitutionality of public aid to private religious schools.<sup>74</sup> The Court struck down the challenged programs, holding that they violated the First Amendment's prohibition against establishment of religion.<sup>75</sup>

*Lemon's* later importance stemmed from its articulation of a governing test for Establishment Clause cases. The *Lemon* test required that a challenged governmental action satisfy three conditions: It must (1) have a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive governmental entanglement with religion.<sup>76</sup> Justice Fortas was already gone from the Court, and *Lemon* did not cite *Epperson*. But the *Lemon* test echoed *Epperson's* reasoning—especially Fortas's focus on the impermissibly religious purpose of Arkansas's antievolution law and his explanation that government may neither aid nor impede religion.<sup>77</sup> While it remained binding law, *Lemon* played a role in most Establishment Clause cases, including those involving evolution.<sup>78</sup>

The antievolution movement hardly conceded defeat after *Epperson*. Spurred on by the increasing prominence of evolution in school curricula, activists began advocating for new measures that avoided criminal sanctions against teachers.<sup>79</sup>

These activists adopted several strategies. First, they sought passage of statutes requiring schools to balance instruction on evolution with explanations of humanity's origins that were consistent with a literal Biblical account.<sup>80</sup> Second, where local curricula included evolutionary science, they argued that teachers' First Amendment rights empowered them to advance their own dissenting views in the classroom. One important case sought to

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<sup>73</sup> 403 U.S. 602 (1971).

<sup>74</sup> *Id.* at 607.

<sup>75</sup> *See id.* at 607, 625.

<sup>76</sup> *Id.* at 612–13.

<sup>77</sup> *See* Janssen, *supra* note 61, at 698 n.32. *Compare Lemon*, 403 U.S. at 612–13 (noting that a statute violates the Establishment Clause unless it has a secular purpose, neither inhibits nor advances religion, and does not significantly entangle government with religion), *with Epperson v. Arkansas*, 393 U.S. 97, 106, 109 (1968) (holding that Arkansas's law came from a religious motivation and that the State should not adopt any programs that may aid or oppose any religion).

<sup>78</sup> *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987) (utilizing the three-pronged *Lemon* test to determine whether state action violated the Establishment Clause). The Court did not apply *Lemon* in discrete areas such as legislative prayer, where an “unambiguous and unbroken history of more than 200 years” weighed in favor of the practice of opening legislative sessions with prayers. *See Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

<sup>79</sup> *See Stern & DiFonzo, supra* note 29, at 63 (noting that Tennessee passed a law in 1973 requiring public school biology textbooks to explicitly state that the theory of human origins was a theory rather than a scientific fact).

<sup>80</sup> *See infra* Section I.B.2.a.

assert parental rights to receive opt-out opportunities.<sup>81</sup> Other novel strategies were advanced on occasion.<sup>82</sup>

Though these tactics were creative, virtually all of them failed under *Lemon*.<sup>83</sup> Moreover, when state legislators considered antievolution bills and referred them for analysis of their constitutionality, the resulting opinions typically concluded that such bills were impermissible under *Lemon*.<sup>84</sup> *Lemon*'s use thus discouraged the enactment of even more statutes than the ones that were litigated. By providing a rationale for court action and deterring antievolution statutes, *Lemon* came to play a dominant role in cases involving evolution.

#### a. Statutes Requiring "Balanced" Instruction

A few minor court decisions shortly after *Epperson* speculated that requiring balance between evolution and religious accounts might be a constitutionally permissible compromise.<sup>85</sup> Ultimately, this became a major legal strategy of antievolution groups, leading to a series of measures that were each struck down in turn. Early measures were phrased in explicitly religious terms, while later ones were carefully tailored to avoid theological language.

The first post-*Epperson* attempt to limit the teaching of evolution in schools came in 1973, when Tennessee enacted a law providing that any textbook introducing a theory related to the origins of humanity must include "the Genesis account in the Bible."<sup>86</sup> The law also forbade (but did not

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<sup>81</sup> See *infra* Section I.B.2.c.

<sup>82</sup> See *infra* Section I.B.2.d.

<sup>83</sup> See, e.g., *Edwards*, 482 U.S. 578 (1987); *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320 (11th Cir. 2006); *Freiler v. Tangipahoa Par. Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999); *Pelozo v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994); *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *Wright v. Hou. Indep. Sch. Dist.*, 486 F.2d 137 (5th Cir. 1973); *Kitzmilller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982); *Moeller v. Schrenko*, 554 S.E.2d 198 (Ga. Ct. App. 2001); cf. *Steele v. Waters*, 527 S.W.2d 72 (Tenn. 1975) (striking down statute banning the teaching of "all occult or satanical beliefs of human origin"). See generally G. Sidney Buchanan, *Evolution, Creation-Science, and the Meaning of Primary Religious Purpose*, 58 SMU L. REV. 303, 315–16 (2005) (recognizing the difficulty of "determin[ing] whether the primary purpose of a curriculum mandate is to advance a particular religious belief" but concluding that "it is not beyond the capacity of the judicial system to determine whether a particular theory concerning the origin of life is scientifically credible or whether the theory in question is simply a mask for the advancement of a religious belief").

<sup>84</sup> See, e.g., 67 Md. Op. Att'y Gen. 26 (1982); Tenn. Op. Att'y Gen. No. 96-025 (Feb. 26, 1996).

<sup>85</sup> E.g., *Valent v. N.J. State Bd. of Educ.*, 274 A.2d 832, 840 (N.J. Super. Ct. Ch. Div. 1971) ("The disputed area of evolution, still disputed after all these years, is a matter of one belief in a scientific fact which does not intrude as long as other [sic] doctrine of genesis is given to the children.").

<sup>86</sup> See *Daniel*, 515 F.2d at 487.

define) the teaching of “occult or satanical beliefs of human origin.”<sup>87</sup>

Relying on both *Epperson* and *Lemon*, the Sixth Circuit struck down this “balancing” requirement in 1975.<sup>88</sup> Despite surface-level differences between this statute and previous antievolution laws, the court held that “the purpose of establishing the Biblical version of the creation of man over the Darwinian theory of the evolution of man is as clear . . . as it was in the statute of 1925” that had been used to prosecute John Scopes.<sup>89</sup>

In 1981, Arkansas’s legislature enacted a similar balancing statute.<sup>90</sup> This new act was more carefully drafted than Tennessee’s (or Arkansas’s prior law that had fallen in *Epperson*), and it avoided explicit mandates to teach Genesis, implications that evolution might be “satanical,” or other obvious flaws.<sup>91</sup> Instead, Arkansas required balance between evolution and another expressly defined theory, termed “creation science.”<sup>92</sup> The law defined “creation science” by using benchmarks that overlapped almost entirely with fundamentalist religious doctrine, including sudden creation from nothing, separate ancestry for man and apes, a recent inception of the Earth, and geological features caused by a worldwide flood.<sup>93</sup> By rhetorically framing the traditional Biblical account as *science*, Arkansas legislators sought to position it as a competitor to evolutionary theory with an equally legitimate place in the science curriculum.<sup>94</sup>

After Arkansas’s law was challenged in 1981, Judge William Overton conducted a ten-day trial, hearing extensively from expert witnesses including Stephen Jay Gould, a leading evolutionary biologist, paleontologist, and historian of science.<sup>95</sup> Judge Overton’s opinion charted

<sup>87</sup> *Steele*, 527 S.W.2d at 72.

<sup>88</sup> *Daniel*, 515 F.2d 485.

<sup>89</sup> *Id.* at 487. The court struck down all but the “occult or satanic beliefs” provision, which it found no need to rule on. That section was dealt with by the Tennessee Supreme Court a few months later, in an opinion observing that it “would be utterly impossible for the Textbook Commission to determine which religious theories were ‘occult’ or ‘satanical’ without seeking to resolve” theological questions. *Steele*, 527 S.W.2d at 73.

<sup>90</sup> *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1264 (E.D. Ark. 1982).

<sup>91</sup> *See id.* at 1264.

<sup>92</sup> *Id.*

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

<sup>94</sup> *See Stern & DiFonzo, supra* note 29, at 66.

<sup>95</sup> Gould’s hypothesis that natural selection often operates through brief periods of abrupt change followed by long periods of steady-state equilibrium was hugely influential. *See* Niles Eldredge & Stephen Jay Gould, *Punctuated Equilibria: An Alternative to Phyletic Gradualism*, in *MODELS IN PALEOBIOLOGY* 82 (Thomas J.M. Schopf ed., 1972). Indeed, it even prompted a proposed model for understanding administrative regulation. *See* Sidney A. Shapiro, *Talking About Regulation: Political Discourse and Regulatory Gridlock*, 7 *WAKE FOREST J.L. & POL’Y* 1, 24 (2017) (utilizing a punctuated equilibrium model to characterize the political equilibrium). Gould’s writing was sufficiently broad that Professor Timothy Terrell derived insights on jurisprudence from “a very short, but remarkably profound” essay Gould wrote about a baseball game. *See* Timothy P. Terrell, *The Art of Legal Reasoning and the Angst of Judging: Of Balls, Strikes, and Moments of Truth*, 8 *NW. J.L. & SOC. POL’Y* 35, 37 (2012). His involvement in the *McLean* trial is

the history of fundamentalist opposition to Darwinian theory, how antievolutionists had retooled themselves as advocates of “scientific creationism,” and how that movement influenced and animated Arkansas’s new law.<sup>96</sup>

Judge Overton then examined the structure of Arkansas’s law, finding that its definition of “creation science” was inescapably religious.<sup>97</sup> He determined that the state’s division between evolution and “creation science” was “a contrived dualism” with “no scientific factual basis or legitimate educational purpose.”<sup>98</sup> Despite the drafters’ use of the word “science,” the creationist account “is not explanatory by reference to natural law, is not testable and is not falsifiable.”<sup>99</sup> Nor did its advocates “take data, weigh it against the opposing scientific data, and thereafter reach the conclusions.”<sup>100</sup> These findings established that, in substance, Arkansas’s new law was not materially different than the older one struck down in *Epperson*.<sup>101</sup>

Opponents were undeterred and repeated the tactic elsewhere. Louisiana enacted a law obligating any school that chose to provide instruction on the origins of humanity to give “balanced treatment” to evolution and creation science.<sup>102</sup> The law was quickly challenged and invalidated by a district court.<sup>103</sup> A panel of the Fifth Circuit upheld the trial court’s decision,<sup>104</sup> and the full circuit narrowly denied en banc review after a contentious proceeding.<sup>105</sup>

After the Supreme Court granted certiorari, seventy-two Nobel laureates and other prominent research organizations argued against the law in an amicus brief.<sup>106</sup> Many were experts in fields stretching well beyond biology.<sup>107</sup> One, physicist Murray Gell-Mann, whose work on the

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discussed at length in Myra Perez, *Stephen Jay Gould and McLean v. Arkansas: Scientific Expertise and the Nature of Science in American Culture 1980–1985*, in *BETWEEN SCIENTISTS AND CITIZENS: PROCEEDINGS OF A CONFERENCE AT IOWA STATE UNIVERSITY* (J. Goodwin ed., 2012).

<sup>96</sup> See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1261–63 (E.D. Ark. 1982).

<sup>97</sup> See *id.* at 1264–65.

<sup>98</sup> *Id.* at 1266.

<sup>99</sup> *Id.* at 1267.

<sup>100</sup> *Id.* at 1269.

<sup>101</sup> See *id.* at 1274.

<sup>102</sup> See *Aguillard v. Edwards*, 765 F.2d 1251, 1253 (5th Cir. 1985), *aff’d*, 482 U.S. 578 (1987).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Aguillard v. Edwards*, 778 F.2d 225, 225 (5th Cir. 1985).

<sup>106</sup> Shermer, *supra* note 16, at 517; Amicus Curiae Brief of 72 Nobel Laureates, 17 State Academies of Science, and 7 Other Scientific Organizations, in Support of Appellees, *Edwards v. Aguillard*, 482 U.S. 578 (1987); Randy Moore & Don Aguillard, *The Courage & Convictions of Don Aguillard*, 61 AM. BIOLOGY TCHR. 166, 167 (1999).

<sup>107</sup> This includes chemist Glenn Seaborg, whose research on trans-uranium elements led to the discovery of plutonium; physicist Emilio Segré, who had demonstrated the existence of the antiproton; Francis Crick and James Watson, who discovered the molecular structure of DNA; and

classification of elementary particles earned a Nobel Prize in 1969, explained the importance of the case to scientists across fields.<sup>108</sup> Gell-Mann noted that the antievolution movement had, by this point, attacked scientific developments beyond biology: “For example, fundamental and well-established principles of nuclear physics are challenged, for no sound reason, when ‘creation scientists’ attack the validity of the radioactive clocks that provide the most reliable methods used to date the earth.”<sup>109</sup>

In *Edwards v. Aguillard*, the Supreme Court held that Louisiana’s statute was unconstitutional.<sup>110</sup> The opinion by Justice William Brennan highlighted a longstanding concern: Dating back to the early 1960s, Justice Brennan had argued that the Establishment Clause applied with extra force in public schools, where children are impressionable and attendance is mandatory.<sup>111</sup> Applying the *Lemon* test in light of this additional consideration, Justice Brennan concluded that Louisiana’s law “advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety.”<sup>112</sup>

But *Edwards* was a weaker win for defenders of evolutionary theory than *Epperson* had been.<sup>113</sup> Justice Brennan closed his opinion with a defensive concession: “[T]eaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction.”<sup>114</sup> It was an odd and cryptic caveat—the Nobel Laureate brief had explained that evolution was as validated as any other biological theory; thus, the introduction of pseudo-scientific alternatives could not enhance science instruction.<sup>115</sup> Some critics have read Justice Brennan’s opinion as implying that the antievolutionist movement might *still* prevail, if only they found less

Murray Gell-Mann, whose work on the classification of elementary particles earned a Nobel Prize in 1969. See Shermer, *supra* note 16.

<sup>108</sup> See *id.* at 517–35.

<sup>109</sup> *Id.* at 518.

<sup>110</sup> 482 U.S. 578, 597 (1987).

<sup>111</sup> See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 252–53 (1963) (Brennan, J., concurring).

<sup>112</sup> *Edwards*, 482 U.S. at 596–97.

<sup>113</sup> See Moreno, *supra* note 17, at 451–95 (explaining, among other things, Justice Brennan’s limitation of *Edwards* to its facts, his assurance of remaining open to laws mandating teaching a variety of theories about the origins of humankind, and the Court’s failure to define “scientific theory” and “scientific critique”).

<sup>114</sup> *Edwards*, 482 U.S. at 594.

<sup>115</sup> See Moreno, *supra* note 17, at 480; Gould, *supra* note 14, at 9–11; see also Eugenie C. Scott & Henry P. Cole, *The Elusive Scientific Basis of Creation* “Science,” 60 Q. REV. BIOLOGY 21, 28 (1985) (reviewing submissions to scientific journals, finding virtually no attempts to “publish empirical, experimental, or theoretical evidence for creation in standard journals”).

obviously religious theories to rely on.<sup>116</sup>

Of course, another explanation is that Justice Brennan may have needed hedging language to win over votes on a Court that was far more conservative than the one Fortas had written for in *Epperson*. Indeed, Justice Scalia, recently elevated to the Court, wrote in a blistering dissent that one could not say “that the scientific evidence for evolution is so conclusive that no one could be gullible enough to believe that there is any real scientific evidence to the contrary.”<sup>117</sup> Gould felt compelled to reply to Justice Scalia, writing in an essay:

[T]his is exactly what I, and all scientists, do say. We are not blessed with absolute certainty about any fact of nature, but evolution is as well confirmed as anything we know—surely as well as the earth’s shape and position (and we don’t require equal time for flat earthers and those who believe that our planet resides at the center of the universe).<sup>118</sup>

Despite another loss before the Supreme Court, antievolution groups continued to advance measures that would signal disapproval of evolution or elevate religiously derived alternatives.<sup>119</sup> In Georgia in 2005, litigation over whether a school district could place a sticker on its biology textbooks disclaiming that evolution is “not a fact” reached the Eleventh Circuit before settling in favor of those challenging the stickers’ constitutionality.<sup>120</sup> Around the same time, an extremely contentious case was litigated in Dover, Pennsylvania, after a school district passed a resolution supporting “intelligent design,”<sup>121</sup> another attempt to present certain religious understandings of creation as an alternative scientific theory.<sup>122</sup> Though slickly packaged, the district court recognized that intelligent design “cloak[ed] religious beliefs in scientific sounding language.”<sup>123</sup> Therefore, in

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<sup>116</sup> See Moreno, *supra* note 17, at 477–84. An alternative possibility is that Brennan intended only that a hypothetical, scientifically validated alternative might permissibly be taught. That would be unobjectionable, but Brennan’s choice of words left open the door for later advocates of “creation-science.” See, e.g., Rena M. Bila, *The Establishment Clause: A Constitutional Permission Slip for Religion in Public Education*, 60 BROOK. L. REV. 1535, 1588 (1995) (paraphrasing Brennan’s statement, while adding an explicit reference to “creation-science,” to suggest that *Edwards* held that “teaching a variety of scientific theories about the origins of humankind, including creation-science, could be permissible”).

<sup>117</sup> *Edwards*, 482 U.S. at 634 (Scalia, J., dissenting).

<sup>118</sup> Gould, *supra* note 14, at 9.

<sup>119</sup> See Moreno, *supra* note 17, at 484–85; *supra* note 79 and accompanying text.

<sup>120</sup> See *Selman v. Cobb Cnty. Sch. Dist.*, 449 F.3d 1320, 1322, 1324 (11th Cir. 2006); see also Mike Rich, *Textbooks Disclaimed or Evolution Denied: A Constitutional Analysis of Textbook Disclaimer Policies and Academic Freedom Acts*, 63 ALA. L. REV. 641, 644 n.21 (2012).

<sup>121</sup> See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005); Edward J. Larson, *ID in the Courts: Anti-Evolutionism for the 21st Century*, 54 AM. J. LEGAL HIST. 147, 162–64 (2014) (explaining the legal and political backlash to the resolution).

<sup>122</sup> See Colin McRoberts & Timothy Sandefur, *Piercing the Veil of Intelligent Design: Why Courts Should Beware Creationism’s Secular Disguise*, 15 KAN. J.L. & PUB. POL’Y 15, 15 (2005).

<sup>123</sup> *Kitzmiller*, 400 F. Supp. 2d at 717; see also McRoberts & Sandefur, *supra* note 122, at 15–

*Edwards*, another antievolution measure was struck down, but controversies would continue.<sup>124</sup>

#### b. Teachers' Speech Rights

When John Scopes was prosecuted in 1925 for teaching evolution, prevailing doctrine held that the government had broad leeway to limit the exercise of its employees' constitutional rights.<sup>125</sup> Under greater-includes-the-lesser reasoning, the dominant view was that the greater power to not employ a person at all included the lesser power to employ them only upon the condition that they waive certain rights.<sup>126</sup> As Oliver Wendell Holmes, Jr. put it, a policeman enjoys "a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>127</sup>

This doctrine was altered by the Supreme Court in 1968—the same year that it decided *Epperson*—when the Court held that a school district had erred in firing a teacher for exercising First Amendment speech rights, even though the speech in question was criticism of the school board.<sup>128</sup> Teachers were no longer expected to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>129</sup>

Though the Court later tempered this principle in 2006,<sup>130</sup> an expanded focus on the expressive rights of teachers suggested a different strategy for the antievolution movement. After *Epperson*, a state might no longer be able to discipline a teacher for teaching evolution, but perhaps it was equally unable to discipline a teacher for *rejecting* evolution or teaching the Bible in the classroom.

Several teachers advanced arguments along these lines. Ray Webster, a social studies teacher in Illinois, became involved in a dispute with his school board in 1987.<sup>131</sup> Webster "taught nonevolutionary theories of creation to rebut a statement in the social studies textbook indicating that the world is

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20 (describing the similarities of intellectual design and creationism and the development of intellectual design post-*Edwards*).

<sup>124</sup> See *Kitzmiller*, 400 F. Supp. 2d at 717–18.

<sup>125</sup> See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 597–98 (1990).

<sup>126</sup> Cf. Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 254–55 (1994) (discussing Justice White's argument that a law is constitutional because it interferes with First Amendment rights less than a broader, but still constitutional, prohibition).

<sup>127</sup> *McAuliffe v. City of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

<sup>128</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 569–70, 574–75 (1968).

<sup>129</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>130</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not bar government from disciplining employees for speech made pursuant to their official duties).

<sup>131</sup> *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1005–06 (7th Cir. 1990).

over four billion years old.”<sup>132</sup> After the board mandated that Webster teach the required curriculum, which included evolution, their dispute was litigated in federal court.<sup>133</sup> The Seventh Circuit recognized that school boards did not have completely unfettered control over teachers’ speech, but held that, in Webster’s case, the board “had the authority and the responsibility to ensure that [he] did not stray from the established curriculum.”<sup>134</sup>

Shortly thereafter, a California high-school biology teacher named John Peloza launched a more robust challenge to his school’s curriculum. Peloza alleged that “evolutionism” is itself a religion rather than a scientific fact, and that his own religious exercise and free speech rights were violated by the school’s requirement that he teach it.<sup>135</sup> Peloza’s complaint was dismissed by a federal trial court, partially resurrected by an appellate panel, and then dismissed again by the Ninth Circuit.<sup>136</sup> Peloza lost, but the court held that his complaint was not so frivolous as to justify an award of attorneys’ fees and costs to the defending school district.<sup>137</sup>

Similarly, in 2013, an Ohio eighth-grade science teacher invoked his constitutional rights after being disciplined for repeatedly deviating from the curriculum and distributing creationist materials rather than teaching evolution.<sup>138</sup> The teacher, John Freshwater, had been instructed as early as 1994 to remove religious doctrine from his science class, but nevertheless continued teaching creationism, intelligent design, and the “unreliability of carbon dating” as late as 2008.<sup>139</sup> The Ohio Supreme Court upheld his removal for insubordination, but one judge, writing in dissent, praised Freshwater’s “willingness to challenge students in his science classes to think critically about evolutionary theory.”<sup>140</sup>

While teachers have generally not succeeded when invoking personal First Amendment rights to remove evolution from curricular content, these cases were partially successful in repositioning the sides of this longstanding conflict. Critics of evolution framed these teachers as victims of state overreach, much as supporters of evolution had once done with John Scopes. For example, one of the Ohio dissenters said of John Freshwater that “he taught well” and exhibited “a lifetime of dedication to the students.”<sup>141</sup>

The extent to which such rhetorical framing reflected reality was always debatable. (Freshwater, for one, had separately been disciplined for leaving

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<sup>132</sup> *Id.* at 1006.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 1007.

<sup>135</sup> *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 519 (9th Cir. 1994).

<sup>136</sup> *Id.* at 517, 519.

<sup>137</sup> *Id.* at 524.

<sup>138</sup> *Freshwater v. Mt. Vernon City Sch. Dist. Bd. of Educ.*, 1 N.E.3d 335, 338 (Ohio 2013).

<sup>139</sup> *Id.* at 340–45.

<sup>140</sup> *Id.* at 364 (O’Donnell, J., dissenting).

<sup>141</sup> *Id.* (Pfeifer, J., dissenting).

a mark on a student's arm with a Tesla coil.<sup>142</sup>) But the antievolution movement likely benefited, from a public relations perspective, by repositioning itself as a friend rather than prosecutor of individual teachers.<sup>143</sup>

### c. Parental Rights

A rarer but significant alternative strategy was to challenge curricular content based on the parental right to shape the upbringing of children. Parental rights to guide a child's upbringing have been recognized since *Meyer v. Nebraska*, when the Supreme Court struck down a post-World War I law forbidding the teaching of German in classrooms.<sup>144</sup> Though in *Meyer* the right was invoked in furtherance of educational rigor,<sup>145</sup> more recently it has been used to challenge curricular principles.

In the early 1980s, a group of parents in Hawkins County, Tennessee objected to a series of basic reading textbooks designed for elementary and middle school students that incorporated passages from various disciplines.<sup>146</sup> These passages were “aimed at fostering a broad tolerance for all of man's diversity, in his races, religions and cultures.”<sup>147</sup>

Books from this series that included science content were hardly strident in their presentation of evolutionary theory—in fact, they contained a disclaimer repeating the canard that “evolution is a theory, not a proven scientific fact.”<sup>148</sup> Some parents nevertheless challenged these reading materials for including passages they deemed religiously objectionable.<sup>149</sup> Their objections were not restricted to those involving evolution: Other challenged passages included “biographical material about women who have been recognized for achievements outside their homes.”<sup>150</sup>

<sup>142</sup> *Id.* at 342–43 (majority opinion).

<sup>143</sup> See Zalman Rothschild, *The Impossibility of Religious Equality*, 125 COLUM. L. REV. 453, 454 (2025) (noting “the valence of free exercise as an equality right that casts religious plaintiffs as a vulnerable group in need of protection”); cf. Bernadette Meyler, *Fiction at the Court*, 138 HARV. L. REV. F. 22, 22 (2024) (noting that courts “have highlighted the plights of certain protagonists in their opinions” and tend to show solicitude toward “those otherwise perceived as oppressed by governmental excesses”).

<sup>144</sup> 262 U.S. 390, 400, 403 (1923); see also *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925) (stating that government exceeded its power by mandating that children attend public schools in violation of parents’ right to “nurture”).

<sup>145</sup> *Meyer*, 262 U.S. at 400–01.

<sup>146</sup> *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1060, 1062 (6th Cir. 1987); see also *Mozert v. Hawkins Cnty. Pub. Sch.*, 582 F. Supp. 201, 202 (E.D. Tenn. 1984) (describing passages included in the textbooks, including a poem described as a Hindu fable and an excerpt from *The Diary of Anne Frank*).

<sup>147</sup> *Mozert*, 582 F. Supp. at 202.

<sup>148</sup> *Mozert*, 827 F.2d at 1062; see Gould, *supra* note 14, at 9–11 (“[E]volution is as well confirmed as anything we know—surely as well as the earth’s shape and position.”).

<sup>149</sup> *Mozert*, 827 F.2d at 1060.

<sup>150</sup> *Id.* at 1062.

Objecting parents had initially reached an agreement with the school to provide their children with alternative reading options.<sup>151</sup> The school board later voted to require all students to receive the same instruction, leading to litigation.<sup>152</sup> The parents initially won a trial court judgment ordering their children to be excused from classes, along with an award for more than \$50,000 in damages for purported violations of their constitutional right to religious liberty.<sup>153</sup>

During the course of litigation, the state Commissioner of Education intervened to argue that the state's interests precluded a rule that would require fashioning alternative curricula for individual students.<sup>154</sup> The case then reached the Sixth Circuit, which reversed the district court.<sup>155</sup>

*Mozert v. Hawkins County* was decided before the Supreme Court's landmark Free Exercise Clause decision in *Employment Division v. Smith*.<sup>156</sup> The district court had thus applied a demanding compelling interest test, rather than the lenient rational basis review that *Smith* would mandate for generally applicable laws that incidentally burden religious exercise.<sup>157</sup> It had analogized the challenged curriculum to precedents where objectors had been compelled to engage in *conduct* that violated religious beliefs, such as working on the Sabbath or participating in ROTC training.<sup>158</sup> But the Sixth Circuit distinguished between state-compelled and religiously prohibited *conduct*, which burdens free-exercise rights, and *exposure to contrary ideas*, which (by itself) would not.<sup>159</sup>

The Sixth Circuit also rejected comparisons to *Wisconsin v. Yoder*, in which the Supreme Court had held that a state could not force teenagers from the Old Order Amish community to attend high school in contravention of religious beliefs that forbade assimilation into the wider community.<sup>160</sup> The Sixth Circuit found the parents' objections in *Mozert* "dramatically" different, noting that Tennessee already allowed home schooling and private religious schools, and that the *Yoder* Court had "emphasize[d] the narrowness of its holding because of the unique 300 year history of the Old

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<sup>151</sup> *Id.* at 1060.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1063.

<sup>154</sup> *Mozert v. Hawkins Cnty. Pub. Sch.*, 647 F. Supp. 1194, 1195 (E.D. Tenn. 1986), *rev'd sub nom.*, *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987).

<sup>155</sup> *Mozert*, 827 F.2d at 1059, 1070.

<sup>156</sup> *See infra* Section II.C.2.

<sup>157</sup> *See infra* Section II.C.2.

<sup>158</sup> *Mozert*, 827 F.2d 1058 at 1065.

<sup>159</sup> *Id.*; *see also* Marc O. DeGirolami, *The Problem of Religious Learning*, 49 B.C. L. REV. 1213, 1272 (2008) ("[T]he approach taken by . . . *Mozert v. Hawkins County Board of Education* seems fundamentally sound: exemptions are in principle unwarranted merely for exposure to ideas with which one disagrees.").

<sup>160</sup> 406 U.S. 205, 218, 234 (1972).

Amish Order.”<sup>161</sup> The court thus reversed and ruled against the objecting parents.<sup>162</sup>

In the context of objections to evolution, *Mozert* was an outlier. Indeed, the challenged curricular content already contained “balancing” caveats that, in a different context, might have drawn objections from scientific educators.<sup>163</sup>

More broadly, however, *Mozert* reflected a general consensus among the circuit courts of appeal that mere exposure to disagreeable ideas did not implicate constitutional rights. In the later case of *Parker v. Hurley*, the First Circuit rejected similar arguments regarding material favorably depicting marriage equality.<sup>164</sup> And in *California Parents for the Equalization of Educational Materials v. Torlakson*, the Ninth Circuit rejected claims brought by Hindu parents challenging statements about Hinduism in California’s history and social-science curriculum.<sup>165</sup>

As will be explained below, however, these types of parental-rights arguments have taken on renewed importance after the Supreme Court’s contrary holding in *Mahmoud v. Taylor*.<sup>166</sup>

#### d. Alternative Strategies

Though “balancing” statutes, rights for dissenting teachers, and occasionally parental rights have been antievolution advocates’ primary strategies, they have experimented with others too.

One argument that has occasionally been advanced (and was raised, for example, in *Pelozo*’s case) is that evolutionary biology should itself be treated as a religion, and its inclusion in curricula thus violates the separation of church and state.<sup>167</sup> Along these lines, in 1973, a plaintiff taxpayer challenged the National Science Foundation’s funding for textbooks containing content on evolution, arguing that teaching evolution violated the Establishment Clause.<sup>168</sup> A federal court dismissed his case without issuing an opinion, finding it meritless.<sup>169</sup>

<sup>161</sup> *Mozert*, 827 F.2d at 1067; see also Chad Flanders, *Is Wisconsin v. Yoder Limited to Its Facts?*, 16 CONLAWNOW 23, 24–26 (2024) (discussing how *Yoder* may be limited to the unique facts of the case).

<sup>162</sup> *Mozert*, 827 F.2d at 1070.

<sup>163</sup> See *id.* at 1062; Gould, *supra* note 14, at 9–11 (“[E]volution is as well confirmed as anything we know—surely as well as the earth’s shape and position.”).

<sup>164</sup> 514 F.3d 87, 90, 107 (1st Cir. 2008).

<sup>165</sup> 973 F.3d 1010, 1017, 1021–22 (9th Cir. 2020).

<sup>166</sup> See *infra* Part II.

<sup>167</sup> See generally Peter Irons, *Darwin, Dogma, and Definitions: A Reply to Professor McCreary*, 37 SW. U. L. REV. 69 (2008) (noting the argument and refuting it).

<sup>168</sup> *Willoughby v. Stever*, CA No. 1574-75 (D.D.C. May 18, 1973) (deciding without opinion); *aff’d*, 504 F.2d 271 (D.C. Cir. 1974); see also *Crowley v. Smithsonian Inst.*, 636 F.2d 738, 744 (D.C. Cir. 1980) (describing the *Willoughby* litigation).

<sup>169</sup> *Id.*

Another school district (notably in Rhea County, Tennessee, the site of the *Scopes* trial), sought to bypass Establishment Clause restrictions by outsourcing religious instruction to non-employee volunteers.<sup>170</sup> Volunteers from a nearby religious college taught from a lesson plan that included creationist talking points.<sup>171</sup> Having outsourced this instruction to external volunteers, the school district's representatives argued that there had been no constitutional violation by the government itself.<sup>172</sup>

When challenged, a district court overturned the policy, finding that it was "not a close case" under *Lemon*.<sup>173</sup> The third part of the *Lemon* test, which prohibited actions that excessively entangle the government with religion, was especially implicated.<sup>174</sup> As Judge Robert Allen Edgar explained, "the wholesale delegation of the administration of that program to . . . a decidedly religious institution, by itself results in an impermissible entanglement of government and religion."<sup>175</sup>

Finally, another strategy taken by some schools has simply been to remove all discussion of the origins of species from science classes.<sup>176</sup> Formally, removal of course material due to a religious objection would contravene *Epperson*, even when that material is not replaced by or balanced against theological content.<sup>177</sup> But practically, establishing that the absence of content from a curriculum is due to impermissible decision making is challenging without evidence of an accompanying introduction of religious content. As will be discussed below, this strategy is likely to accelerate after recent developments.

### 3. *The Post-Lemon Era*

The *Lemon* test came under fire gradually, then suddenly.<sup>178</sup> In the late 1980s and 1990s, several academics and judges (often writing in concurrences or dissents) strongly criticized the test and the outcomes it produced.<sup>179</sup> In certain contexts when *Lemon* would arguably have applied,

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<sup>170</sup> *Doe v. Porter*, 188 F. Supp. 2d 904, 907 (E.D. Tenn. 2002), *aff'd*, 370 F.3d 558 (6th Cir. 2004).

<sup>171</sup> *Id.* at 912 & n.2.

<sup>172</sup> *Doe*, 370 F.3d at 564.

<sup>173</sup> *Doe*, 188 F. Supp. 2d at 914.

<sup>174</sup> *Id.* at 910, 913.

<sup>175</sup> *Id.* at 913.

<sup>176</sup> See, e.g., Douglas E. Stewart, Jr., *Going Back in Time: How the Kansas Board of Education's Removal of Evolution from the State Curriculum Violates the First Amendment's Establishment Clause*, 20 REV. LITIG. 549, 552–57 (2001) (describing the circumstances surrounding Kansas's removal of evolution from its curriculum).

<sup>177</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (concluding that a state may not "blot out a particular theory because of its supposed conflict with the Biblical account, literally read").

<sup>178</sup> Cf. ERNEST HEMINGWAY, *THE SUN ALSO RISES* 141 (1926) ("How did you go bankrupt?" Bill asked. "Two ways," Mike said. "Gradually and then suddenly.").

<sup>179</sup> See, e.g., Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An*

the Court declined to rely on it, providing momentum to its critics.<sup>180</sup> Later, after significant changes to the makeup of the Court, the justices effectively overturned *Lemon* in a pair of significant cases beginning in 2019.<sup>181</sup>

In the first of these cases, *American Legion v. American Humanist Association*, plaintiffs brought a quixotic challenge against the use of public funds to maintain a large cross erected in 1925 to commemorate American soldiers lost in the First World War.<sup>182</sup> In rejecting the challenge, Justice Alito signaled that the Court would no longer use the venerable *Lemon* test in Establishment Clause cases.<sup>183</sup> In fact, he treated *Lemon* as already having been overruled, writing that “[w]hile the *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause, in later cases we have taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”<sup>184</sup> Making this point, Justice Alito pointed to two legislative prayer cases—*Town of Greece v. Galloway* and *Marsh v. Chambers*—that had treated ratification-era prayer practices as especially probative of the original understanding of the First Amendment’s text.<sup>185</sup>

A closer reading shows that the legislative prayer cases were the exception, rather than the rule, when they were decided. In *Aguillard*, Justice Brennan explained that the prior *Marsh* decision was an outlier in having departed from *Lemon*.<sup>186</sup> To Justice Brennan, the Founding-era practice of legislative prayer was probative in *Marsh*, but ratification-era history had little to say about public education, which was “virtually nonexistent at the

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*Update*, 75 CAL. L. REV. 5, 6 (1987) (arguing that cases decided under *Lemon* “have produced a conceptual disaster area”); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (comparing the *Lemon* test to a “ghoul”).

<sup>180</sup> See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (deciding Establishment Clause question without relying on *Lemon*).

<sup>181</sup> See Melissa Murray, *Stare Decisis and Remedy*, 73 DUKE L.J. 1501, 1538 n.205 (2024) (recognizing that *Lemon* has been effectively overruled even though “the Court did not utter the words ‘*Lemon v. Kurtzman* is hereby overruled’”).

<sup>182</sup> 588 U.S. 29, 37–40 (2019).

<sup>183</sup> See *id.* at 60 (describing the more “modest” approach the Court has taken in Establishment Clause cases in recent years); see also Clay Calvert & Mary-Rose Papandrea, *The End of Balancing? Text, History & Tradition in First Amendment Speech Cases After Bruen*, 18 DUKE J. CONST. L. & PUB. POL’Y 59, 63–64 (2023) (discussing *Lemon*’s recent treatment by the Roberts Court).

<sup>184</sup> *Am. Legion*, 588 U.S. at 60.

<sup>185</sup> See *Town of Greece v. Galloway*, 572 U.S. 565, 577, 583–84 (2014); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983); see also William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019) (identifying liquidation as “a specific way of looking at post-Founding practice to settle constitutional disputes”).

<sup>186</sup> *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987); see also Richard W. Garnett, *Justice Breyer and the Establishment Clause: Notes on “Appeasement,” “Legal Judgment,” and “Divisiveness,”* 21 FIRST AMEND. L. REV. 378, 386 (2023) (discussing Brennan’s view of the legislative prayer cases).

time the Constitution was adopted.”<sup>187</sup> Nevertheless, *American Legion* treated *Lemon* as having pre-deceased it, implying that history and tradition had already become the general touchstone for Establishment Clause analysis.<sup>188</sup>

Some lower courts continued to apply *Lemon* after *American Legion*’s puzzling discussion of the precedent. But the Supreme Court confirmed its demise three years later, in *Kennedy v. Bremerton School District*, a case involving public prayer by a high school football coach.<sup>189</sup> Drawing from *American Legion*, Justice Gorsuch explained that, in “place of *Lemon* . . . this Court has instructed that the Establishment Clause must be interpreted by ‘reference to historical practices and understandings.’”<sup>190</sup> The majority castigated *Lemon* as “abstract” and “ahistorical,” enigmatically suggesting that it would also abandon *Lemon*’s “offshoot[s].”<sup>191</sup>

Antievolutionist actors began moving quickly. In 2023, the Oklahoma Senate introduced a bill that would require any “teacher employed by a school district or a charter school in this state who presents instruction to students on the concept of biological evolution [to] also provide instruction to students on the concepts of creationism and/or intelligent design.”<sup>192</sup> Though that bill was not enacted, West Virginia subsequently passed a statute barring state officials from limiting responses to “questions from students about scientific theories of how the universe and/or life came to exist.”<sup>193</sup>

The West Virginia statute was less obviously contrary to *Epperson* and *Edwards* than the proposed bill in Oklahoma, but both actions demonstrate a renewed appetite to contest the place of evolution in schools after the Court’s reversal of *Lemon*. Moreover, just three years after *Kennedy*, the First Amendment landscape was further disrupted by the momentous decision in *Mahmoud v. Taylor*. That case may have an even greater impact.

## II

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<sup>187</sup> *Edwards*, 482 U.S. at 583 n.4; see Abigail Riddle, *The Fathers Have Eaten Sour Grapes: History Is the Wrong Test for Establishment Clause Questions in Public Schools*, 77 ARK. L. REV. 557, 572 (2024) (“Until the nineteenth century, education largely took place in the home . . . Few formalized schools existed (those that did were largely private religious cooperations) . . .”).

<sup>188</sup> See *Am. Legion*, 588 U.S. at 60 (discussing the historical approach taken in more recently decided *Marsh* and *Town of Greece*).

<sup>189</sup> 142 S. Ct. 2407, 2415–16 (2022).

<sup>190</sup> *Id.* at 2428 (quoting *Town of Greece*, 572 U.S. at 576).

<sup>191</sup> *Id.* at 2427.

<sup>192</sup> S.B. 1871, 59th Leg., 2d Sess. (Okla. 2024).

<sup>193</sup> W. Va. Code Ann. § 18-5-41a (West 2024).

## MAHMOUD'S DISRUPTIONS

*A. Comparing the Movements Against Classroom Discussion of LGBTQ-Inclusivity and Evolution*

Though of more recent vintage than controversies over evolution, clashes over curricular content promoting acceptance of the LGBTQ community have their own historical antecedents.<sup>194</sup> State legislation mandating antigay curricular content was first enacted in Oklahoma in 1978, and by 1996, sixteen states had passed antigay curriculum laws.<sup>195</sup> As gay rights gained more public acceptance, anti-LGBTQ groups advanced parental-rights arguments with increasing frequency.<sup>196</sup>

Efforts to limit education on gender identity are newer but have quickly intensified.<sup>197</sup> In 2022, Florida banned all instruction on “sexual orientation or gender identity” in early kindergarten through third grade; the next year the state expanded the prohibition through the eighth grade.<sup>198</sup> The state also prohibited schools from discussing trans people during sexual education instruction.<sup>199</sup> Other states have taken similar measures.<sup>200</sup> These curricular decisions by state actors have received the lion’s share of attention.<sup>201</sup> But cases involving education’s intersection with gender identity have also been brought to courts by teachers<sup>202</sup> and parents.<sup>203</sup>

Clearly, the movement to remove instruction on LGBTQ inclusion and gender identity from schools resembles, and partially overlaps with, the

<sup>194</sup> See Clifford J. Rosky, *Fear of the Queer Child*, 61 BUFF. L. REV. 607, 620–21 (2013) (noting panics that “anticipate the contemporary fears of indoctrination, role modeling, and public approval, which claim that teachers, parents, and the state can teach children to be queer”); Marie-Amélie George, *Framing Trans Rights*, 114 NW. U. L. REV. 555, 579 (2019) (noting argument by opponents of a marriage-equality amendment “that schools would teach children about same-sex marriage if voters approved the measure”).

<sup>195</sup> Rosky, *supra* note 1, at 1477, 1491.

<sup>196</sup> Mary Ziegler, Maxine Eichner & Naomi Cahn, *Retrenchment by Division: The New Politics of Parental Rights*, 123 MICH. L. REV. 669, 688–92 (2025).

<sup>197</sup> See Katie Eyer, *Anti-Transgender Constitutional Law*, 77 VAND. L. REV. 1113, 1208 (2024) (“Virtually nonexistent a decade ago, anti-transgender constitutional litigation has proliferated since 2016.”).

<sup>198</sup> Fla. Sta. Ann. § 1001.42(8)(c) (West 2025); Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. REV. 965, 1000 (2024).

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

<sup>200</sup> See Dara E. Purvis, *Transgender Students and the First Amendment*, 104 B.U. L. REV. 435, 462 (2024).

<sup>201</sup> See, e.g., Kyla Tinsley, Note, *Anti-LGBT Legislation in Florida: A Prime Example of States Mentally Harming LGBT Youth*, 44 N. ILL. U. L. REV. 135, 135 (2024) (describing Florida’s measure as “[t]he most famous anti-LGBT law”).

<sup>202</sup> See, e.g., Ricard v. USD 475 Geary Cnty. Sch. Bd., No. 22-CV-04015, 2022 WL 1471372, at \*1 (D. Kan. May 9, 2022) (adjudicating a teacher’s challenge to her employer’s policies regarding treatment of transgender students).

<sup>203</sup> Mahmoud v. Taylor, 145 S. Ct. 2332, 2342 (2025) (adjudicating parents’ challenge to LGBTQ-inclusive curriculum).

movement to remove evolution. That said, similarities should not be overstated.

One major difference involves the role of religion. Opposition to discussion of sexual orientation or gender identity is sometimes rooted in sincere religious belief, and other times in motivations unconnected to religious teachings (which can include simple animus).<sup>204</sup> Those attacks on LGBTQ inclusion that involve religious liberty claims raise more difficult constitutional questions than those that do not,<sup>205</sup> and movement groups thus have strong incentives to select clients and prioritize cases that present religious rather than secular challenges.<sup>206</sup>

In contrast, historical disputes over instruction on evolution have always had religious motivations. No recorded case turns on a genuinely secular objection to evolution.<sup>207</sup> And it is precisely the religious nature of the objection to evolution that presents a constitutional problem.<sup>208</sup> Should a school district decide to balance scientific instruction against other pseudo-scientific ideas—say, alchemy, astrology, or belief in a flat earth—opponents would need to object through the political process rather than through constitutional litigation.<sup>209</sup>

And in all likelihood, they would be successful in doing so: As a general rule, schools do not teach that the world is flat.<sup>210</sup> It is *only* the religious valence of creationism and intelligent design that hinders resort to the political process as a means to restore evidence-based instruction in the area of evolution.<sup>211</sup>

These dynamics lead to a striking contrast. Because free-exercise

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<sup>204</sup> See, e.g., Alex Reed, *Religious Organization Staffing Post-Bostock*, 43 BERKELEY J. EMP. & LAB. L. 203, 205 (2022) (discussing *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which involved sexual-orientation and gender-identity discrimination but did not present religious liberty issues); Terri R. Day & Danielle Weatherby, *LGBT Rights and the Mini RFRA: A Return to Separate But Equal*, 65 DEPAUL L. REV. 907, 929 (2016) (“Employment discrimination against LGBT individuals can also be seen in abundance in nonreligious contexts.”).

<sup>205</sup> See, e.g., *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (discussing the tension between religious liberty concerns and bars on LGBTQ discrimination, but noting that religious claims were not raised in this case).

<sup>206</sup> See Alexander Gouzoules, *The Success of Pre-Enforcement Challenges to Antidiscrimination Laws*, 55 COLUM. HUM. RTS. L. REV. 571, 604–05 (2023).

<sup>207</sup> See *supra* Part I.

<sup>208</sup> E.g., *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968) (“Arkansas’ law cannot be defended as an act of religious neutrality.”).

<sup>209</sup> See Jeffrey M. Cohen, *The Right to Learn: Intellectual Honesty and the First Amendment*, 39 HASTINGS CONST. L.Q. 659, 659–61 (2012) (elaborating a hypothetical that shows how teaching climate denial in public schools would be found constitutionally permissible if based on political rather than religious hostility to climate science).

<sup>210</sup> But see Kevin Bennardo, *The Madness of Insane Delusions*, 60 ARIZ. L. REV. 601, 618 n.100 (2018) (noting “a recent wave of flat-earth believers among U.S. middle-school students”).

<sup>211</sup> See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CALIF. L. REV. 673, 703–04 (2002) (applying political process theories of John Hart Ely to discussions of the Establishment Clause).

objections to LGBTQ inclusion are both rhetorically and legally more effective than secular objections (especially those rooted in simple animus), most litigation in that space is framed, from the stage of “client shopping” onward, as involving sincere religious beliefs.<sup>212</sup> In contrast, evolution cases often involve attempts to repackage religious objections to appear as secular theories.<sup>213</sup> These contrasting strategies demonstrate the extent to which movement litigation is facilitated by careful client selection and strategic framing.<sup>214</sup>

A second meaningful difference between the two fields concerns the scope of the conflict. The Establishment Clause objection to biblical accounts of Creation arises when those accounts are taught as truth, particularly in a science class otherwise focused on falsifiable claims demonstrated through empirical testing. Those same religious accounts may unobjectionably be presented in courses studying world religions, human societies, literature, or history, so long as teachers do not cross the Establishment Clause line by proselytizing.<sup>215</sup> Legal challenges to creationist curricular content have thus *not* sought to exclude religion from schools—only from science classes. Indeed, many reasoned observers have argued that American students would benefit from greater religious literacy while also recognizing that religious doctrines should not be presented as scientific alternatives to evolution.<sup>216</sup>

In contrast, Free Exercise Clause objections to LGBTQ inclusivity have challenged content in a zero-sum way. Curricular objections have been brought as part of a broader strategy that has challenged virtually *all* school

<sup>212</sup> See Gouzoules, *supra* note 206, at 604–05 (“[I]n the context of religion-based litigation, pre-enforcement challenges allow interest groups to prioritize parties whose religious beliefs are more likely to be taken seriously and elicit sympathy.”).

<sup>213</sup> See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 717 (M.D. Pa. 2005) (“[R]eligious opponents of evolution began cloaking religious beliefs in scientific sounding language and then mandating that schools teach the resulting ‘creation science’ or ‘scientific creationism’ as an alternative to evolution.”). The exception to this trend would be the teachers’ rights cases, which have relied on religious exercise rights alongside free speech rights to defend individuals who deviated from curricular content on evolution. See *supra* Part I.B.2.

<sup>214</sup> See Gouzoules, *supra* note 206, at 604–05.

<sup>215</sup> See *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968) (“[S]tudy of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment’s prohibition . . .”).

<sup>216</sup> See Philip C. Kissam, *Let’s Bring Religion into the Public Schools and Respect the Religion Clauses*, 49 U. KAN. L. REV. 593, 606 (2001) (arguing for “a relatively full and balanced treatment of scientific and nonscientific perspectives on our origins” but recognizing that “evolution should continue to be taught as a separate subject in high school science courses”); Barry P. McDonald, *Getting Beyond Religion as Science: “Unstifling” Worldview Formation in American Public Education*, 66 WASH. & LEE L. REV. 587, 595 (2009) (“Religion is essentially ignored by public schools (including religious perspectives on the nature of reality), while science frequently presents a very sterile account of evolutionary theory . . .”).

policies relating to the LGBTQ community.<sup>217</sup> These suits are often brought by movement organizations that also litigate on behalf of private entities seeking exemptions from antidiscrimination laws.<sup>218</sup>

Accordingly, while “settlement” of the evolution-creationism wars along the non-overlapping magisteria model<sup>219</sup> remains an elusive but tantalizing possibility,<sup>220</sup> the allocation of rights between the LGBTQ community and those who oppose its inclusion in a pluralistic society may ultimately present an even more difficult challenge.<sup>221</sup>

### B. *The Mahmoud Litigation*

In 2022 the Montgomery County, Maryland school board approved a set of “LGBTQ-Inclusive Books” as part of its English Language Arts curriculum.<sup>222</sup> The books’ themes and subject matters varied, including positive depictions of marriage between same-sex couples, stories with non-binary or transgender protagonists, and an alphabet book following a lost puppy at a pride parade.<sup>223</sup> Teachers were provided with a guidance document that provided prompts for responding to students and parents who disagreed with the content.<sup>224</sup>

The material drew significant protest from a diverse coalition of Muslim, Catholic, and Orthodox Christian families on religious grounds,<sup>225</sup> as well as from some educators, who contended that some of the selections were age-inappropriate or introduced concepts that were too difficult for the

<sup>217</sup> See, e.g., Eyer, *supra* note 197, at 1148 (discussing challenges to school policies against deadnaming or misgendering faculty and students); Amy Vedder, Note, *Not a Mere Creature of the State: Protecting Parental Rights in the Era of Anti-Trans Legislation*, 19 HARV. L. & POL’Y REV. 279, 284 (2024) (categorizing recent anti-transgender legislation, including measures restricting the use of transgender students’ pronouns, book bans, and exclusion from sports); Scott Skinner-Thompson, Response, *Solidifying Students’ Right to Gender Expression*, 104 B.U. L. REV. 503, 506–07 (2024) (exploring how school policies reinforce gender norms and heteronormativity).

<sup>218</sup> See Redburn, *supra* note 12, at 1883.

<sup>219</sup> See *supra* note 27 and accompanying text.

<sup>220</sup> See Mason, *supra* note 27, at 102–03 (referencing “the anthropological criticism that the consensus endorsement of the non-overlapping magisterial framework is perhaps unduly rose-colored as a purely descriptive matter”); Gould, *supra* note 27, at 16 (noting that biblical literalism is a relatively fringe position in various western religious traditions).

<sup>221</sup> Cf. Abner S. Greene, *The Dilemma of Liberal Pluralism*, 70 BUFF. L. REV. 1637, 1640–42 (2022) (discussing the tensions within a commitment to both LGBTQ+ rights and religious freedom).

<sup>222</sup> *Mahmoud v. McKnight*, 102 F.4th 191, 197 (4th Cir. 2024), *rev’d sub nom.*, *Mahmoud v. Taylor*, 145 S. Ct. 2332 (2025).

<sup>223</sup> See *Mahmoud*, 145 S. Ct. at 2343–44; *Mahmoud*, 102 F.4th at 197–98; Asma T. Uddin, *Religion and Identity Capitalism*, 70 WAYNE L. REV. 309, 312 (2024).

<sup>224</sup> *Mahmoud*, 145 S. Ct. at 2345.

<sup>225</sup> See Uddin, *supra* note 223, at 312.

classroom.<sup>226</sup> The board initially compromised by agreeing to notify objecting parents when the books would be taught and allowing them to direct teachers to provide substitute texts for their children that supported the same learning goals.<sup>227</sup>

This opt-out policy, however, was quickly rescinded.<sup>228</sup> During litigation, the Board provided a variety of reasons for its change of policy, including the burden placed on administrators who were required to supervise and develop alternative plans for non-participating students.<sup>229</sup> Shortly after the opt-outs were canceled, a collection of parents sued, alleging various claims including that their children’s mandatory exposure to these books violated religious-exercise rights.<sup>230</sup>

The district court denied the parents’ motion for a preliminary injunction, and a divided panel of the Fourth Circuit affirmed.<sup>231</sup> The Supreme Court reversed, holding in a decision by Justice Alito that parents were entitled to an injunction allowing their children to opt out of any instruction involving the challenged books.<sup>232</sup>

Prior to *Mahmoud*, the leading cases on religious objections to curricular content had held that exposure to conflicting ideas did not burden religious exercise. The Sixth Circuit had rejected such a claim in *Mozert*, over books that included evolution and other content.<sup>233</sup> The First and Ninth Circuits had reached similar conclusions in challenges to materials depicting Hinduism<sup>234</sup> and material favorably depicting marriage equality.<sup>235</sup>

Charting a different course, Justice Alito wrote that “government burdens the religious exercise of parents when it requires them to submit their children to instruction that poses ‘a very real threat of undermining’ the religious beliefs and practices that the parents wish to instill.”<sup>236</sup> After engaging in extensive analysis of the books themselves, the Court determined that they “impose[d] upon children a set of values and beliefs

<sup>226</sup> *Mahmoud*, 102 F.4th at 199.

<sup>227</sup> *Id.* at 199–200.

<sup>228</sup> *Id.* at 200.

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

<sup>230</sup> *Id.* at 200–01.

<sup>231</sup> *Id.* at 197.

<sup>232</sup> *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2341–42 (2025).

<sup>233</sup> *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987).

<sup>234</sup> *See Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020) (“Offensive content that does not penalize, interfere with, or otherwise burden religious exercise does not violate Free Exercise Rights.”).

<sup>235</sup> *See Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) (“Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them.”).

<sup>236</sup> *Mahmoud*, 145 S. Ct. at 2342 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

that are ‘hostile’ to their parents’ religious beliefs.”<sup>237</sup> Alito’s opinion also implied that the young age and impressionable nature of the plaintiffs’ children was relevant to the burden analysis.<sup>238</sup>

Having identified a burden on religious exercise, the majority then proceeded to assess whether that burden was permissible. The majority held that strict scrutiny applied because the character of the burden was the “exact same” as in *Wisconsin v. Yoder*.<sup>239</sup> In *Yoder*, the Court held that a state could not require Amish teenagers to attend school past the eighth grade where their community’s religious beliefs forbade assimilation with the outside world.<sup>240</sup>

While the majority conceded that the state had a compelling interest in an orderly and effective school session, it held that the board’s actions were not narrowly tailored to achieving that interest.<sup>241</sup> The Court noted that the school system already allowed opt-outs from sexual-education classes, allowed for individualized instruction programs for students learning English as a second language, and had briefly allowed opt-outs from the material challenged by plaintiffs.<sup>242</sup>

Justice Sotomayor dissented, joined by Justices Kagan and Jackson. In addition to disagreeing with the majority’s substantive conclusions and application of precedent, she warned of “chaos for this Nation’s public schools.”<sup>243</sup> “Next to go,” she warned, “could be teaching on evolution, the work of female scientist Marie Curie, or the history of vaccines.”<sup>244</sup>

### C. *Shifting Doctrine*

#### 1. *The Burden Analysis: Exposure to Ideas as a Constitutional Harm*

Before *Mahmoud*, most scholars believed that parents with objections to curricular content in public schools needed to resort to the political process, effecting change by elevating candidates for the school board or state legislature.<sup>245</sup> Parents whose curricular objections did not prevail democratically could alternatively resort to private schools or

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<sup>237</sup> *Id.* at 2355.

<sup>238</sup> *Id.* at 2355 & n.8.

<sup>239</sup> *Id.* at 2361 (citing *Yoder*, 406 U.S. at 218).

<sup>240</sup> *Yoder*, 406 U.S. at 234.

<sup>241</sup> *Mahmoud*, 145 S. Ct. at 2361–62.

<sup>242</sup> *Id.* at 2362.

<sup>243</sup> *Id.* at 2381 (Sotomayor, J., dissenting).

<sup>244</sup> *Id.* at 2395.

<sup>245</sup> See, e.g., Catherine J. Ross, *Are “Book Bans” Unconstitutional? Reflections on Public School Libraries and the Limits of Law*, 76 STAN. L. REV. 1675, 1707 (2024) (“The parents who target books for removal may succeed through political action but they lack any constitutional right to achieve their goals if their children attend public schools.”).

homeschooling.<sup>246</sup> Apart from the Establishment Clause, which barred government from proselytizing or teaching religious doctrine as truth, curricular objections were generally not grounds for constitutional litigation.<sup>247</sup>

*Mahmoud* dramatically altered that equilibrium by holding that free-exercise rights may be burdened by the teaching of ideas that threaten to undermine religious values. Virtually any idea taught in school is potentially subject to this sort of challenge—the *Mozert* litigation, for example, saw parents complain about literature that involved “pacifism, magic and false views of death.”<sup>248</sup> Another parent argued that a poem “presenting the idea that by using imagination a child can become part of anything” as harming religious values by promoting “occult practice.”<sup>249</sup> Still another objected on religious grounds to passages promoting “role reversal or role elimination, particularly biographical material about women who have been recognized for achievements outside their homes.”<sup>250</sup> That these objections are further outside mainstream beliefs than the complaints raised in *Mahmoud* has little or no formal significance, as courts do not second-guess sincerely held religious beliefs.<sup>251</sup>

But the areas likely to most frequently generate demands for opt-outs are education on gender identity and sexual orientation (as seen in *Mahmoud* and *Hurley*), evolution and other scientific concepts (as seen in *Mozert* and elsewhere), and coursework involving religious literacy (of the kind challenged in *Torlakson*). As Part III of this Essay contends, an administrative chilling effect created by demands for opt-outs in these areas is likely to result in reduced educational effectiveness.

## 2. *A Stealth Reversal of Smith?*

Another ramification of *Mahmoud* is a further restriction of the embattled *Employment Division v. Smith* precedent, which for thirty-five years has governed demands for religious exemptions under the First Amendment.

The Free Exercise Clause of the First Amendment unquestionably

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<sup>246</sup> Cf. Yossi Dahan, *Privatization, School Choice and Educational Equality*, 5 L. & ETHICS HUM. RTS. 307, 307 (2011) (noting the competitive nature of the education system as a result of private education options); Chu et al., *supra* note 1, at 547 (noting that “all states allow homeschools” as a replacement for attending public schools).

<sup>247</sup> See Cal. Parents for the Equalization of Educ. Materials v. Torlakson, 973 F.3d 1010, 1020 (9th Cir. 2020); Parker v. Hurley, 514 F.3d 87, 106 (1st Cir. 2008); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987).

<sup>248</sup> See *Mozert*, 827 F.2d at 1062.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (stating that the Court has “repeatedly refused” to question whether a religious belief is reasonable).

forbids governmental actions that target or suppress religious practice.<sup>252</sup> More contested are impositions of neutral civil requirements that happen to conflict with religious obligations.<sup>253</sup> In the nineteenth and early twentieth centuries, courts generally did not require exemptions for people of faith whose religious duties were inconsistent with civic obligations.<sup>254</sup>

Two significant cases of the mid-twentieth century suggested otherwise, holding that the Free Exercise Clause sometimes mandates religious exemptions to at least some neutral and nondiscriminatory laws. First, in *Sherbert v. Verner*, the Court held that a state could not deny unemployment benefits from a Seventh-day Adventist whose beliefs prohibited her from taking a job requiring work on Saturdays.<sup>255</sup>

Then, in *Wisconsin v. Yoder*, as already discussed, the Court held that a state could not require Amish teenagers to attend school past the eighth grade.<sup>256</sup> Both *Sherbert* and *Yoder* evaluated the challenged governmental action under an elevated standard of review.<sup>257</sup> Specifically, both applied a compelling interest test that was substantially more demanding than intermediate scrutiny or rational basis review.<sup>258</sup>

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<sup>252</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638–39 (2018) (finding state civil rights commission’s actions unconstitutional based on their hostility to religion); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 461 (2017) (explaining that laws cannot discriminate against conduct because it is religious); *Church of the Lukumi Babalu, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (finding that the challenged actions had deliberately targeted the religious practices of followers of Santeria).

<sup>253</sup> Compare Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1415 (1990) (arguing that the original understanding of the Free Exercise Clause included religious exemptions from generally applicable laws), with Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916–17 (1992) (arguing that in the late-eighteenth century, it was not understood that the Free Exercise Clause provided for religious exemptions).

<sup>254</sup> See, e.g., *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (stating that allowing religious exemptions for a ban on plural marriage “would be introducing a new element into criminal law”); see also *City of Boerne v. Flores*, 521 U.S. 507, 542–43 (1997) (Scalia, J., concurring in part) (disputing the view that the free exercise jurisprudence had historically provided for religious exemptions). But see *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that Jehovah’s Witness schoolchildren could not be compelled to recite the Pledge of Allegiance on freedom of speech grounds).

<sup>255</sup> 374 U.S. 398, 401–02 (1963).

<sup>256</sup> 406 U.S. 205, 234 (1972).

<sup>257</sup> See *Sherbert*, 374 U.S. at 403 (“[A]ny incidental burden on the free exercise of appellant’s religion may be justified by a ‘compelling state interest in the regulation of a subject within the State’s constitutional power to regulate.’” (citations omitted)); *Yoder*, 406 U.S. at 215 (“[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”).

<sup>258</sup> Neither explicitly used the term “strict scrutiny.” Neither did Congress, when it sought to legislatively restore the *Sherbert* and *Yoder* standard by enacting the Religious Freedom Restoration Act (RFRA). Instead, Congress declared its purpose as “to restore the *compelling interest test* as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).” 42 U.S.C. § 2000bb(b)(1) (emphasis added). Nevertheless, RFRA imposed strict scrutiny’s “least restrictive means” requirement, which the Court later noted was “not used in the

*Sherbert* and *Yoder* appeared to pave the way for a more robust regime of religious exemptions, but the Court reversed course again in 1990. In *Employment Division v. Smith*, an opinion by Justice Scalia rejected claims that free exercise rights were burdened when the religious use of peyote was limited by controlled substance laws.<sup>259</sup> Scalia wrote that “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’”<sup>260</sup> Scalia characterized *Sherbert* and *Yoder* as exceptions to a longstanding constitutional tradition.<sup>261</sup>

Under the rule articulated in *Smith*, Free Exercise Clause challenges to neutral laws of general applicability—in other words, laws that do not single out religion for discriminatory treatment—were to be reviewed under the lenient rational basis standard of review, requiring only that the challenged action be rationally related to a legitimate governmental interest.<sup>262</sup> Only laws that discriminated against religion, and were thus not neutral or generally applicable, triggered a heightened judicial review.<sup>263</sup>

*Smith* would have seemed to govern Free Exercise Clause claims seeking religious exemptions from a neutral and generally applicable state requirement like public-school instructional content on sexual orientation and gender identity. In other words, even though *Mahmoud* broke new ground in recognizing the exposure to conflicting ideas as a burden on religious exercise, the practical impact might be minimal if the lenient rational basis review applied.

However, the current Supreme Court has declined to apply *Smith* in a variety of challenges to measures that were arguably neutral and generally applicable. First, in *Tandon v. Newsom*,<sup>264</sup> a per curiam opinion issued on the Court’s shadow docket,<sup>265</sup> the Court declined to apply *Smith* to an emergency

pre-*Smith* jurisprudence RFRA purported to codify.” *Flores*, 521 U.S. at 535.

<sup>259</sup> See *Emp. Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

<sup>260</sup> *Id.* at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

<sup>261</sup> See *id.* at 881, 883.

<sup>262</sup> See *id.* at 878–79; *Church of the Lukumi Babalu, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citing *Smith*, 494 U.S. 872); see also *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of application for injunctive relief) (finding that the restrictions imposed on places of worship by California’s COVID-19 guidelines appeared to be consistent with the Free Exercise Clause of the First Amendment and highlighting that “[s]imilar or more severe restrictions appl[ied] to comparable secular gatherings”).

<sup>263</sup> See *Lukumi Babalu*, 508 U.S. at 531 (holding that a law that fails to satisfy the requirements of neutrality and general applicability must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest).

<sup>264</sup> 141 S. Ct. 1294 (2021) (per curiam).

<sup>265</sup> The “shadow docket” is a term used to refer to “everything *other* than the Court’s ‘merits docket’” including rulings on petitions for certiorari and emergency applications. STEPHEN

public-health order during the COVID-19 pandemic. Instead, it avoided *Smith* by holding that “government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise.”<sup>266</sup>

*Tandon*’s refusal to apply *Smith* was notable because the Court had applied the *Smith* principle (without citation) in a nearly identical case less than a year before.<sup>267</sup> The Court’s pivot is explained entirely by Justice Ginsburg’s death and replacement by Justice Barrett. In other words, these were facts that appeared to be governed by *Smith* to a majority of the Court as recently as 2020.<sup>268</sup>

In 2021, in *Fulton v. City of Philadelphia*, the Supreme Court formally considered overruling *Smith* in a challenge against a city policy requiring organizations that certify foster parents to include same-sex couples.<sup>269</sup> It did not, instead holding that the challenged policy was not governed by *Smith* because it authorized too much discretion to governmental actors to determine its application.<sup>270</sup> Separate concurrences by Justices Alito and Gorsuch (both joined by Justice Thomas) argued that *Smith* should be altogether abandoned.<sup>271</sup>

The Court’s newfound reluctance to apply *Smith* is again seen in *Mahmoud*. There, strict scrutiny was triggered because the burden to religious exercise was “of the same character” as that in *Yoder*.<sup>272</sup> Even before *Mahmoud*, the *Yoder* decision had served as something of a Rorschach test,<sup>273</sup> and lower courts are now all but certain to face arguments about which burdens are close enough to *Yoder* to trigger heightened review. Moreover, the Supreme Court explained in 1997 that pre-*Smith* cases such

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VLADÉCK, THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC 1–10 (2023) (describing the “inflection point in the history of how the Supreme Court handles procedural applications” and “a shift in the justices’ willingness to collectively—rather than individually—decide controversial and widely impactful matters behind closed doors”); *see also* *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (discussing the implications of the Supreme Court’s increased reliance on “shadow-docket decisionmaking”).

<sup>266</sup> *Tandon*, 141 S. Ct. at 1296.

<sup>267</sup> *See S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (noting that challenged COVID-19 “restrictions appear consistent with the Free Exercise Clause of the First Amendment” as “[s]imilar or more severe restrictions apply to comparable secular gatherings”).

<sup>268</sup> *See id.*

<sup>269</sup> *See* 141 S. Ct. 1868, 1881 (2021).

<sup>270</sup> *See id.* at 1878.

<sup>271</sup> *See id.* at 1924 (Alito, J., concurring in the judgment); *id.* at 1931 (Gorsuch, J., concurring in the judgment).

<sup>272</sup> *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2361 (2025).

<sup>273</sup> *See* Flanders, *supra* note 161, at 24–25 (noting that lower courts and commentators divide over whether to treat *Yoder* as “setting out a clear and general rule about how the First Amendment should decide free exercise cases” or as “a quirky case about the Amish”).

as *Yoder* did not include strict scrutiny’s “least restrictive means” requirement.<sup>274</sup> After *Mahmoud*, however, the full strict scrutiny test is triggered by burdens that resemble *Yoder*.<sup>275</sup>

Three times in four years, the Court declined to apply *Smith* in cases that might easily have been resolved by it. This trend raises real questions about the continued vitality of the beleaguered decision. Scholars have noted the Court’s tendency to engage in “stealth reversals.” In the words of Barry Friedman, a stealth reversal occurs when the court “reduc[es] a precedent to nothing” or “by sleight of hand or fiat simply chops the precedent to a stub” rather than declare that it has been overruled.<sup>276</sup> Duncan Hosie has documented several recent examples, including the Court’s reversal of *Lemon* by indulging in the fiction that past decisions had already reversed *Lemon*.<sup>277</sup>

After *Mahmoud*, it is time to ask whether *Smith* will soon follow *Lemon* into the ranks of rejected cases. If it does, *Mahmoud*’s ramifications will be greater than just those related to curricular content.<sup>278</sup>

### III

#### HOW VULNERABLE IS INSTRUCTION ON EVOLUTION?

##### A. *Creationist Legislation Remains Invalid Under the Establishment Clause*

Although instruction on evolution is newly vulnerable under *Kennedy* and *Mahmoud*, there are several reasons to believe that renewed efforts by antievolutionist advocates will generally remain unsuccessful. Although *Lemon* has been unquestionably (if imprecisely) overruled, *Epperson*, which predated *Lemon*, has not. For the lower courts, the existence of binding Supreme Court precedent invalidating attempts to remove evolution based on particular religious objections should be determinative.<sup>279</sup> And while

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<sup>274</sup> *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) (noting that RFRA “imposes in every case a least restrictive means requirement—a requirement that was not used in the pre-*Smith* jurisprudence RFRA purported to codify”).

<sup>275</sup> See *Mahmoud*, 145 S. Ct. at 2361.

<sup>276</sup> Friedman, *supra* note 20, at 12.

<sup>277</sup> See Duncan Hosie, *Stealth Reversals: Precedent Evasion in the Roberts Court and Constitutional Reclamation*, 58 U.C. DAVIS L. REV. 1323, 1373–75 (2025).

<sup>278</sup> See Boso, *supra* note 12, at 297 (“[A] maximalist theory of constitutionally protected expressive conduct could effectively guarantee individual exemptions or accommodations from any number of laws and policies.”); see also Micah Schwartzman, Richard Schragger & Nelson Tebbe, *The Structure of Religious Preference*, 139 HARV. L. REV. 211, 223 (2025) (“[T]he approaches to general applicability in *Tandon* and *Fulton* are so expansive and malleable that courts with even a modicum of creativity will have no difficulty circumventing the rule in *Smith*.”).

<sup>279</sup> See, e.g., Santiago Legarre & Andrew Chenevert, *A Modified Approach to Overruling for the “Conservative Majority,”* 98 TUL. L. REV. 591, 597 (2024) (“Vertical stare decisis is totally binding on the lower court; the lower court cannot overturn the precedent set by the higher court.”).

legislative action by West Virginia and Oklahoma perhaps reflects an increased interest in antievolution bills following *Kennedy*, only one of these bills passed, and most states have yet to move on this issue.<sup>280</sup> *Epperson* should continue to restrain both legislatures and lower courts—for now.

A closer question is how the Supreme Court would respond to invitations to reconsider its evolution precedents using the history-and-tradition methodology espoused by *Kennedy*.<sup>281</sup> There is, however, good reason to believe that the Court may avoid overruling *Epperson* based on a historical review.

First, commentators widely agree that one of the Court's most aggressive forays into history-and-tradition methodology, in the Second Amendment case *New York State Rifle & Pistol Association v. Bruen*,<sup>282</sup> produced chaotic results in the lower courts.<sup>283</sup> *Bruen* directed courts to search for early historical analogues to challenged gun-control statutes in order to establish their permissibility.<sup>284</sup> In the absence of a parallel regulation in early American history, a modern regulation was presumed to violate the Second Amendment.<sup>285</sup> Combining *Kennedy*'s directive to analyze Establishment Clause issues through history and tradition and *Bruen*'s mandate to search for ratification-era analogues would be a tall order, given the general absence of public education during the founding era.<sup>286</sup>

<sup>280</sup> See *supra* Section I.B.3.

<sup>281</sup> See Randy E. Barnett & Lawrence B. Solum, *Originalism After Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 435 (2023) (“In three recent cases, the constitutional concepts of history and tradition have played important roles in the reasoning of the Supreme Court.”); Girgis, *supra* note 8, at 1479 (noting the Court’s reliance on “‘living traditionalism’: ‘traditionalist’ because it looks to political traditions, and ‘living’ because the traditions postdate ratification”).

<sup>282</sup> 142 S. Ct. 2111 (2022).

<sup>283</sup> See Vicki C. Jackson, *Exclusionary Originalism as Anti-Constitutionalist: Dobbs and Bruen as Threats to Constitutionalism*, 18 HARV. L. & POL’Y REV. 221, 236 n.65 (2024) (observing that the Court’s Opinion in *Bruen* “has, not surprisingly, produced ‘occluded and unprincipled reasoning’ in lower courts that have sought to apply [it]” (quoting Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L. J. 99, 145 (2023) (manuscript at 58))); Michael L. Smith, *Historical Tradition: A Vague, Overconfident, and Malleable Approach to Constitutional Law*, 88 BROOK. L. REV. 797, 838 (2023) (concluding that the Court’s “historical tradition approach” in *Bruen* has led to “confusion, contradiction, and avoidance of the method” in the lower courts); *United States v. Rahimi*, 144 S. Ct. 1889, 1929 (2024) (Jackson, J., concurring) (“Consistent analyses and outcomes are likely to remain elusive because whether [the history and tradition] test is satisfied in a particular case seems to depend on the suitability of whatever historical sources the parties can manage to cobble together, as well as the level of generality at which a court evaluates those sources . . .”).

<sup>284</sup> See *Bruen*, 142 S. Ct. at 2126.

<sup>285</sup> See *id.*

<sup>286</sup> This presents challenges in the education context. See *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (“[A] historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.”); Riddle, *supra* note 187, at 572 (“Until the nineteenth century, education largely took place in the home . . . Few formalized schools existed (those that did were

However, the Supreme Court recontextualized *Bruen* just two years later. In *United States v. Rahimi*, eight justices (all but *Bruen*'s author, Justice Thomas) reversed a controversial Fifth Circuit decision and upheld the application of a statute banning firearm possession to a defendant subject to a domestic-violence restraining order.<sup>287</sup> The Supreme Court accused lower courts of having “misunderstood the methodology” required by *Bruen*,<sup>288</sup> though one scholar argued that the Court had in fact deployed “tortured, unpersuasive reasoning” to “pretend[] that historical analysis drove its decision.”<sup>289</sup>

In *Rahimi*, the majority directed that, instead of searching for exact analogues, courts must determine whether challenged laws are “consistent with the principles that underpin our regulatory tradition.”<sup>290</sup> The *Rahimi* decision was widely seen as having partially corrected or relaxed *Bruen*'s maximalist approach to history-and-tradition methodology.<sup>291</sup> Moreover, the decision revealed disagreement among the conservative majority about how to apply historical tests—Justice Barrett separately argued that only ratification-era material is relevant, while others on the Court are willing to look later in the nation's history.<sup>292</sup>

Under the more cautious *Rahimi* approach, with its search for high-level principles rather than exact historical analogues, an imminent reversal of *Epperson* appears less likely. Notably, even those who reject a strict separationist view of the Establishment Clause generally accept that it prohibits government from elevating one particular religious viewpoint over others.<sup>293</sup> While conservative justices have been skeptical of laws that disadvantage religious activities relative to secular activities, they have demonstrated less willingness to revisit the prevention of sectarian religious preferences.<sup>294</sup>

When viewed in its proper context, *Epperson* should be seen as a case

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largely private religious cooperations) . . .”).

<sup>287</sup> See 144 S. Ct. 1889, 1894, 1903 (2024).

<sup>288</sup> *Id.* at 1897.

<sup>289</sup> Allen Rostron, *Inconclusive History*, 93 GEO. WASH. L. REV. ARGUENDO 26, 27 (2025).

<sup>290</sup> 144 S. Ct. at 1898.

<sup>291</sup> See, e.g., Travis Crum, *The Riddle of Race-Based Redistricting*, 124 COLUM. L. REV. 1823, 1878 n.400 (2024); Joseph Blocher, *Bruen in a Changing Judiciary*, 74 DUKE L.J. ONLINE 139, 140 (2025); Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 CAL. L. REV. 1, 72 (2025).

<sup>292</sup> See Sherif Girgis, *Originalism's Age of Ironies*, 138 HARV. L. REV. F. 1, 2 (2024).

<sup>293</sup> See, e.g., Vincent Phillip Muñoz & Kate Hardiman Rhodes, *Constructing the Establishment Clause*, 54 LOY. U. CHI. L.J. 387, 426 (2022).

<sup>294</sup> See, e.g., *Carson v. Makin*, 142 S. Ct. 1987, 1993, 2002 (2022); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 453–54, 467 (2017). *But see* Andy G. Olree, *James Madison and Legislative Chaplains*, 102 NW. U. L. REV. 145, 220–21 (2008) (noting that, during his tenure in the Virginia legislature, James Madison opposed a general nonsectarian assessment for the support of religion).

barring legislative preference for a *particular* religious theory, rather than a decision that treated secularism more favorably than religion. The idea that evolution is incompatible with religion is persistent but far from a majority view. Indeed, many mainstream religious traditions teach the opposite.<sup>295</sup> When creationist legislation is framed as governmental preference for a specific religious viewpoint that is itself contrary to other religious viewpoints, *Epperson*'s compatibility with uncontroversial Establishment Clause principles is clear.

Thus, while the Court's current approach to the Establishment Clause may well be less protective when scientific instruction is attacked on religious grounds, its rapid retreat from *Bruen* demonstrates that not all precedents are under immediate threat of history-and-tradition revisionism.

### B. *Evolution Remains Formally Protected from Opt-Out Demands*

Despite Justice Sotomayor's warning in dissent, there are several reasons to conclude that the denial of opt-outs from content on evolution should still survive the *Mahmoud* decision. Significantly, the Court explained that "[e]ducational requirements targeted toward very young children, for example, may be analyzed differently from educational requirements for high school students."<sup>296</sup> It also asserted that "[h]igh school students may understand that widespread approval of a practice does not necessarily mean that everyone should accept it, but very young children are most unlikely to appreciate that fine point."<sup>297</sup>

Most of the challenged material in *Mahmoud* was presented to grade-school children as young as age five.<sup>298</sup> In contrast, virtually all serious discussions of evolutionary biology take place at a high-school level: *Scopes*, *Epperson*, and *Edwards*, for example, each involved high-school instruction.<sup>299</sup> The Court has long concluded that older students are more equipped to understand and distinguish nuanced concepts.<sup>300</sup>

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<sup>295</sup> See, e.g., Saint John Paul II, *Address to the Plenary Session on 'The Origins and Early Evolution of Life'*, PONTIFICAL ACAD. SCI. (Oct. 22, 1996), <https://www.pas.va/en/magisterium/saint-john-paul-ii/1996-22-october.html> [<https://perma.cc/CC3E-F8PZ>] ("In his Encyclical *Humani Generis* (1950), my predecessor Pius XII had already stated that there was no opposition between evolution and the doctrine of the faith about man and his vocation, on condition that one did not lose sight of several indisputable points."); Mohammed Alassiri, *Evolution is the Disguised Friend of Islam*, 4 NATURE HUM. BEHAV. 122, 122 (2020) (calling for the teaching of evolution in Islamic countries).

<sup>296</sup> *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2353 (2025).

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

<sup>298</sup> See *id.* at 2343.

<sup>299</sup> See *supra* Sections I.A, I.B.

<sup>300</sup> See *Mahmoud*, 145 S. Ct. at 2353; *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985) ("[S]ymbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited.").

Older students are often asked to understand ideas, regardless of whether they accept or believe in them.<sup>301</sup> For example, classes on world religions routinely ask students to learn about other faiths and belief systems. They do not ask students to accept or profess those faiths (and if they did, they would violate the Establishment Clause).<sup>302</sup> Likewise, instruction on evolution requires students to understand scientific conclusions, not to accept or reject any belief system.

A very young child may be unable to understand this distinction—although that point is arguable, and the Court, characteristically, has never cited research on child development in its decisions in this area.<sup>303</sup> Older children undoubtedly are equipped to engage with nuance. As a consequence, *Mahmoud*'s burden analysis need not necessarily extend to instruction on evolution at the high-school level, where it typically takes place.

Even if it does, the key question for districts facing demands to opt out of instruction on evolution will be whether a policy against opt-outs survives strict scrutiny. Here, too, there are important distinctions between scientific education and Montgomery County's program.

Most obviously, the Board's initial decision to allow opt-outs before reversing itself undermined its later arguments that a policy against opt-outs was narrowly tailored or the least restrictive means to achieve its interests. Moreover, although the Board expected the books to be used, individual teachers had discretion over which books to select and how to teach them.<sup>304</sup> This discretionary approach implied that no single text was indispensable for conveying the desired outcomes of developing language skills and inclusive values. And if no single text was indispensable, it was a small leap for courts to conclude that the school could facilitate opt-outs from all of them.

Evolution, in contrast, is a core principle of biology impossible to disentangle from other topics in the field. Even if a high-school class is taught with a discrete unit on evolution, rather than having the subject interwoven throughout the course, an opt-out regime would impose immense burdens on teachers. With opt-outs, teachers and administrators would

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<sup>301</sup> See Meredith Schlacter, *A Prayer for Relief: Assessing the Constitutionality of Missouri's Right to Pray Amendment*, 45 WASH. U. J.L. & POL'Y 293, 309 (2014) (“[S]chools do not ask students to believe in evolution, only to understand it.”).

<sup>302</sup> See Wexler, *supra* note 3, at 854 (“Policymakers who consider changing how public schools teach evolution must always keep in mind the possibility that, under current Supreme Court doctrine, those changes may violate the Constitution’s prohibition of religious establishment.”).

<sup>303</sup> See Elizabeth Steedley, “Humble Yourselves Before the [Court]”: *Self-Exaltation and Disdain for Expertise at the U.S. Supreme Court*, 19 CHARLESTON L. REV. 295, 297 (2024) (noting the Court’s “reliance on interpretive methodologies that, in theory, would seem to require expertise and specialized knowledge but that, in practice, are used to avoid the results and findings of expert research and scholarship”).

<sup>304</sup> See *Mahmoud v. McKnight*, 102 F.4th 191, 198 (4th Cir. 2024).

confront the challenge of designing fair assessments to evaluate most students' knowledge of evolution along with the objectors' performance on an alternative lesson plan. Objectors would need to be dismissed, supervised, and provided alternative lessons whenever the rest of the class studied evolution. The greater need to provide all students with rigorous and equivalent assessments further distinguishes high-school education from earlier grades.

Thus, notwithstanding Justice Sotomayor's warning, *Mahmoud* should not be read as guaranteeing parental opt-out rights from any class content in which their children will study evolution. That being said, the decision is likely to dramatically alter instruction on evolution (and other subjects) for the reasons below.<sup>305</sup>

### C. Increased Frequency of Opt-Out Requests

One likely impact from the *Mahmoud* case will be the signaling effect of the decision itself. Supreme Court decisions send messages to the public, increase the salience of contested issues, and embolden actors who perceive themselves to be on the winning side.

One prominent example of this was the Court's 2018 decision in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which found that a civil rights enforcement body demonstrated animus against a baker who asserted religious objections to serving a same-sex couple.<sup>306</sup> Professor Netta Barak-Corren conducted an experiment measuring the willingness of wedding vendors to serve same-sex couples before and after the *Masterpiece* decision, finding that the Court's ruling "significantly reduced the willingness to serve same-sex couples as compared to opposite-sex couples, even among previously willing vendors."<sup>307</sup> This pathbreaking study demonstrated the Court's power to shape public behavior.<sup>308</sup>

Like *Masterpiece*, *Mahmoud* may have a strong signaling effect. Before it, litigants had lost a string of cases seeking religious exemptions from exposure to curricular ideas in the public schools. Now, that dynamic has reversed. Already, in less than a year after the decision was issued, it has been invoked in challenges to school policies on subjects ranging from

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<sup>305</sup> See *infra* Section III.D.

<sup>306</sup> 584 U.S. 617, 621–25 (2018).

<sup>307</sup> Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 J. LEGAL STUDS. 75, 75 (2021) [hereinafter *Religious Exemptions*]; see also Netta Barak-Corren, *A License to Discriminate? The Market Response to Masterpiece Cakeshop*, 56 HARV. C.R.-C.L. L. REV. 315, 344–46 (2021) (finding that *Masterpiece Cakeshop* negatively affected the willingness of businesses to provide services to same-sex couples).

<sup>308</sup> See *Religious Exemptions*, *supra* note 307, at 106.

curricular content on LGBTQ inclusion to vaccine requirements.<sup>309</sup>

More requests for opt outs from the science curriculum—and threats of litigation—are sure to follow. These will likely focus on, but will by no means be limited to, evolution. In their cases, Webster’s lectures on creationism included challenges to geological conclusions about the age of the Earth, while Freshwater’s classes included attacks on carbon dating.<sup>310</sup> A growing volume of opt-out requests covering a range of scientific concepts will magnify the administrability problems discussed below.

#### D. Chilling Effects

The burdens of either litigating or administering opt-outs may deter schools from teaching evolution.<sup>311</sup> When curricular subjects risk lawsuits or increased administrative burdens, the end result is a decline in classroom discussion.<sup>312</sup>

Opt-outs have been successfully administered in certain contexts: Many school districts allow parents to remove their children from sexual-education classes, as these tend to be discrete and ungraded sessions.<sup>313</sup> Some states allow broader curricular opt-outs, but typically with requirements that limit their appeal to parents: One example requires parents to pay the cost of alternative instruction under certain circumstances.<sup>314</sup>

In contrast, opt-outs from content on evolution are likely to be far more disruptive for teachers and administrators, as content on evolution is not typically limited to a single discrete session, and performance must be assessed. The burden of supervising opt-out students, administering parallel

<sup>309</sup> *Grimsby v. Pan*, No. 5:25-CV-01575-AB-JC, 2025 WL 2829502, at \*5 (C.D. Cal. Aug. 29, 2025) (challenging school’s vaccine policy); *Alan L. v. Lexington Pub. Schs.*, CV No. 25-13047-FDS, 2025 WL 3767420, at \*1 (D. Mass. Dec. 30, 2025) (challenging curricular content related to LGBTQ inclusion).

<sup>310</sup> See *supra* Section I.B.2.b.

<sup>311</sup> See *supra* note 21 and accompanying text.

<sup>312</sup> See Corbin, *supra* note 2, at 1503 (“The chilling effect of the curriculum bans adds another layer of silencing as teachers avoid subjects entirely in an abundance of caution.”); Douglas Nejaime, *Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation*, 32 HARV. J.L. & GENDER 303, 380 (2009) (“The prospect of aggressive, costly litigation by a perceived adversary may compel schools to bow to . . . demands.”); Thalia González & Mara Schiff, *The Uncertain Future of Restorative Justice: Anti-Woke Legislation, Retrenchment and Politics of the Right*, 30 WM. & MARY J. RACE, GENDER & SOC. JUST. 1, 37 (2023) (“For teachers, the cumulative and chilling effect of divisive concepts legislation has limited curriculum and placed them in direct conflict with parents and community members who can increasingly determine how and what they teach.”); Barbara K. Bucholtz, *What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 328 (2007) (arguing, in the context of higher education, that “more lawsuits . . . must surely have a chilling effect on university policy”).

<sup>313</sup> See *Mahmoud v. Taylor*, 145 S. Ct. 2332, 2362 (2025).

<sup>314</sup> See, e.g., Minn. Stat. § 120B.20 (2025).

science curricula, and providing fair assessments may be overwhelming. In practice, the result may be the quiet removal of evolutionary material from the curriculum. Schools, seeking to avoid conflict, may effectuate through self-censorship what the antievolution movement has long failed to achieve through litigation.

This phenomenon is precisely what happened in the wake of the *Scopes* trial, when evolution faded from public school instruction until the Cold War. Even after Cold War era curricular modernization, recurring controversies around evolution have continued to reduce the effectiveness of instruction. A 2006 survey of incoming college students revealed that, although over ninety percent had studied some evolution in public high school, fewer than three quarters had studied it significantly.<sup>315</sup> Even more surprisingly—despite myriad precedents holding such content unconstitutional—roughly a third had received some instruction on creationism.<sup>316</sup> All that, long before *Mahmoud*.

Frequent and burdensome opt-out requests are likely to accelerate and exacerbate these trends, degrading scientific literacy and public understanding. Perhaps ironically, these same dynamics may play out with respect to education on religious literacy as well. Classes on world religions have sparked parental objections when students are taught principles of other faiths.<sup>317</sup> Frequent requests for administratively burdensome opt-outs may deter education in that important field as well.

#### CONCLUSION

A century after *Scopes* and more than a half century after *Epperson*, the teaching of evolution in American public schools again stands at a crossroads. This Essay has traced the long arc of antievolution advocacy—from criminal bans to “balanced-treatment” statutes, and from teacher speech claims to parental-rights suits. It has also explained how each antievolution strategy was contained under previous understandings of the First Amendment. Two recent doctrinal upheavals now unsettle that settlement.

First, the Court’s abandonment of *Lemon* has stripped away a key precedent that invalidated creationist legislation for nearly five decades, leaving lower courts with a history-and-tradition test ill-suited to debate over public education. Second, *Mahmoud* has extended Free Exercise Clause

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<sup>315</sup> See Kristi L. Bowman, *An Empirical Study of Evolution, Creationism, and Intelligent Design Instruction in Public Schools*, 36 J.L. & EDUC. 301, 301–02 (2007).

<sup>316</sup> See *id.*

<sup>317</sup> See, e.g., *Hilsenrath ex rel. C.H. v. Sch. Dist. of Chatham*, 136 F.4th 484, 486, 488 (3d Cir. 2025) (“Hilsenrath sued the Board of Education of the School District of the Chatham over instructional videos about Islam in her son’s seventh-grade World Cultures and Geography class.”).

protection to shield students from mere exposure to disfavored ideas. Together, these moves will embolden fresh challenges to scientific instruction.

Formally, precedent and prevailing doctrine still protect the inclusion of evolutionary biology in public school science classes, especially at the secondary level. Functionally, however, *Mahmoud* may invite a torrent of opt-out requests and threatened litigation that risks recreating the post-*Scopes* chilling of scientific instruction. The likely result is a gradual erosion of scientific literacy, achieved through administrative attrition.

This Essay has positioned *Mahmoud* as more than a case with dramatic implications for instruction on sexual orientation and gender identity. It is surely that too, but also a pivotal moment in the century-long contest over science education. This Essay anticipates and warns against impending degradation of scientific literacy. The responses of schools, courts, and policymakers may determine whether evolution remains a pillar of public scientific education or recedes, once again, into silence.