

A Constitutional Framework for Addressing Religious Viewpoints in Public School Classrooms

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This article explores the proper constitutional standard to apply to teaching, or at least acknowledging, religious viewpoints in the public school classroom. It suggests an approach consistent with Establishment Clause jurisprudence that also advances the important goals of furthering public tolerance and respect for alternative viewpoints. In particular, it suggests distinguishing among three kinds of public classroom activities -- *acknowledging* religious beliefs, *explaining* religious beliefs and *endorsing* religious beliefs. The first two can be reconciled with the Establishment Clause under some circumstances. The third cannot. Defining these activities and developing a framework to clarify when they are permissible can help us further the goals of tolerance and respect.

Throughout much of this article, I illustrate the discussion with an example that will be familiar to many – teaching evolution in the face of many Christian religious conservatives’ preference that their children be taught the Biblical account of creation. I argue that, as a general matter, progressives should prefer an approach to this conflict that is consistent with bedrock constitutional principles but at the same time reflects a tolerance and respect for individual beliefs. For example, the widespread adoption of a moment of silence at the beginning of the day, during which students can pray if they wish, may prove a workable long-term compromise to the issue of school prayer. The acknowledgment of the legitimacy of voluntary silent prayer in schools – without the endorsement of it – has to a large extent defused at least the overt political battle over prayer in schools. This is a result that progressives and conservatives alike should applaud.

Progressives should seek similar solutions to other contentious issues that arise in the context of church-state issues, including deep differences over teaching about the origins of human life. To get started on this problem, it is useful to step, for a moment, into the intellectual shoes of a religious conservative who has a child in a public high school science class. Assume, as is often the case, that Darwin’s account of the development of the human species, the modern physicists’ description of the Big Bang and the scientific explanation of the appearance of the earliest forms of life are taught while the Bible’s account of creation is not. The Christian religious conservative may see the state as endorsing explanations directly inconsistent with Biblical truth and his own deeply held beliefs. In other words, from the Christian religious conservative’s point of view, the state has gone beyond neutrality to hostility toward her religious viewpoint.

In general, as progressives we value the separation of church and state and, therefore, support the idea of religious neutrality in the classroom. Even if we value neutrality, however, we cannot expect teachers to be neutral on every factual question

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simply because there are religious objections. Teachers explain Hurricane Katrina based on weather patterns over the Gulf of Mexico, not as the demonstration of the wrath of a vengeful God, as suggested by some Christian evangelists. Teachers use charts and textbooks showing that dinosaurs lived hundreds of millions years ago, even though Christian religious conservatives believe that the earth is only a few thousand years old. An essential characteristic of a public school classroom is that it is not a public forum available for the expression of multiple viewpoints.¹ The school system and teachers, in consultation with communities, have to formulate the curriculum and decide the content of the courses, including some ideas and excluding others.

In some courses and contexts, a public school teacher can say: “some people believe X and some people believe Y” without endorsing X or Y. However, science education would become incoherent if teachers tried to present all viewpoints, including religious viewpoints, without endorsing any of them. The challenge is to teach young people what science has to say about evolution, the origins of life, and the creation of the universe without conveying open support for any particular religious viewpoint and without conveying open hostility to one either. In order to identify the applicable legal framework for this sometimes challenging process, we turn first to the Supreme Court’s approach to the Establishment Clause.

I. The Establishment Clause Governs

A. The *Lemon* Test and *McCreary County v. ACLU of Kentucky*

Attempting to find a place for the expression of religious viewpoints in public classrooms, if there is one, presents an Establishment Clause problem.² Thus, our starting point is *Lemon v. Kurtzman*.³ *Lemon* required that, to avoid offending the Establishment Clause: 1) a state law must have a bona fide secular purpose; 2) the principal effect must be one that neither advances nor inhibits religion; and 3) the law must not lead to an excessive “entanglement” of government and religion. Over the years, the entanglement prong has become less significant, and, therefore, the discussion below focuses on prongs one and two -- purpose and effect.

Lemon has been subject to criticism from many quarters and the application of it has frequently strayed from its original formulation. A recent opinion illustrating the disagreements among Supreme Court justices over how to apply *Lemon* is *McCreary County v. ACLU of Kentucky*.⁴ *McCreary* dealt with a display of the Ten Commandments on the walls of county courthouses in Kentucky. Justice Souter’s majority opinion, joined by four other justices,⁵ found that the display offended the Establishment Clause because the policy of displaying the Ten Commandments was

¹ Below I discuss cases where courts have rejected the idea that classrooms are public forums.

² The Establishment Clause, found in the First Amendment, provides that: “Congress shall make no law respecting an establishment of religion...” The guarantees of the Establishment Clause bind the states as well as the Federal Government. See *Everson Board of Education*, 330 U.S. 1 (1947).

³ 403 U.S. 602 (1971).

⁴ 545 U.S. 844 (2005).

⁵ Justices Stevens, O’Connor, Ginsburg and Breyer.

based on a purpose to advance religion. In particular, there had been a series of actions by the county indicating that county officials were determined to maintain a display conveying a distinctly religious message.

The dissenting opinion by Justice Scalia illustrates the principal controversies over *Lemon*. First, four members of the *McCreary* Court took the position that the Establishment Clause does not prohibit a government preference for religion over irreligion. In other words, in their view, the state can endorse religion in general although it cannot prefer one religious doctrine over another. It is possible that support on the Supreme Court for that position has grown with the replacement of Justice O'Connor by Justice Alito.

Second, Justice Scalia and others have complained about the application of the purpose prong of *Lemon*. One argument is that it may be a futile exercise to determine the primary purpose intended by a single person, much less the collective purpose of a group of policymakers. The Court's application of the purpose prong in *McCreary* was even worse, according to Justice Scalia, since the Court appeared to apply a heightened requirement that the secular purpose must "predominate" over any purpose to advance religion, rather than require only that there be "a" secular purpose. Moreover, he complained that even if the government's actual purpose was not to advance religion, the majority would strike down a law if an "objective observer" would conclude that the policymakers' purpose was to advance religion.⁶

B. Justice O'Connor's Endorsement Test

Justice O'Connor's concurring opinion in *McCreary* advanced a formulation of *Lemon* that she advocated in several opinions. Her approach focuses whether the policy has the purpose or effect of endorsing religion.⁷ If so, she argues, the policy is constitutionally infirm. The endorsement reformulation of *Lemon* has certain advantages because it more narrowly focuses the inquiry about both purpose and effect. Arguably, it provides a way to analyze public policies that offer some support to religion, but that, overall, do not convey a clear message of endorsement, such as public displays that include symbols from different religious traditions. Asking if the display, as a whole, has the effect of endorsing a religious point of view might make more sense than asking if any part of the display had the "effect" of advancing religion.⁸

Justice O'Connor's endorsement approach appeared to be accepted by a majority of the Court in *County of Allegheny v. ACLU*⁹ where the Court struck down a freestanding display of a nativity scene in a public courthouse and, in the same case, upheld the display of a menorah alongside a Christmas tree. Justices Souter and Breyer

⁶ *Id.* at 900-01.

⁷ *Id.* at 883-84.

⁸ Justice O'Connor originally proposed an endorsement analysis in *Lynch v. Donnelly*, 465 U.S. 668, 688-92 (1984).

⁹ 492 U.S. 573 (1989).

also noted their support for this approach in *Capital Square Review Board v. Pinette*¹⁰, which upheld the State’s decision to permit a private group to erect a cross on a public square next to the Statehouse. The endorsement test has not risen to the level of clear Supreme Court precedent, however, and courts sometimes feel obliged to apply both the traditional *Lemon* test and the endorsement test in the same case.¹¹

C. Does the State’s Purpose Make a Difference?

There are conceptual problems with both *Lemon* and the endorsement test as delineated by Justice O’Connor. Even if one does not go as far as Justice Scalia in advocating a wholesale rejection of purpose analysis, striking down a policy based on purpose can lead to arbitrary results. For example, a search for purpose can consist of scouring the record for poorly advised statements by legislators or other public officials revealing their intent to support religion. Without such evidence, a plaintiff might be unable to convince a court to strike down a policy even though the actual purpose would remain the same.

Another conceptual problem is that there may not be any harmful effect of a policy even if the underlying purpose is clearly impermissible. For example, imagine that there is an organized effort by religious groups to persuade a legislature to enact a statute requiring that high school teachers make a statement in class each day that students should “keep an open mind and have respect for all beliefs and creeds.” Assume the religious groups are convinced that this practice will encourage students to reject their classroom teacher’s explanation of evolution and to continue to accept the Bible’s account of creation. Assume also that this purpose is stated clearly in authoritative statements in the legislative record, such as committee reports. Should this impermissible purpose result in striking down what is otherwise a benign, perhaps even admirable, message?

One possibility is to employ an “objective observer” test to review the actual policy. In this example, it is possible that, given the neutral language of the statement, an objective observer would conclude that the purpose of the policy is not to advance religion, but rather to value religious tolerance.¹² The problem from a constitutional perspective is that the State’s actual purpose to advance religion is clearly stated in the legislative record. A second approach is to allow the state to meet its burden if it can point to any legitimate secular purpose that might be served even if the “actual” purpose is impermissible. That is the conventional approach when most statutes are challenged. The simplest approach of all may be to examine whether any constitutionally-recognized harm flows from reading this statement, which I would argue it does not. Under the last approach, where no harm flows from the state action, the plaintiff would not be entitled

¹⁰ See 515 U.S. 753, 773 (1995).

¹¹ *Kitzmiller* is an example. See also *Freiler v. Tangipahao Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999). Both cases are discussed in Part VI below.

¹² See, e.g., *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308 (2000) (where the Court, in describing the endorsement test, said the finder of fact should consider the perception of a “objective observer, acquainted with the text, legislative history and implementation of the statute”).

to a remedy even if the government's purpose was impermissible. Whatever the best analysis of this particular hypothetical case, it suggests that we should be cautious about an approach that turns entirely on purpose, without any assessment of effects.

Further guidance from the Supreme Court on Establishment Clause analysis is likely. We can assume that the Court will continue to examine both the purpose and effect of any policy that appears to support religion, and the current makeup of the Court suggests that the State will have more leeway on both elements. In particular, it is possible that the replacement of Justice O'Connor by Justice Alito will tip the Court to hold that the Establishment Clause does not prohibit support for religion in general although it does prohibit support for any particular religious viewpoint.¹³ For reasons that I discuss below, however, even this narrower view of the Establishment Clause should not permit endorsement of creationism in the classroom.

II. Neutrality and Indoctrination in Public Classrooms

Before we turn to cases that deal specifically with teaching evolution and creationism in the classroom, it is helpful to review two other related lines of cases. The first addresses whether the state must be "neutral" in presenting ideas in the classroom. The second is whether the state can engage in religious indoctrination.

A. Neutrality in the Classroom?

Some have argued that the state must present (or allow others to present) both creationist and Darwinian points of view when discussing the origin of the human species.¹⁴ This position presents obvious problems, not the least of which is figuring out how to implement it. Applying a principle of neutrality would not begin and end with two points of view about the theory of evolution. There are many points of view about many issues that can arise in science class. Even if this "neutrality" principle were limited to religious viewpoints, there would be different views about the age of the earth, the causes of disease, and other thorny issues. If the principle were extended to all scientific issues about which some students have deeply held conflicting beliefs, it would quickly become unworkable. It is hard to imagine how a teacher could remain "neutral" on all issues and still provide a valuable academic experience rather than a panoply of conflicting arguments.

More fundamentally, from both a practical and constitutional perspective, the classroom is not a public forum where all comers are permitted to appear and present

¹³ Some of Justice Alito's decisions while he was a judge on the Third Circuit suggest that he might have a narrower view of the Establishment Clause than his predecessor on the Supreme Court, Justice O'Connor. *See, e.g.,* *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1489 (3rd Cir. 1996) (where he joined a dissent, which would have upheld a school policy permitting prayer at a high school graduation because the student body had voted for it). In contrast, the Supreme Court struck down a similar policy in *Santa Fe Indep. Sch. Dist. v. Jane Doe*, 530 U.S. 290 (2000). Justice O'Connor joined the majority opinion.

¹⁴ *See, e.g.,* Stephen W. Trask, *Evolution, Science and Ideology: Why the Establishment Clause Requires Neutrality in Science Classes*, 10 *CHAP. L.REV.* 359 (2006).

their points of view.¹⁵ The teacher’s speech is the speech of the state and the state need not remain neutral as to its content. This is one implication of the line of cases dealing with discretion of the State to decide how public schools will function.¹⁶ A school board can decide that its teachers will address religious beliefs as long as it is clear that the state is not endorsing them.¹⁷ That is what takes place, for example, in courses on comparative religions, the history of religions, or literature. However, the state is not obligated to present different points of view if it concludes that doing so is not a worthwhile part of the educational experience.

B. State Cannot Engage in Indoctrination

A second line of cases makes clear that the state cannot engage in *directly* promoting sectarian messages. Although the Supreme Court’s approach to taxpayer support for sectarian education has a long and tortured history, this principle remains firmly intact. Even in two Establishment Clause cases where the Court split on the validity of the funding program, the disagreement was not about whether the state could engage in religious indoctrination. All of the justices agreed it could not. In *Agostini v. Felton*, the Court upheld by a 5-4 vote the use of public funds to teach nonsectarian remedial courses in parochial school classrooms.¹⁸ The Court rejected the argument that education inside parochial classrooms should be presumed to inculcate religion. A similar result was reached in *Mitchell v. Helms*, which upheld the use of public funds for computers and teaching aids.¹⁹ *Helms* raised the practical issue that taxpayer funds earmarked for a nonsectarian purpose can in practice free up funds to spend on religious indoctrination. This troubled the dissenters (Justices Souter, Stevens and Ginsburg) but not a majority of the justices. From a practical perspective, it is likely that through budgetary reallocations the taxpayers in *Helms* were in fact paying *indirectly* for religious indoctrination. Still, there was no suggestion that the government could support such indoctrination directly.

Another case has made clear that if the public funding is not earmarked for a secular purpose, the funds may be used for sectarian purposes as long as individuals and not the state are making the spending decisions. In *Zelman v. Simmons-Harris*, a majority upheld Cleveland’s school voucher program providing unrestricted tuition vouchers to families who could use them for sectarian schools.²⁰ Four justices required only that the state remained “neutral” as between sectarian and non-sectarian schools. Justice O’Connor concurred on the grounds that the amount of diversion of public funds

¹⁵ See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 267 (1984).

¹⁶ See, e.g., *Peck v. Baldwinville Central School District*, 426 F.3d 617, 629 (2d Cir. 2005) (student assignments); *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (textbooks); and *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3rd Cir. 1998) (course content).

¹⁷ See *Stone v. Graham*, 449 U.S. 39, 42 (1980) (“This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion or the like.”) (citations omitted); *Freiler*, 185 F.3d at 347.

¹⁸ 521 U.S. 203 (1997).

¹⁹ 530 U.S. 793 (2000).

²⁰ 536 U.S. 639 (2002).

to religious education would be “neither substantial nor atypical of existing government programs.”²¹ Despite the result in this case, the facts were limited to vouchers given to parents who could then choose to use them to pay for their children’s education at secular or sectarian schools. *Zelman* does not mean that taxpayer dollars can be used *directly* by the state to sponsor religious indoctrination; parental choice was key to the decision. Applying this principle to classroom education, we can still conclude that public school teachers cannot deliver a religious message.

What if the religious message in the classroom offers “general” support for religion? Might Justices who believe that public support for religion “in general” is permissible also conclude that “general” religion indoctrination in a public classroom is permissible? I do not think so. The argument that the Establishment Clause permits support for religion over irreligion has been made primarily in the context of public displays and ceremonies. Religious messages in the classroom are invariably more specific than public displays or “generic” prayers at a public event.²² The fact that the audience for the state’s message is composed of children who are required by law to be educated (mostly in public schools) means that, from a constitutional perspective, the state must be even more careful to avoid possible indoctrination. For example, if a public school teacher endorses a Biblical description of the origin of man, the state’s religious message is far more influential than Justice Scalia’s example of permissible support for religion in general through “acknowledgment of the Creator” in a public ceremony or display.²³ In short, a solid majority of Justices will probably continue to say that public school teachers cannot engage in religious indoctrination or endorse a religious message, even if the message is one of “general” support for religion.

III. What is Science?

It is helpful to address one more threshold issue before we apply these standards to teaching of creationism in the public school classroom: what is science? Science consists of making empirical observations of natural phenomena and formulating hypotheses about them. These hypotheses are then tested through repeated observations, through comparing them with other relevant scientific knowledge, and, if possible, through controlled testing. Any repeated observations that are inconsistent with the hypothesis cast great doubt on its validity. Over time, a body of evidence is created, some of which is consistent with the hypothesis, some of which may be inconsistent. When the hypothesis is repeatedly confirmed by more observations, scientists become more confident about its validity.

While we can never be completely confident that any conclusion reached through empirical observation is true, once a certain degree of confidence is reached, we incorporate the hypothesis into our body of accepted knowledge about how the world

²¹ *Id.* at 668.

²² See *Lee v. Weisman*, 505 U.S. 577, 643 (1992) (Justice Scalia’s dissenting discussion of the difference between public displays and school instruction).

²³ 545 U.S. at 893.

works.²⁴ For example, we accept as a known fact that the earth revolves around the sun and that, due to the rotation of the earth, the sun will appear to “rise” tomorrow, even though there is at least a tiny probability that we are wrong. Our confidence about the special theory of relativity is not quite as high but repeated observations confirming it make it very likely as well. Based on the evidence obtained by scientists, our confidence that the use of fossil fuels is having an adverse long-term effect on the earth’s climate has steadily increased in recent years to approach a fairly high level of certainty, though there remain some skeptics.

Evolution and its principal mechanism, natural selection, explain the development of all species, including plants, animals and humans. Today, the central elements of evolution are widely accepted by scientists. Not every detail of this process is understood and there are still some disagreements among scientists about certain aspects. In these respects, evolution is like any other complex natural phenomenon, from the earth’s climate to the migration of birds. However, the core elements of evolution and natural selection meet the test of a hypothesis about which scientists have a great deal of confidence. That is why they are taught in our nation’s public schools as an established theory.

A. Science and Creation

The debate about teaching creationism in the public school classroom does not stop with the question of how humans came to exist, although the centrality of that issue makes it the most prominent one. Teaching how the earliest forms of life developed can raise similar objections from religious conservatives. The consensus view about the origin of living things is that inert molecules in the soup of the earth’s ancient oceans randomly formed various combinations, perhaps with the aid of lightning, ultraviolet radiation, or gases present in the atmosphere. Some of these combinations were amino acids, the building blocks of proteins. These proteins combined to form more complex arrangements of molecules, which eventually, through further random combinations, formed one-cell organisms capable of reproducing. These “successful” combinations expanded their numbers and, through mutations, formed the basis of new species. Evolution of living things was then off and running. Although most scientists would subscribe to this (oversimplified) explanation of the origin of life on earth, creationists would argue that this account is directly contrary to the Bible.

Support for outright teaching of the Biblical description of creation in public schools has given way among politically sophisticated advocates to support for teaching “intelligent design” as an alternative explanation of the development of complex organisms. The methodology underlying this alternative explanation is sometimes called “creation science” to emphasize the claim that, like evolution and natural selection it, too, qualifies as science. Supporters of the intelligent design theory describe it as the view that a powerful and supremely intelligent creator was responsible for the creation of the

²⁴ See Anne Marie Lofaso, *The Constitutional Debate over Teaching Intelligent Design as Science in Public Schools*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF (December 2005) (Giving a thoughtful discussion of the definition of science).

universe and the living things in it. Advocates of the theory argue that it constitutes a scientific theory that deserves consideration alongside the mainstream scientific view that living things evolved through natural selection. Proponents of the intelligent design theory often take pains to say that the “designer” is not necessarily the God of the Bible, but the history and literature of the movement make it clear that the overwhelming purpose of the proponents is to persuade the public, including children in public schools, to believe in the Bible’s account of the creation of man.²⁵ Nevertheless, the argument that intelligent design qualifies as science rather than religious belief complicates the constitutional analysis, not to mention the politics, of the debate.

The tension between explaining nature through conventional scientific observations and incorporating a divine creator in the story arises with respect to the creation of the universe as a whole. Our understanding of the expansion and transformation of matter after what is commonly called the “Big Bang” is amazingly complete. There is powerful evidence about the incredibly high temperatures at the instant of that event and the steady cooling of the universe in the succeeding billions of years, the formation of atoms and molecules from the simple subatomic particles that were created at the time of the Big Bang, the eventual accumulation of matter in primordial galaxies and solar systems, then finally into stars and planets, and the ongoing expansion of the universe. Thus, the Big Bang, like evolution, is based on overwhelming empirical evidence, tested against other established facts.

Despite the elegant detail with which astrophysicists can describe the process of the Big Bang, empirical evidence is limited to observations about what occurred the instant after the event took place. How matter came to be compressed to a virtual point in the first place and why there was matter at all remain left to informed speculation. One possible answer to those who wonder about the origin of the universe is to say that time and space began with the Big Bang. Therefore, asking about the state of affairs before the Big Bang is meaningless. This response may be intellectually satisfying only to the hard-headed physicists among us; the rest of us still want to hear some possible explanations. One possibility is based on the discoveries of quantum physics, which include the observation that subatomic particles spontaneously come into existence under some circumstances. A replication of this process on a massive scale could account for the existence of matter that led to the Big Bang. Conceivably, the circumstances under which this occurs are almost infinitesimally rare, but, if we assume a long enough time horizon, the likelihood that a very low probability event will occur at least once becomes very high.

Our understanding of the origin of the universe will continue to grow as scientists peer across the vast reaches of the universe and study the nature of subatomic particles. At some point, informed speculation about why the Big Bang occurred may turn into a sufficiently well-developed hypothesis, which school boards will conclude should be taught to students. Introducing students to a science-based account of the creation of the

²⁵ A discussion of the ID movement is provided in *Kitzmiller v. Dover Area School District*, 400 F. Supp.2d 707 (M.D. Penn. 2005). This case is discussed more fully below.

universe, however, will almost certainly lead to arguments that students should be told about the religious creationist alternative. Proponents of creationism might argue that the universe is too complicated, too vast and simply too incredible to have come into existence without divine intervention. They might argue that the empirical evidence for why there was a Big Bang in the first place is so thin that the case for teaching a “supernatural” explanation is even stronger than in the case of evolution or the Big Bang. Nevertheless, if explanations of natural phenomena, even tentative ones, are based on empirical observations and tested against known facts and established physical laws, they qualify as science. For purposes of Establishment Clause analysis, they stand on the same footing as evolution, Ohm’s law (which explains the nature of electrical current), and Newton’s Laws of Motion (which describe, among things, the relationship between force and acceleration).

B. Why Intelligent Design and Creationism are not Science

In contrast to evolution and natural selection, intelligent design and creationism (or “creation science”) are not science, primarily for two reasons. First, the proposition that man was created by an “intelligent designer” is not based on empirical observations that are subject to conventional scientific scrutiny. Proponents of this theory point to gaps in the evidence for evolution, but gaps in the evidence for one scientific theory do not amount to support for an alternative explanation, particularly when the entire body of evidence for the established theory is so powerful. The proponents of intelligent design offer one central observation: the probability that natural selection, unplanned and undirected, would have led to the human species is very small. That is true, but the scientific inference is that we are very fortunate, not that an intelligent designer is responsible. In the vast reaches of the universe there may be billions of planets that provide conditions where life could have developed. Perhaps intelligent life developed only on a handful, perhaps only on one. But the low probability that a human-like species would develop on any single planet does not transform an account of creation based on faith to a conclusion based on science.

Second, the implications of the “intelligent designer” hypothesis go far beyond explaining why there are such amazingly complex natural phenomena as DNA and the human eye. It has implications for the most far-reaching and important questions about the existence of God, indeed the meaning and purpose of our lives. These implications take us far beyond anything that could be characterized as science. Any explanation of the origin of the human species that includes a role for God invariably promotes the idea that God exists and intervenes in the world. For example, many people accept evolution but do not consider it incompatible with the idea that man was created in God’s image.²⁶ A public school that presented evolution as fact but endorsed God’s role in it would invariably be endorsing beliefs about the existence of God that are distinctly religious. As the Court has stated, “Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not

²⁶ That is the position of the Catholic Church, for example. See Pope John Paul II, *Message to the Pontifical Academy of Sciences*, October 22, 1996.

purposely be used to advance religious beliefs that may conflict with the private beliefs of the student and his or her family.”²⁷

All this is not to say that beliefs about the role of God in creation are wrong; they may be perfectly right. Indeed, we might hope that they are right. It also does not mean that conclusions based on science are more worthwhile and meaningful than conclusions based on religious faith. It only means that religious beliefs about God and creation, whether they amount to a wholesale rejection of evolution or an approach that reconciles evolution with God’s role in it, are not based on science. Therefore, with respect to their place in the science classroom, they stand on a different footing in Establishment Clause analysis than conclusions that are based on science.

IV. Why Policies Promoting Creationism Do Not Pass Constitutional Muster

Opponents of evolution have over the years pursued a number of approaches to bar or limit the teaching of it in public classrooms. The most direct approach is a statute that simply bans it. In *Epperson v. Arkansas*, the Court struck down an Arkansas statute that flatly prohibited the teaching of evolution.²⁸ The Court concluded that such a statute impermissibly promotes religion.²⁹ A second approach is to mandate “balanced treatment,” for example by requiring that both evolution and creationism be taught or by prohibiting the teaching of evolution unless creationism is also taught. In *Edwards v. Aguillard* the Court struck down Louisiana’s “balanced treatment” statute, which prohibited the teaching of evolution unless “creation science” was also taught.³⁰ A third approach is to require the schools to acknowledge in some way that creationism is an alternative explanation of evolution. Recent cases reviewing such policies are discussed below. It is obvious that a statute that flatly bars the teaching of evolution would violate the Establishment Clause. Such a statute puts the state squarely in the position of endorsing religion and rejecting an explanation of the development of the species that has overwhelming scientific support. In this section, I discuss the other two approaches.

A. Balanced Treatment Statutes

The statute reviewed in *Edwards* prohibited the teaching of evolution unless “creation-science” was also taught.”³¹ The State’s position was made more difficult because the statute built in a series of preferences for teaching creationism, including requiring curriculum guides only for creationism, providing research services only for creationism and so on. Moreover, it was clear that the purpose of the legislature was to “restructure the science curriculum to conform with a particular religious viewpoint.”³² Thus, applying the purpose prong of *Lemon*, the Court struck down the statute.

²⁷ *Edwards*, 482 U.S. at 584.

²⁸ 393 U.S. 98, 109 (1968).

²⁹ *Id.* at 103-4.

³⁰ 482 U.S. 578, 597 (1987).

³¹ *Id.* at 578.

³² *Id.* at 593.

What if the statute had been perfectly neutral with regard to teaching creationism and evolution? In other words, assume that the statute had not included the preferences for teaching creationism that the Court emphasized in *Edwards*? There would still be the argument that the legislature's purpose was to advance religion, but recall the difficulties that can sometimes accompany a search for the legislature's actual purpose. Even if the legislators had not openly expressed a purpose to advance religion during the passage of the legislation, however, the statute would still violate the Establishment Clause. It required the State to endorse the Biblical account of creation by putting it on the same footing as a science-based conclusion. As we have seen, there is a constitutional dividing line between conclusions based on empirical observations and conclusions based on faith. Evolution is on one side of the line and creationism and intelligent design are on the other. Requiring the state to endorse both cannot be reconciled with the Establishment Clause.

B. Informing Students of an Alternative

Because of the constitutional infirmities of a bar on teaching evolution and a mandatory balanced treatment statute, politically sophisticated proponents of intelligent design and creationism have begun to advocate a different approach – requiring that students be informed about them as an alternative explanation. Two recent cases dealt with this type of statute. In *Kitzmiller v. Dover School District*, a federal district court examined a policy adopted by the Dover Area School Board of Directors requiring that students “will be made aware of the gaps/problems in Darwin’s theory and of other theories of evolution, including but not limited to, intelligent design.”³³ The Dover Area School District had issued a directive based on this resolution requiring that the following statement be read to ninth grade biology students:

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

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

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

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussions of the

³³ 400 F. Supp.2d 707, 709 (M.D. Penn. 2005).

Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses on preparing students to achieve proficiency on Standards-based assessments.

When many teachers refused to read it, the administrators came into the class and read the statement themselves. The disclaimer included the ominous mandate that: “there will be no other discussion of the issue and your teachers will not answer questions on the issue.” Students who did not wish to hear the disclaimer read had to “opt out” to avoid hearing it. There were no other such disclaimers on any other topic in any class in the Dover Schools.

The court rejected the statement on constitutional grounds, concluding that the history of the disclaimer showed that the purpose of the directive was to promote religion by undermining students’ acceptance of evolution and by strongly suggesting that students accept the religious-based alternative of intelligent design. Moreover, the court concluded that the effect of the disclaimer was to send a message disavowing the validity of evolution, not only by expressly stating that the “Theory is not a fact,” but by strongly implying that the only reason that it was taught was to satisfy an arbitrary state law.³⁴ It found that through the statement, the state implied support for the theory of intelligent design. For example, students were referred to a book that the court found promoted expressly religious ideas. In practice, while purporting to provide only an acknowledgment of an alternative viewpoint, the disclaimer was intended to undermine evolution and support the faith-based alternative.

A closer case was *Freiler v. Tangipahoa Parish Board of Education*.³⁵ The Board of Education required the following disclaimer to be read to students at the beginning of any topic dealing with evolution:

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

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her opinion or maintain beliefs taught by parents on this very

³⁴ There is clearly a potential for confusion in emphasizing that a science-based conclusion is a “theory.” In everyday conversation, “theory” is often synonymous with “speculative suggestion.” In the scientific literature, however, the word “theory” is often used to refer to a well-established explanation of natural phenomena. For example, we still refer to Einstein’s “special theory of relativity,” although it has been firmly established through empirical observations.

³⁵ 185 F.3d 337, 341 (5th Cir. 1999).

important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

The state argued that its secular purposes were to: 1) encourage informed freedom of belief, 2) “disclaim any orthodoxy of belief” that could be inferred from including evolution in the curriculum and 3) “reduce offense to sensibilities and sensitivities” of students and parents.³⁶ The Fifth Circuit found that the second and third purposes were valid secular ones and that the statute furthered them. Thus, the state survived the purpose prong of *Lemon*. The question was whether it would survive the effect prong as well.

The appeals court answered that question “no,” concluding that the disclaimer provided an endorsement of religion based on three features: “1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; 2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and 3) the [reference to the] ‘Biblical version of Creation’ as the only alternative theory expressly referenced in the disclaimer.”³⁷ The court commented that there is no Establishment Clause bar on introducing religious concepts in the classroom if they are done in the context of comparative religion or history classes. Notably, however, the disclaimer at issue did not provide information designed to promote the understanding of various religions.³⁸

In evaluating these types of statements, it is helpful to step back and ask what their proponents are trying to accomplish. In these two cases, it is fair to say that the principal purpose was to undermine students’ belief in evolution and to persuade them to accept the Biblical account of creation. If the Establishment Clause requires that the “primary” purpose be secular, as the majority suggested in *McCreary*, such a purpose would be fatal, at least if the purpose is reflected in the legislative record. Let us assume that *Lemon’s* original formulation of the purpose requirement is applied, however, and the state only needs to present one legitimate secular purpose. That was the approach followed in *Freiler*. The *Freiler* court concluded that disavowing orthodoxy and avoiding offending the sensitivities of parents and students were legitimate secular objectives. One might rephrase the court’s formulation to say that a legitimate secular purpose is to show respect and tolerance for students and parents’ religious beliefs.

If we state the purpose requirement this way, then the purpose prong is satisfied as long as the statute can legitimately be said to show respect and tolerance for religious beliefs. The challenge is to avoid a message that has the effect of advancing religion or (in Justice O’Connor’s formulation) avoids sending a message of endorsement of religion. The disclaimer reviewed in *Freiler* was not a model of English prose. Presumably, the first part of the disclaimer was intended to convey the following: “The

³⁶ *Id.* at 344.

³⁷ *Id.* at 346.

³⁸ *Id.* at 347.

theory of evolution should be presented to inform students of the scientific concept [of evolution] and [the presentation of the theory is not intended to influence students in their acceptance or rejection of] the Biblical version of Creation or any other concept...[I]t is the basic right and privilege of each student to form his/her own opinion or maintain beliefs taught by parents on this very important matter of the origin of life and matter.”³⁹

Is there anything that is constitutionally objectionable about this statement? To put the first sentence in the most favorable light, the school board is telling a student: “Our motive is not to change your beliefs about the Biblical version of creation one way or the other.” That message may be seen as fairly benign. On the other hand, why do schools teach students unless there is a possibility that their existing beliefs might be altered in some way? Consequently, a less favorable, but probably more realistic, interpretation is that: “The lesson about evolution you are about to hear is not sufficiently weighty or informative to cause you to change your mind about anything, including the Biblical version of Creation.” That statement, though more subtle, would fall into the same category as the one reviewed in the Dover case – a message undermining the scientific validity of evolution and favoring the religious view of creationism.

The second sentence also creates problems. A condensed, but realistic, reading of the statement is: “Every student has a right to form his own opinion on the validity of evolution.” It is true that, as a First Amendment matter, the state cannot force someone, even a ninth grader, to actually *believe* anything. As a matter of grading the biology exam, however, the state’s permissible role regarding course content is very different. The state can insist that students learn about natural selection and demonstrate their understanding through papers and on exams. This statement is troubling, then, because it conveys to students the idea that “unlike all the other things you need to learn in biology, evolution is just a ‘matter of opinion.’” Thus, the second sentence, too, undermines the science-based explanation of evolution in order to encourage support for a faith-based explanation.

Many teenagers pay little or no attention to these kinds of disclaimers and carefully parsing the possible interpretations is a waste of time. However, as *Freiler* and *Kitzmilller* demonstrate, these kinds of statements can have enormous importance for some groups of students and parents and for many in the larger community as well. It is important to focus on the fact that the Establishment Clause guards against state policies that marginalize persons with particular beliefs even though the policies might not actually increase or reduce the number of people who hold any particular viewpoint.⁴⁰ Thus, it is worth considering how a school system can show respect and tolerance for

³⁹ The disclaimer as quoted in the first opinion read “to form his/her own opinion and maintain beliefs...” but this was corrected when the court denied rehearing en banc. 201 F.3d 602, 603 (5th Cir. 2000).

⁴⁰ “Endorsement [of a particular belief] sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.” *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (citations omitted).

religious beliefs while teaching students what science has to say about the origins of the universe and human life.

V. What is Permissible?

In discussions about the law of church and state, it is often easier to say what is impermissible rather than to state affirmatively what is permissible. Nevertheless, it is a useful exercise to suggest a framework for what states can do. At the outset, we should distinguish among three types of classroom activities that relate to religious ideas – *endorsement*, *acknowledgment*, and *explanation*. All of these can arise in teaching students about evolution (and many other issues as well). The first of these is clearly impermissible under the Establishment Clause. However, the other two may be permissible, depending on the circumstances. An acknowledgment that some members of the community hold religious beliefs does not necessarily offend the Establishment Clause under the *Lemon* test or the endorsement test. The challenge is to present the acknowledgment in a way that avoids the problems created by the statements reviewed in *Freiler* and *Kitzmiller* -- conveying a message that undermines evolution or implicitly endorses a religious view.

The difficult task of implementing constitutional standards falls on school boards, administrators and, ultimately, on teachers. All these groups must be made aware of their constitutional obligations to ensure that the guarantees of the First Amendment are met in a practical and reasonable way. Finding a violation of the Establishment Clause based on such technical considerations as the number of minutes devoted to a particular viewpoint or on the precise way a lesson is delivered has the potential to make controversial, but important, topics impossible to teach. The experiences recounted in the *Freiler* and *Kitzmiller* cases suggest that a highly formalized “disclaimer” to be read to students is not the best way to resolve these difficult issues. As anyone who has attempted it knows, it is hard to communicate in a meaningful way to teenagers by standing in front of class and reading a formal statement. Developing guidance for classroom presentations and discussions depending on the course subject matter, curricula and academic achievement goals would seem to make more sense.

In my view, it is consistent with the Establishment Clause for teachers to offer an appropriate acknowledgment of religious beliefs in the presentation of such sensitive subjects as evolution or the origins of life. Teachers should make clear that the scientific explanation of the development of plants and animals is an important and established part of the curriculum. It does not undermine the importance of these topics if teachers also say: “We recognize that some students hold religious beliefs that may be inconsistent with the theory of evolution,” and “We encourage all students to respect the views of others, including those who reject the theory of evolution on religious grounds.” There are many other ways of expressing these same ideas. The need for such statements as well as their context and timing will vary greatly depending upon the circumstances. If done in a manner that merely acknowledges rather than endorses beliefs, I believe that they do not conflict with the Establishment Clause because they simply show tolerance and respect for alternative viewpoints.

A state may go even further and *explain* religious viewpoints in courses and contexts other than science class if it avoids endorsing or disparaging a particular viewpoint. That is what happens in comparative religion courses or courses on the history of religion where several religions are discussed. High schools that offer introductory courses on philosophy can include segments on various arguments for (and against) the existence of God. A comprehensive discussion of Aquinas's arguments for the existence of God, for example, would address his version of the "intelligent design" argument. Literature courses may explore biblical and other religious textual references and images that commonly appear in literature. Again, schools can acquaint students with these important ideas without running afoul of the Establishment Clause because it is understood that the state, through the teacher's presentation, is *explaining* these concepts but not *endorsing* them.

Whenever public schools deal with religious ideas, the challenge is to do it without engaging in religious indoctrination in the guise of explaining an alternative viewpoint. The same principle applies when the teacher discusses a critique of a religious viewpoint. The state cannot convey a message that it rejects a particular religious belief or favors one religious belief over another. Explaining religious viewpoints without endorsing or disparaging a particular religious point of view is more easily done in a history course, a course on comparative religions or a literature course than it is in science class. In those settings it is easier to make clear that the state is not sending a message of endorsement by raising religious ideas in the context of teaching scientific theory and fact. Even though no Supreme Court opinion has ever held that there is a constitutional line between explaining religious ideas in a science class and explaining them an hour later in history class, it probably makes sense as a policy matter to draw such a line.

The genius of the Framers is that they left it to future generations to work out these kinds of difficult issues within a broad framework of bedrock principles. The Free Exercise Clause, with its inherent tolerance for religious diversity, and the Establishment Clause, with its inherent limitations on the State's promotion or disparagement of religious viewpoints, are among the most important of these. I am optimistic that school boards can work with parents who hold varying viewpoints to develop guidelines that are reasonably satisfactory to everyone as long as these fundamental principles are followed. Distinguishing between science courses and other courses, as well as between acknowledging and explaining religious beliefs on the one hand and endorsing them on the other, is one workable approach. The endeavor may not be easy, but protecting these constitutional principles is surely worth the effort.