DOES CHALLENGING DARWIN CREATE CONSTITUTIONAL JEOPARDY? A COMPREHENSIVE SURVEY OF CASE LAW REGARDING THE TEACHING OF BIOLOGICAL ORIGINS

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The teaching of biological origins in public schools remains a contentious scientific, cultural, and legal debate. With the increase of public interest in this topic, it is essential for attorneys, legal scholars, and educational authorities to have an awareness of the full breadth of case law on this issue. Yet at present, a comprehensive collation and summary of the relevant cases is absent from the literature. Moreover, few have bothered to engage in a careful review of the case law to determine if evolution actually is beyond scrutiny in public schools. This article attempts to exhaustively survey the case law relevant to the teaching of biological origins, dividing the cases into three major categories: (1) Cases upholding the right to teach about evolution; (2) Cases rejecting the teaching of alternatives to evolution; and (3) Cases rejecting disclaimers regarding the teaching of evolution. The range of constitutionally permissible policies for teaching evolution can also be understood by studying policies that have not *engendered lawsuits. Twenty-one cases will be reviewed, as well as various policies that have not faced legal challenges, revealing that while courts have firmly upheld the rights of educators to teach evolution and have rejected attempts to teach creationism, none of these cases stands for the proposition that a curriculum that teaches scientific critiques of evolution would necessarily place a school board in constitutional jeopardy. Indeed, case law and the public policy history of this issue suggest precisely the opposite: curricular policies in public schools need not unilaterally support evolution. Rather, as the U.S. Supreme Court has stated, "scientific critiques of prevailing scientific theories [may] be taught" provided that such curricula are enacted with the "clear secular intent of enhancing the effectiveness of science instruction." Educators that choose to improve science education by teaching both the scientific evidence supporting modern Darwinian theory, as well as the scientific evidence that challenges this view, can rest assured that they are on firm legal ground and that Darwin himself may even be smiling approvingly from whichever realm of the afterlife he resides today.*

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I. INTRODUCTION

The teaching of biological origins in public schools remains a contentious scientific, cultural, and legal debate. The confluence of intense public interest in the question,[1] high profile school board elections,[2] and recently-publicized litigation over efforts to introduce curriculum modifications,[3] has created widespread interest regarding the legal boundaries of curriculum innovations with regard to teaching evolution.[4]

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[1] *See, e.g.,* Evan Ratliff, *The Crusade Against Evolution*, WIRED, Oct. 2004, http://www.wired.com/wired/archive/12.10/evolution.html; Claudia Wallis, *The Evolution Wars*, TIME, Aug. 7, 2005, at 30, http://www.time.com/time/magazine/article/0,9171, 1090909,00.html; Jodi Wilgoren, *Politicized Scholars Put Evolution on the Defensive*, NEW YORK TIMES, Aug. 21, 2005, at 14, http://www.nytimes.com/2005/08/21/national/ 21evolve.html.

[2] For example, in the past 5 years there have been widely publicized attempts to change the evolution curricula in the state science standards of Kansas and Ohio. *See* Jodi Wilgoren, *Kansas Board Approves Challenges to Evolution*, NEW YORK TIMES, Nov. 9, 2005, at A14, http://www.nytimes.com/2005/11/09/national/09kansas.html; Larry Witham, *Ohio Schools to Teach the Evolution "Controversy,"* WASH. TIMES, Oct. 17, 2002, at A1, http://goliath.ecnext.com/coms2/summary_0199-2133541_ITM.

[3] *See* Selman v. Cobb County Bd. of Educ., 449 F.3d 1320, 1324 (11th Cir. 2006); Kitzmiller v. Dover Area Sch. Bd., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

[4] Numerous law review articles have been published discussing recent cases that have dealt with the teaching of biological origins in public schools. *See, e.g.,* David R. Bauer, *Resolving the Controversy Over "Teaching the Controversy": The Constitutionality of Teaching Intelligent Design In Public Schools,* 75 FORDHAM L. REV. 1019 (2006); Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417 (2006); Johnny Rex Buckles, *The Constitutionality of the Monkey Wrench: Exploring the Case for Intelligent Design,* PUB. L. & LEGAL THEORY SERIES 2006-A-22 (2006); Matthew Cutchen, Selman v. Cobb County School District*: The Evolution of Establishment Clause Jurisprudence*, 7 RUTGERS J.L. & RELIG. 9 (2006); Kaitlin DeCrescio, *An Education in Evolution: Silencing Scientific Inquiry in* Selman v. Cobb County School District, 25 TEMP. J. SCI. TECH. & ENVTL. L. 285 (2006); Joan DelFattore, *Speaking of Evolution: The Historical Context of* Kitzmiller v. Dover Area School District, 9 RUTGERS J.L. & RELIG. (2007), *available at* http://www.lawandreligion.com/vol9.shtml; David K. DeWolf, John G. West & Casey Luskin, *Intelligent Design Will Survive* Kitzmiller v. Dover, 68 MONT. L. REV. 7 (2007); Ronna Greff Schneider, *First Amendment, Due Process and Discrimination Litigation Database Updated May* 2007, 1 Education Law § 1:16 (West 2008); Mary Katherine Hackney, *Is This Apple for Teacher an Apple from Eve? Reanalyzing the Intelligent Design Debate from a Curricular*

It is widely thought that the courts have, as one source puts it, "consistently supported the teaching of evolution."[5] While that statement may be true, many have followed such logic to wrongly presume that it is unconstitutional to suggest in public schools that neo-Darwinian evolution has any scientific weaknesses.[6] With the increase of public interest in this topic, it is essential for attorneys, legal scholars, and educational authorities to have an awareness of the full breadth of case law on this issue. Yet at present, a comprehensive collation and summary of the relevant cases is absent from the literature. Moreover, few have bothered to engage in a careful review of the case law to determine if evolution actually is beyond scrutiny in public schools. This article attempts to exhaustively survey the case law relevant to the teaching of biological origins, dividing the cases into three major categories:

(1) Cases Upholding the Right to Teach About Evolution

Perspective, 85 N.C. L. REV. 349 (2006); Philip A. Italiano, Kitzmiller v. Dover Area School District*: The First Judicial Test for Intelligent Design*, 8 RUTGERS J.L. & RELIG. (2006), *available at* http://www.lawandreligion.com/vol8.shtml; Richard B. Katskee, *Why It Mattered to* Dover *that Intelligent Design Isn't Science*, 5 FIRST AMEND. L. REV. 112 (2006); Anthony Kirwin, *Toto, I've a Feeling We're . . . Still in Kansas? The Constitutionality of Intelligent Design and the 2005 Kansas Science Education Standards*, 7 MINN. J. L. SCI. & TECH. 657 (2006); Charles Kitcher, *Lawful Design: A New Standard for Evaluating Establishment Clause Challenges to School Science Curricula*, 39 COLUM. J.L. & SOC. PROBS. 451 (2006); Brenda Lee, Kitzmiller v. Dover Area School District*: Teaching Intelligent Design in Public Schools*, 41 HARV. C.R.-C.L. L. REV. 581 (2006); Arnold H. Loewy, *The Wisdom and Constitutionality of Teaching Intelligent Design in Public Schools*, 5 FIRST AMEND. L. REV. 82 (2006); Anne Marie Lofaso, *Does Changing the Definition of Science Solve the Establishment Clause Problem for Teaching Intelligent Design as Science in Public Schools? Doing an End-Run Around the Constitution*, 4 PIERCE L. REV. 219 (2006); Martha M. McCarthy, *Instructions About the Origin of Humanity: Legal Controversies Evolve*, 203 EDUC. L. REP. 453 (2006); Stephen A. Newman, *Evolution and the Holy Ghost of* Scopes*: Can Science Lose the Next Round?,* 8 RUTGERS J.L. & RELIG. 11 (2007), *available at* http://www.lawandreligion.com/vol8.shtml; Todd R. Olin, *Fruit of the Poison Tree: A First Amendment Analysis of the History and Character of Intelligent Design Education*, 90 MINN. L. REV. 1107 (2006); Chet K.W. Pager, *The Establishment of Evolution: Public Courts and Public Classrooms*, 81 TUL. L. REV. 17 (2006); Kevin Trowel, *Divided by Design:* Kitzmiller v. Dover Area School District*, Intelligent Design, and Civic Education*, 95 GEO. L.J. 859 (2007); Asma T. Uddin, *Evolution Toward Neutrality: Evolution Disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted Fruits of a Poisonous Tree*, 8 RUTGERS J.L. & RELIG. 12 (2007), *available at* http://www.lawandreligion.com/vol8.shtml; Louis J. Virelli III, *Making* Lemon*ade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423 (2006); Jay D. Wexler, Kitzmiller *and the 'Is It Science?' Question*, 5 FIRST AMEND. L. REV. 90 (2006); Recent Case, *Middle District of Pennsylvania Holds that the Teaching of Intelligent Design Violates the Establishment Clause,* Kitzmiller v. Dover Area School District, *400 F. Supp. 2d 707 (M.D. Pa. 2005),* 119 HARV. L. REV. 2268 (2006).

[5] University of California Museum of Paleontology, Understanding Evolution, http://evolution.berkeley.edu/evosite/Roadblocks/IIICLegalities.shtml (last visited Jan. 7, 2009).

[6] In this article, I will use the terms "evolution," "Darwinism," "Darwinian theory," "neo-Darwinism," and "neo-Darwinian evolution" interchangeably.

(2) Cases Rejecting the Teaching of Alternatives to Evolution
(3) Cases Rejecting Disclaimers Regarding the Teaching of Evolution

The range of constitutionally permissible policies for teaching evolution can also be understood by studying policies that have *not* engendered lawsuits. This article reviews twenty-one cases[7] and various policies that have not been subjected to legal challenges and reveals the striking finding that although courts have firmly upheld the rights of educators to teach evolution and have rejected attempts to teach creationism, none of these cases indicate that a school board is necessarily placed in constitutional jeopardy by a curriculum that teaches scientific critiques of evolution. Indeed, case law and the history of public policy suggests precisely the opposite: curricular policies in public schools need not unilaterally support evolution. Rather, as the U.S. Supreme Court has stated, "scientific critiques of prevailing scientific theories [may] be taught" provided that curricular policies requiring such are enacted with the "clear secular intent of enhancing the effectiveness of science instruction."[8]

II. CASES UPHOLDING THE RIGHT TO TEACH EVOLUTION

The earliest cases dealing with the teaching of biological origins dealt with government bodies attempting to ban the teaching of evolution. Such laws definitively failed. Subsequently, various citizens and at least one teacher also filed suits to challenge the teaching of evolution under both the Establishment and the Free Exercise Clauses of the First Amendment. These attempts also failed. In one case, a court found that a teacher could be legitimately censured for failing to teach the entire proscribed evolution-curriculum. Essentially, any attempts to censor the teaching of evolution

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[7] In order reviewed, these cases are: Scopes v. State, 289 S.W. 363 (Tenn. 1926); Epperson v. Arkansas, 393 U.S. 97 (1968); Wright v. Houston Ind. Sch. Dist., 366 F. Supp. 1208 (S.D. Tex. 1972); Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973); Crowley v. Smithsonian Inst., 462 F. Supp. 725 (D.C. 1978); Segraves v. California, No. 278978 (Super. Ct. Sacramento County 1981), *available at* http://www.geocities.com/Athens/1618/Segraves_vs._California.html; Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); Moeller v. Schrenko, 554 S.E.2d 198 (Ga. Ct. App. 2001); LeVake v. Indep. Sch. Dist. #656, 625 N.W.2d 502 (Minn. Ct. App. 2001); Hendren v. Campbell, No. S577-0139 (Marion Super. Ct. Ind. Apr. 14, 1977), *available at* http://www.talkorigins.org/faqs/hendren/hendren_v_campbell.pdf; McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255 (D.C. Ark. 1982); Edwards v. Aguillard, 482 U.S. 578 (1987); Webster v. New Lenox Sch. Dist. #122, 917 F.2d 1004 (7th Cir. 1990); Helland v. South Bend Cmty. Sch. Corp., 93 F.3d 327 (7th Cir. 1996); Kitzmiller v. Dover Area Sch. Bd., 400 F. Supp. 2d 707 (M.D. Pa. 2005); Hurst v. Newman, No. 1:06-CV-00036-OWW-SMS (E.D. Cal. Jan. 17, 2006), *available at* http://www2.ncseweb.org/hurst/Hurst_stipulated_dismissal_signed%20by_court_20060117.pdf; Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975); Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975); Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000); Selman v. Cobb County Sch. Dist., 449 F.3d 1320 (11th Cir. 2006).

[8] Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987).

from public schools have failed. This section includes cases where the advocacy of evolution was challenged either by a law, an administrative policy, or lawsuits from citizens, including teachers.

A. Scopes v. State[9]

1. Summary

In 1925, teacher John T. Scopes was convicted under the recently adopted Tennessee "Monkey Law" that had criminalized the teaching of evolution.[10] In Scopes's defense, attorneys working with the American Civil Liberties Union ("ACLU") argued that it was unconstitutional to force a teacher to present only one view of humanity's origin, namely the Biblical account of creation.[11] The Tennessee high court upheld the law, stating that because the prohibition of evolution did not establish an official government religion, the law did not violate the Establishment Clause.[12] Mr. Scopes's conviction was later overturned on a technicality.[13] Over four decades later, *Scopes v. State* was overruled by *Epperson v. Arkansas*, which recognized that it is illegal to prohibit, much less criminalize, the teaching of any scientific theory due to religious motives.[14]

2. Importance and Commentary

The widely-publicized "Scopes Monkey Trial" became famous as a radio-broadcasted courtroom trial that debated the validity of evolution versus the Biblical account of creation.[15] Although Scopes "lost," the public perceived that the pro-evolution side won after prosecutor William Jennings Bryan took the witness stand to be cross-examined by lead defense counsel Clarence Darrow.[16] Popular notions of history, based upon the dramatized account portrayed in the play and movie *Inherit the Wind*, typically teach that Darrow humiliated Bryan with well-reasoned questions about the creation account in Genesis that Bryan was unable to answer. Yet evolutionary paleontologist Stephen Jay Gould reminds that:

> [T]he most celebrated moment—when Darrow supposedly forced Bryan to admit that the days of creation might have spanned more than twenty-four hours—represented Bryan's

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9 Scopes v. State, 289 S.W. 363 (Tenn. 1927).
10 *Id.* at 363.
11 *Id.* at 364.
12 *Id.* at 367.
13 *Id.*
14 Epperson v. Arkansas, 393 U.S. 97, 109 (1968).
15 *See* EDWARD J. LARSON, SUMMER FOR THE GODS (Basic Books 1997).
16 Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 446-47 (1997).

> free-will statement about his own and well known personal beliefs (he had never been a strict biblical literalist), not a fatal inconsistency, exposed by Darrow's relentless questioning.[17]

Cultural memory has recorded a version of the Scopes Trial that differs sharply from reality; but nonetheless, as a result of the trial, "Antievolutionists and Fundamentalists in general were portrayed as foolish, unthinking, religious zealots."[18]

Despite its infamy, the *Scopes* case has little direct relevance to current law. The trial was later dramatized by the play and movie *Inherit the Wind*, which "contributed to the negative public image of Fundamentalists"[19] and is still regularly shown to high school and college students.[20] Many Americans do not realize that this movie falsely casts the trial, as well as the entire debate over evolution, as being between close-minded, backwards, and religiously motivated "Christian fundamentalists" versus enlightened, progressive, and freedom-loving evolutionary scientists and educators.[21] U.S. Supreme Court Justice Antonin Scalia calls this portrayal the "beloved secular legend of the Monkey Trial,"[22] while another legal scholar calls it the "*Inherit the Wind* stereotype."[23] Unfortunately, many people believe this stereotype is valid, unaware that a significant number of well-credentialed scientists find legitimate scientific reasons to question Darwin.[24] Moreover, this stereotype continues to be perpetuated by the media covering modern curricular battles because the story of enlightened Darwinian scientists and educators versus bigoted and unsophisticated fundamentalists riles emotions and sells newspapers just as well today as it did in 1925.[25] As will be discussed, this caricature has even infiltrated the minds of some judges who believe that opposition to evolution necessarily endorses fundamentalist Christianity. While the criminalization of teaching evolution by the Tennessee Legislature was inimical to freedom of inquiry and the fair

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[17] STEPHEN JAY GOULD, ROCKS OF AGES 137 (Ballantine Books 1999).

[18] EUGENIE SCOTT, EVOLUTION VS. CREATIONISM: AN INTRODUCTION 96 (2004). For an account of the Scopes Trial that is more accurate and complete than the popular *Inherit the Wind* versions, see LARSON, *supra* note 15.

[19] SCOTT, *supra* note 18, at 96.

[20] *Id.* at 97 (stating that *Inherit the Wind* is "often read and performed in high schools").

[21] For an excellent account of the actual historical events versus the *Inherit the Wind* version, see LARSON, *supra* note 15; see also PHILLIP JOHNSON, DEFEATING DARWINISM BY OPENING MINDS 24-36 (1998); Scott, *supra* note 18, at 94-97.

[22] Tangipahoa Parish Bd. of Educ. v. Freiler*,* 530 U.S. 1251, 1255 (2000).

[23] *See* JOHNSON, *supra* note 21, at 24-36.

[24] *See generally* A Scientific Dissent from Darwin, http://www.dissent fromdarwin.com (last visited Sept. 1, 2006).

[25] A recent popular book which makes heavy use of the "*Inherit the Wind* stereotype" while telling the story behind the *Kitzmiller v. Dover* lawsuit is EDWARD HUMES, MONKEY GIRL: EVOLUTION, EDUCATION, RELIGION AND THE BATTLE FOR AMERICA'S SOUL (2007).

administration of justice, Scalia believes that today we have "*Scopes*-in-reverse,"[26] where viewpoints that do not support evolution are excluded from classrooms through misguided law and a climate of fear and intimidation.

B. Epperson v. Arkansas[27]

1. Summary

An Arkansas statute descended from the Tennessee "Monkey Law" made it a criminal misdemeanor for teachers in state-supported schools to teach evolution and to use textbooks that taught the theory.[28] Despite this law, in 1965 the Little Rock, Arkansas School Board gave biology teacher Susan Epperson a new textbook containing material on evolution.[29] To avoid criminal penalty and dismissal, she sought a declaration that the Arkansas statute was unconstitutional.[30] The U.S. Supreme Court sided with Epperson and held that the prohibition against teaching evolution violated the Establishment Clause.[31] The Court found that the law existed because evolution conflicted with "a particular interpretation of the Book of Genesis by a particular religious group," and thus it unconstitutionally tailored the curriculum to fit with the teachings of a certain religious viewpoint.[32] The Court wrote:

> The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.[33]

This finding was bolstered by assessing religious concerns expressed in advertisements and other public advocacy for the law at the time it was passed in 1928.[34] The Court also emphasized the importance of government neutrality in matters involving religion:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one

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26 Edwards v. Aguillard, 482 U.S. 578, 634 (1987) (Scalia, J., dissenting).
27 Epperson v. Arkansas, 393 U.S. 97, 103 (1968).
28 *Id.* at 99.
29 *Id.* at 100.
30 *Id.*
31 *Id.* at 110.
32 *Id*. at 103.
33 *Epperson*, 393 U.S. at 103.
34 *Id.* at 105.

> religion or religious theory against another or even against the militant opposite.[35]

2. Importance and Commentary

Epperson effectively made it illegal to prohibit the teaching of evolution, as such an action would be viewed with severe suspicion as having been motivated by religion. *Epperson*'s inquiry into the religious motives underlying the Arkansas statute also provided precedent for the "purpose prong" of the *Lemon* test that was constructed just a few years later. Additionally, this case provides the oft-quoted or rephrased language regarding the importance of preventing Establishment Clause violations in public schools: "[T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[36]

In his concurring opinion, Justice Black foresaw that the failure of courts to recognize that evolution conflicts with the religious beliefs of many Americans would cause much public controversy over this issue in the years to come:

> A second question that arises for me is whether this Court's decision forbidding a State to exclude the subject of evolution from its schools infringes the religious freedom of those who consider evolution an anti-religious doctrine. If the theory is considered anti-religious, as the Court indicates, how can the State be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to schoolchildren? The very cases cited by the Court as supporting its conclusion hold that the State must be neutral, not favoring one religious or anti-religious view over another. The Darwinian theory is said to challenge the Bible's story of creation; so too have some of those who believe in the Bible, along with many others, challenged the Darwinian theory. . . . Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion.[37]

As will be seen, what followed Justice Black's portending words was a string of cases seeking to declare evolution unconstitutional on the grounds that it was an "anti-religious" doctrine. Justice Black's warning also anticipates the current state of affairs where most school districts teach only the scientific

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[35] *Id*. at 103-104.
[36] *Id.* at 104 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
[37] *Id.* at 113 (Black, J., concurring).

evidence supporting Darwin, causing division and controversy among many Americans. Judicially sanctioned methods of defusing this community controversy caused by the teaching of evolution will be discussed below in the reviews of later cases.[38]

Epperson's requirement of "neutrality" in matters of religion may also have implications for those who favor promoting evolution by exposing students to pro-evolution theological views in the science classroom.[39] Simply put, teachers who favor theological views that support evolution likely violate *Epperson*'s mandate that public schools maintain "neutrality between religion and religion."[40]

Finally, the *Epperson* majority explained that "the state has no legitimate interest in protecting any or all religions from views distasteful to them."[41] While such language is undoubtedly partial towards lawsuits against religiously motivated policies that oppose the teaching of evolution, one can also imagine this language being quoted in a brief opposing an atheist plaintiff alleging that teaching scientific critique of evolution, or the teaching of alternatives to evolution such as intelligent design, established theistic religion. Would courts accept such an argument?

C. Wright v. Houston Independent School District[42]

1. Summary

Students in the Houston Independent School District sued their district and the Texas State Board of Education for teaching evolution but not including any other views about origins, such as the Biblical story of creation.[43] The student-plaintiffs contended that the study of evolution constituted the establishment of a sectarian, atheistic religion and inhibited the free exercise of their own religion in violation of the First Amendment.[44] As a remedy for the alleged constitutional violation, the students asked that the Biblical story of creation be required to be taught alongside evolution.[45]

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[38] *See infra* notes 194-195, 347-349, 366-370 and accompanying text.

[39] For example, in 2007 PBS-NOVA released a Briefing Packet for Educators, *available at* http://www.pbs.org/wgbh/nova/id/media/nova-id-briefing.pdf to the NOVA docudrama about the *Kitzmiller v. Dover* trial that instructs teachers to introduce religion into science classes with discussion questions like "Can you accept evolution and still believe in religion? A: Yes. The common view that evolution is inherently antireligious is simply false." Eugenie Scott of the National Center for Science Education similarly recommends that teachers expose students to theological views that favor evolution. *See* Eugenie Scott, *Dealing with Antievolutionism*, http://www.ucmp.berkeley.edu/fosrec/Scott.html; *see also* JOHN G. WEST, DARWIN DAY IN AMERICA 227-230 (2007).

[40] *Epperson*, 393 U.S. at 104.

[41] *Id.* at 107 (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)).

[42] Wright v. Houston Indep. Sch. Dist., 366 F. Supp. 1208 (S.D. Tex. 1972).

[43] *Id.* at 1208.

[44] *Id.* at 1209.

[45] *Id.* at 1211.

The district court held that the school district's one-sided teaching of only the pro-Darwinian scientific evidence was constitutional.[46] Specifically, the court found that the curriculum did not violate *Epperson's* mandate that public schools "may not be hostile to any religion"[47] for two reasons: (1) there was no State law or school district regulation which prohibited non-evolutionary teachings, and (2) there was no evidence to suggest that students could not challenge the theory of evolution in class.[48] The court thus let the curriculum stand without ordering any changes.[49]

2. Importance and Commentary

This case is one of many that found that the teaching of evolution does not establish religion or offend the First Amendment. However, this lesser-known case provides a rare example of candid acknowledgement from the judiciary that "[s]cience and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers."[50] Although the court rightly found that the proper solution is not to avoid the subject of origins altogether,[51] it admitted that it was "hardly qualified to select from among the available theories those which merit attention in a biology school class."[52] Moreover, the court found no constitutional problems with teaching only the pro-Darwin scientific evidence, stating "it is not the business of government to suppress real or imagined attacks upon a particular religious doctrine."[53] At the very least, this implies that school districts may express sensitivity to the anti-religious implications of evolution in their policies on teaching evolution, just as this court did.

D. Moore v. Gaston County Board of Education[54]

1. Summary

A student teacher, George Moore, sued the Gaston County School District in North Carolina after being dismissed because he supported evolution in class by giving "unorthodox answers to student questions

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[46] *Id.* at 1212-13.

[47] Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968).

[48] *Wright*, 366 F. Supp. at 1210.

[49] *Id.* at 1212-1213.

[50] *Id.* at 1211.

[51] *Id.* "Avoidance of any reference to the subject of human origins is, indeed, a decidedly totalitarian approach to the problem presented here. Book-burning is always dangerous, but never more dangerous than when practiced on behalf of young and impressionable minds." *Id.*

[52] *Id.*

[53] *Wright*, 366 F. Supp. at 1211 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952)).

[54] Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D.N.C. 1973).

(derived from the day's lesson text) about creation, evolution, immortality, and the nature and existence of God"[55] while substitute teaching for a seventh grade history class. A student had asked Moore if he "believed that man descended from monkeys"[56] and Moore affirmed his support for Darwin's theory of evolution. The students then asked Moore whether he believed in Adam and Eve, whether he thought the Bible should be taken literally, if he believed in an afterlife, and other questions about the Bible.[57] Moore replied that he was agnostic towards religion and was subsequently relieved of his teaching duties.[58] Moore brought suit arguing that his in-class statements were given merely in response to student questions.[59] Noting that the state has a "vital interest in protecting the impressionable minds of its young people from *any* form of extreme propagandism in the classroom," the district court upheld Moore's right to freedom of expression to answer the students' questions.[60] The court held that it was appropriate to side with Moore because preventing teachers from answering such questions from students would "cast a pall of orthodoxy over the classroom."[61]

2. Importance and Commentary

Under *Moore*, if students inquire about a teacher's personal views on biological origins, the teacher may answer honestly without worry of advancing religion. Of course, *Moore*'s holding applies not only to teachers that support Darwinian evolution, but also to those who dissent from Darwin's theory. As the district court found:

> To discharge a teacher without warning because his answers to scientific and theological questions do not fit the notions of the local parents and teachers is a violation of the Establishment clause of the First Amendment. It is "an establishment of religion," the official approval of local orthodoxy, and a violation of the Constitution.[62]

Thus, when students inquire about a teacher's views on evolution, under *Moore* that teacher may answer those questions regardless of whether she supports Darwinism, or dissents from Darwinian evolution. *Moore* also has implications for teachers that want to teach their own unorthodox viewpoints in the classroom. The court decried the fact that "[r]eligious or scientific dogma supported by the power of the state has historically brought threat to liberty, and often death to the unorthodox"[63] and balanced teacher academic

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55 *Id.* at 1037.
56 *Id.* at 1038.
57 *Id.*
58 *Id.* at 1038-39.
59 *Id.*
60 *Moore*, 357 F. Supp. at 1040.
61 *Id.* at 1040 (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
62 *Id.* at 1043.
63 *Id*. at 1042.

freedom against a desire to "protect[] the impressionable minds of its young people from *any* form of extreme propagandism in the classroom."[64] Also balanced against academic freedom was a need to preserve order in the classroom and prevent disruption.[65] Teacher freedom of speech was supported by the court's finding that "the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and to study is fundamental to a democratic society."[66] Such findings could support the academic freedom of teachers to teach scientific viewpoints that dissent from neo-Darwinism, provided that they are presented in an objective, non-propogandistic fashion which does not disrupt the normal curriculum. *Moore* stands for the protection of such teacher academic freedom even when the teacher is presenting "unorthodox" views.

Finally, the court was troubled by the district's lack of standards for teacher speech.[67] The court found that the teacher "had the right *not to be relieved of his teaching opportunity for unconstitutional reasons*."[68] This implies that teachers have constitutionally protected freedom to express criticisms of neo-Darwinism in response to student questions without fear of losing their jobs. It also implies that there may be legitimate grounds to protect teacher freedom of speech to teach scientific viewpoints that may be considered "unorthodox."

E. Crowley v. Smithsonian Institution[69]

1. Summary

Plaintiffs sued the Smithsonian Institution, arguing that displays featuring evolution at the Smithsonian National Museum of Natural History established secular humanism and violated the constitutional mandate requiring the government to remain neutral in matters of religion.[70] Plaintiffs requested an order compelling the Smithsonian to "expend an amount equal to the amount extended in the promulgation of the evolutionary theory . . . on the Biblical account of creation found in the Book of Genesis."[71] The court found that the displays passed the *Lemon* test because (1) they had "the

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64 *Id.* at 1040.

65 *Id*. ("[Any] conduct . . . in class or out of it, which for any reason—whether it stems from time, place or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.") (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969)).

66 *Moore,* 357 F. Supp. at 1039-1040.

67 *Id.* at 1040-1041.

68 *Id.*

69 Crowley v. Smithsonian Inst., 462 F. Supp. 725 (D.C. 1978).

70 *Id.* at 726-27.

71 *Id.* at 725.

secular purpose of 'increasing and diffusing knowledge among men'";[72] (2) the primary effect of the exhibit did not advance religion and any effects upon religion were "at most incidental to the primary effect of presenting a body of scientific knowledge";[73] and (3) the exhibit did not excessively entangle government and religion because the Museum dealt with evolution as a non-religious subject of natural history.[74] Additionally, the court found that the exhibit did not violate the plaintiffs' free exercise of religion because they "can carry their beliefs into the Museum with them, though they risk seeing science exhibits contrary to that faith."[75] Quoting *Epperson*, the court added that "the state has no legitimate interest in protecting any or all religions from views distasteful to them."[76] The court argued that if it granted plaintiffs relief, it would be showing preferential "treatment to the religious views of one group."[77]

2. Importance and Commentary

This lesser-known case follows *Wright* and *Epperson* in finding that government advocacy of evolution does not establish religion.[78] However, *Crowley* stands apart from those cases in its high degree of stated sensitivity for the plaintiffs who felt that evolution challenged their religious beliefs. The court told the parties it was "sensitive to plaintiffs' interpretation of the theory of evolution as religion and is aware that they do not stand alone."[79] The court thus did not claim there was no offense to the plaintiffs' religious beliefs, but instead argued that "[e]ven accepting their argument that evolution is hostile to their beliefs as to creation, this impact is at most incidental to the primary effect of presenting a body of scientific knowledge."[80] Under *Crowley*, teaching a legitimate scientific theory such as evolution will not establish religion because the primary effect of such a government action will advance scientific knowledge.[81] Any effects upon religion are "incidental."[82]

This doctrine has legal implications for the current controversies over teaching scientific critiques of evolution, and also the controversy over teaching scientific alternatives to evolution, such as intelligent design ("ID").

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[72] *Id*. at 727 (citing Sch. Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963) (defining secular humanism as "affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe")).

[73] *Id.* at 727.

[74] *Id.*

[75] *Crowley*, 462 F. Supp. at 728.

[76] *Id*. at 727 (citing Epperson v. Arkansas, 393 U.S. 93, 107 (1968)).

[77] *Id.* at 728.

[78] *Id.* at 727.

[79] *Id.*

[80] *Id.*

[81] *See Crowley*, 462 F. Supp. at 727.

[82] *Id.*; *see also* DeWolf, West & Luskin, *supra* note 4, at 46-48.

By the reasoning of *Crowley*, when teaching legitimate scientific views that dissent from neo-Darwinism, any effects upon religion should be considered "incidental" to the primary effect that would advance scientific knowledge.

F. Segraves v. California[83]

1. Summary

Plaintiff Kelly Segraves, a parent of children in California public schools, challenged the California State Board of Education's Science Framework that mandated the teaching of evolution.[84] Segraves alleged that the mandatory teaching of evolution prevented both himself and his family from freely exercising their religion.[85] Although the California Superior Court accepted that evolution was incompatible with the Segraves' religious beliefs, the Court held that California's anti-dogmatism policy provided sufficient accommodation for their views.[86] This policy stated that discussions about origins were intended to emphasize that scientific explanations are more about the processes of nature rather than ultimate causes.[87] The court stressed that scientific discussions should be focused on how life began and evolved and not on the ultimate cause of life's origin.[88]

2. Importance and Commentary

Similar to *Wright* and *Crowley*, the *Segraves* decision holds that learning about evolution in public schools does not infringe upon the free exercise of religion.[89] *Segraves* also recognized that evolution can violate the religious beliefs of students and other members of the community, and the court emphasized the importance of embracing tolerance when dealing with such controversial subjects.[90] Under this reasoning, it is presumable that California's "anti-dogmatism policy" would protect the teaching of any scientific theory, even if it offended the views of some citizens. This opinion is of minimal value as precedent, as it comes from a lower state court and was never officially published as a legal opinion.[91] Nonetheless, it implies that evolution education policies may avoid establishing religion when they

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[83] Segraves v. California, No. 278978 (Super. Ct. Sacramento County 1981), *available at* http://www.geocities.com/Athens/1618/Segraves_vs._California.html.

[84] *Id.*

[85] *Id*.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] Segraves v. California, No. 278978, *available at* http://www.geocities.com/Athens/1618/Segraves_vs._California.html.

[90] *Id.*

[91] *Id.*

are based upon the legitimate secular purpose of avoiding dogmatism in the classroom.

G. Peloza v. Capistrano Unified School District[92]

1. Summary

In *Peloza v. Capistrano,* the Ninth Circuit Court of Appeals held that a teacher can be ordered to teach evolution, even if the theory conflicts with his or her religious beliefs.[93] John Peloza, a high school biology teacher, brought an action against the Capistrano Unified School District challenging its requirement that he must teach evolution.[94] According to Peloza, "Evolutionism is an historical, philosophical and religious belief system, but not a valid scientific theory . . . evolutionism is based on the assumption that life and the universe evolved randomly and by chance and with no Creator involved in the process."[95] He claimed that the school district was forcing him to "proselytize his students to a belief in evolutionism 'under the guise of [its being] a valid scientific theory.'"[96] The court rejected this argument, stating that "[evolution] has nothing to do with how the universe was created; it has nothing to do with whether or not there is a divine Creator."[97]

2. Importance and Commentary

According to *Peloza*, a teacher can be forced to teach evolution even if it conflicts with his or her religious beliefs.[98] Like other cases, *Peloza* cites to the 1987 U.S. Supreme Court ruling in *Edwards v. Aguillard* to justify its claim that teaching creationism is unconstitutional.[99] Yet *Peloza* also represents another case that rejects the claim that evolution is a religious belief system, as it implies that pro-evolution-only policies do not raise establishment concerns because it defines evolution, as "simply . . . that higher life forms evolved from lower ones."[100] Under such logic, teaching scientific evidence that holds that higher life forms *did not* evolve from lower ones should be similarly permissible, as it constitutes mere scientific critique of a scientific viewpoint.

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[92] Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

[93] *Id.* at 522-23.

[94] *Id.* at 519.

[95] *Id.*

[96] *Id.* (alteration in original).

[97] *Id.* at 521 (emphasis omitted).

[98] *Peloza*, 37 F.3d at 522-23.

[99] *Id.* at 521 ("The Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not.").

[100] *Id.* at 520.

While the *Peloza* court was correct to state that evolution is based upon a scientific methodology, it dismissively swept aside Mr. Peloza's claims that the propositions of evolution conflict with his religious beliefs. The *Peloza* court thus failed to heed Justice Black's warning that constitutional analysis should not ignore the "troublesome" religious implications that evolution may have for many Americans.[101] In Justice Black's words, the *Peloza* court "write[s] off as pure nonsense the views of those who consider evolution an anti-religious doctrine."[102] Given that at least one prominent mainstream biology textbook has said that "Darwin knew that accepting his theory required believing in *philosophical materialism*, the conviction that matter is the stuff of all existence and that all mental and spiritual phenomena are its by-products,"[103] courts should be sensitive to the religious views of citizens regarding evolution. By failing to recognize the anti-religious implications evolution has for many Americans, courts such as the *Peloza* court continue to inflame community division and strife over the teaching of evolution. Nonetheless, *Peloza* represents another case standing for the proposition that evolution may be taught even when it purportedly conflicts with the religious beliefs of educators.

H. Moeller v. Schrenko[104]

1. Summary

Rebecca Moeller, a 14 year-old high school student, alleged that her biology textbook inhibited her religious beliefs and infringed upon the free exercise of her religion.[105] The textbook stated that "[a] belief in divine creation, however, is not a scientific hypothesis that can be tested."[106] The textbook added that "[t]his is not to say that the [creationist] belief is wrong, but rather that science can never test it."[107] Additionally, the textbook discussed theories about the natural chemical origin of life, noting that very little is known in this area of scientific research.[108]

Moeller's lawsuit was dismissed on summary judgment by the trial court, a ruling that was upheld by the Georgia appellate court.[109] Moeller had argued that the textbook passed judgment "on the efficacy of creation theory,"[110] but the court observed that it actually did precisely the opposite:

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101 Epperson v. Arkansas, 393 U.S. 97, 113 (Black, J., concurring).
102 *Id.*
103 JOSEPH S. LEVINE & KENNETH R. MILLER, BIOLOGY: DISCOVERING LIFE 161 (2d ed. 1994).
104 Moeller v. Schrenko, 554 S.E.2d 198 (Ga. Ct. App. 2001).
105 *Id.* at 199.
106 *Id.* at 200.
107 *Id.*
108 *Id.*
109 *Id.* at 199.
110 *Moeller*, 554 S.E.2d at 201.

"It merely states that creationism is not a scientific theorem capable of being proven or disproven through scientific methods."[111] While the court stated that it would not apply a *Lemon* analysis because it believed that "no establishment of religion is supported by the facts,"[112] it nonetheless engaged in *Lemon* analysis.[113] The court then found a secular purpose of "educating biology students regarding both the nature of the scientific method as well as the most common explanations for the origin of life."[114] As for the effect prong of the *Lemon* test, the court did not consider the textbook's brief discussion of the origin of life to be a "religious reference"[115] and concluded that there were no facts to justify Moeller's allegations.[116] Finally, the court found there was no infringement upon free exercise of her religion because Moeller had not shown any "substantial[] burden[]"[117] upon the practice of her religious beliefs.

2. Importance and Commentary

This lesser-known case provides another example of a court dismissing the allegation that the teaching of mainstream scientific theories about biological origins establishes anti-theistic religion or inhibits the free exercise of religion. However, comparisons to other cases dealing with such allegations reveal that the *Moeller* court lacked sensitivity to the student's complaints. Under a similar fact pattern, the court in *Wright* v. *Houston* reached the same conclusion, yet recognized that "[s]cience and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers."[118] Rebecca Moeller, a creationist, was clearly offended by the mention of hypotheses about the natural chemical origins of life, but the *Moeller* court did not act as sensitively as the *Wright* court; Rebecca Moeller's case was dismissed on summary judgment, with the court giving the unqualified declaration that "no establishment of religion is supported by the facts."[119]

The *Moeller* court implicitly adopted a model of science and religion where the two can seemingly never conflict, *even in principle*. But Rebecca Moeller likely represents many religious Americans for which, as Kent Greenawalt writes, "a persuasive religious account of ultimate reality bears on subjects to which natural science speaks."[120] Education theorist Warren

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111 *Id.* at 201.
112 *Id.* at 200.
113 *Id.* at 201.
114 *Id.*
115 *Id.*
116 *Moeller*, 554 S.E.2d at 201.
117 *Id.* at 201-02.
118 Wright v. Houston, 366 F. Supp. 1208, 1211 (S.D. Tex. 1972).
119 *Moeller*, 554 S.E.2d at 200.
120 Kent Greenawalt, *Establishing Religious Ideas: Evolution, Creationism, and Intelligent Design,* 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 321, 334 (2003).

Nord explains how the view advanced by the scientific and educational establishment conflicts with this theological perspective:

> Science texts . . . usually affirm a two-worlds view, according to which science and religion are conceptual apples and oranges. (This is also the official view of the National Association of Biology Teachers and the National Academy of Sciences.) . . . Everyone agrees that science is critical of fundamentalism, but the scientific and educational establishments typically argue that there is no conflict between science and religion properly understood, true religion. *But this is itself a theological judgment, and a controversial one at that.*[121]

The *Moeller* court dismissed allegations of religious establishment because the biology textbook asserted that Moeller's religious beliefs are merely in the faith realm and cannot be touched by the findings of science. The court could find no facts supporting Moeller's offense because it espoused the "two-worlds view" discussed by Nord, where it is in principle impossible for science to speak about subjects of religious faith. The offense the textbook caused Moeller might have been softened if the court had at least recognized that some scientific claims in the textbook conflicted with Moeller's religious beliefs. But the court adopted a controversial model of science and religion and would not even acknowledge that any offense could take place. This insensitive and inconsistent treatment of students' religious beliefs ignores the warning of Justice Black in *Epperson* and intensifies the community controversy caused by the teaching of evolution.

The *Moeller* court may have feared that if it acknowledged that science can conflict with religion, this could bar the teaching of scientific theories like evolution. Courts facing such situations need not fear. The court could have simultaneously recognized that teaching such a scientific subject did not establish religion because, as the *Crowley* court held, if the subject matter is "hostile to their beliefs as to creation, this impact is at most *incidental* to the primary effect of presenting a body of scientific knowledge.[122] This view is echoed by Theresa Wilson:

> [I]f a theory has scientific value and evidence to support it, its primary effect would be to advance knowledge of the natural world, not to advance religion. The ultimate goal of schools is to educate students. Where a theory has scientific value and supporting evidence, it provides a basis for

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[121] Warren Nord, *Intelligent Design Theory, Religion, and the Science Curriculum, in* DARWIN, DESIGN, AND PUBLIC EDUCATION 52-54 (John Angus Campbell & Stephen C. Meyer eds., 2003) (emphasis added).

[122] Crowley v. Smithsonian Inst., 462 F. Supp. 725, 727 (D.C. 1978) (emphasis added).

> knowledge. Whether it coincidentally advances [or inhibits] religion should not matter.[123]

Such reasoning implies that the teaching of any scientific theory will have a primary effect that advances science, even if it coincidentally also touches upon religion.

Finally, it is worth noting that court treated "divine creation" and the chemical origins of life hypotheses inconsistently. The text recognized that hypotheses about divine creation cannot be tested and therefore fall "outside the realm of science."[124] Regarding the natural chemical origin of life, the textbook stated that "scientists cannot disprove the hypothesis that life originated naturally and spontaneously."[125] Yet, the textbook still maintained that this hypothesis is within the realm of science, stating that "[h]ow life might have originated naturally and spontaneously remains a subject of intense interest, research, and discussion among scientists."[126] Thus Rebecca Moeller was told that schools can teach the "untestable hypothesis" that life originated via natural chemical reactions, but cannot teach the "untestable hypothesis" that life arose via divine creation. Courts should be careful to avoid such double standards when assessing the constitutionality of teaching different views about biological origins.

I. LeVake v. Independent School District[127]

1. Summary

In *LeVake v. Independent School District*, high school biology teacher Rodney LeVake was reassigned after he allegedly failed to adequately cover the curriculum requirements for evolution and told his administrators that he intended to teach scientific criticisms of evolution.[128]

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[123] Theresa Wilson, *Evolution, Creation, and Naturally Selecting Intelligent Design Out of the Public Schools*, 34 U. TOL. L. REV. 203, 232 (2003); *see also* DeWolf, West & Luskin, *supra* note 4, at 46-48.

[124] Moeller v. Schrenko, 554 S.E.2d 198, 200 (Ga. Ct. App. 2001).

[125] *Id.*

[126] *Id.*

[127] LeVake v. Indep. Sch. Dist. No. 656, 625 N.W.2d 502 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1081 (2002).

[128] *Id.* at 505-06. Mr. LeVake claims that he did in fact not fail to teach or refuse to teach the required evolution curriculum. According to an interview the author conducted with Mr. LeVake:

> **Casey Luskin**: "There have been people including both the court and some Darwinists involved with this situation who claimed that you refused to teach evolution. Is that true?
>
> **Rodney LeVake**: "No, that was actually not the case at all. It wasn't that I was refusing to teach evolution. They wanted to know my views about what I thought about evolution. And I told them that I had some concerns about it from a scientific standpoint. I thought that would be a good quality to have and help my biology students to think critically about this. After all, that's what science is all about, trying to help students

LeVake stated, "I will accompany [the] treatment of evolution with an honest look at the difficulties and inconsistencies of the theory without turning my class into a religious one."[129] There was no indication that Mr. LeVake intended to teach creationism or intelligent design.[130] LeVake was subsequently transferred to teach a ninth-grade natural science class.[131] LeVake brought suit alleging violation of his right to free exercise of religion, free speech, freedom of conscience, as well as due process and academic freedom rights, maintaining that the material he wanted to teach his students was lawful.[132] The issue in *LeVake* became whether or not Mr. LeVake's speech rights as a teacher trumped the district's ability to exercise control over the science curriculum.[133] The Minnesota Court of Appeals sided with the school district, holding that "LeVake's responsibility as a public school teacher to teach evolution in the manner prescribed by the curriculum overrides his First Amendment [free speech] rights as a private citizen."[134]

2. Importance and Commentary

The *LeVake* ruling reflects the low degree of academic freedom that teachers have below the university level, absent some form of legislative protection.[135] The ruling is consistent with an earlier U.S. Supreme Court ruling that held that administrators may impose "reasonable restrictions" on teacher speech in public schools.[136] While academic freedom is

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> to think critically about topics, and evolution would be one of them. And so I didn't think it as a defiant proclamation on my part. I was just simply mentioning that I thought that Darwinian evolution had some flaws that would be worthwhile taking a look at.
>
> **Casey Luskin**: "They've also said Mr. LeVake that you refused to teach basically the full curriculum regarding evolution and what you were supposed to teach. Was that a true charge against you?
>
> **Rodney LeVake**: "No. As I had mentioned, on the side as I was talking earlier, I was teaching the very same thing as my mentor teacher was right next door. Every single day I taught the very same thing that he taught."

See ID the Future Podcast, Rodney LeVake: Expelled Science Teacher, Part 1, at http://www.idthefuture.com/2008/09/rodney_levake_expelled_science.html [12:20] (last visited Jan. 7, 2009) (edited for clarity).

[129] *LeVake*, 625 N.W.2d at 506.

[130] *See id.* at 505.

[131] *Id.* at 507.

[132] *Id.*

[133] *Id.* at 508.

[134] *Id.* at 509.

[135] Such legislative protection may come from academic freedom bills, such as the ones proposed in Alabama, Maryland, Oklahoma, and Florida in recent years. *See, e.g.,* David DeWolf, Seth Cooper & John G. West, *Legal Analysis of the Alabama House Substitute for SB 336*, May 14, 2004, http://www.discovery.org/a/2042 (discussing one of these bills).

[136] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988).

understandably restricted, there must come a point where restrictions are no longer "reasonable." For example, if state or local statutes require that textbooks must be accurate,[137] it could be unreasonable to prevent a teacher from using scholarly sources to provide scientific criticisms of incorrect claims made in textbooks about evolution. Teachers may also address the controversy over evolution whenever there is current public debate over origins science.[138]

As noted, the Supreme Court already implied in *Edwards* that it is possible for a legislature to "require that scientific critiques of prevailing scientific theories be taught."[139] Indeed, even groups such as the ACLU and Americans United for the Separation of Church and State acknowledge that "any genuinely scientific evidence for or against any explanation of life may be taught."[140] Yet teacher academic freedom is limited, and *LeVake* demonstrates the need for clear legislative protection of academic freedom for teachers to assert such rights.

It has been this author's experience that *LeVake* is sometimes mis-cited as holding that it is unconstitutional to teach scientific criticisms in public schools. This case stands for no such thing. At base, this is an employment law case about the freedom of speech retained by a government employee when acting in the course of his employment. The court did not attempt to make any determinations about the constitutionality of scientifically critiquing evolution in public schools. It simply balanced Mr. LeVake's academic freedom rights to offer material outside the curriculum against the interests of the school district to control the curriculum.

In the final analysis, the fact pattern in *LeVake* may have made it a poor test case for teacher academic freedom. According to the court, Mr. LeVake had previously failed to teach the evolution curriculum and had stated that he could not teach the curriculum in the future.[141] Commentator Francis Beckwith observes that "[i]n light of the deference accorded states in

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[137] For example, California has a statute requiring that "[a]ll instructional materials adopted by any governing board for use in the schools shall be, to the satisfaction of the governing board, accurate, objective, and current and suited to the needs and comprehension of pupils at their respective grade levels." CAL. EDUCATION CODE § 60045(a) (West 2003). A scholarly source discussing inaccuracies in textbooks over the evidence supporting evolution might be JONATHAN WELLS, ICONS OF EVOLUTION (2000).

[138] *See, e.g.,* Piver v. Pender County Bd. of Educ., 835 F.2d 1076, 1078 (4th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988) (indicating that a public employee's "[s]peech is constitutionally protected only if it relates to matters of public concern . . . and if the interests of the teacher and the community in discussing these issues outweigh the interests of the school in maintaining an efficient workplace" (citations omitted)).

[139] Edwards v. Aguillard, 482 U.S. 578, 593 (1987).

[140] American Civil Liberties Union, *Religion in the Public Schools: A Joint Statement of Current Law*, Apr. 12, 1995, http://www.aclu.org/religion/schools/16146leg19950412.html.

[141] LeVake v. Indep. Sch. Dist. No. 656, 625 N.W.2d 502, 505 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1081 (2002). Mr. LeVake claims he did not fail to teach the curriculum. *See supra* note 128.

matters of public education, and given the school district's legal duty to teach the curriculum correctly, the court seemed to have balanced the interests of LeVake and the school district appropriately."[142] But Beckwith concludes that if LeVake had both "agreed to teach the curriculum in precisely the way he was told to do so, and subsequently taught everything required in the curriculum" and only "offered nonreligious criticisms of evolution" from legitimate scholarly sources, that he might have had "a case with law in his favor."[143] If the court had found that Mr. LeVake had taught the required curriculum under legislatively protected teacher academic freedom, there is little doubt that he would have won his case.[144] This case therefore does not offend the proposition that teachers who fulfill the required curriculum and teach the evidence for evolution may assert the academic freedom to also teach students about scientific problems with evolution.

III. CASES REJECTING THE TEACHING OF ALTERNATIVES TO EVOLUTION

Some school boards or state legislatures have required the teaching of alternative concepts to evolution, usually requiring the teaching of Biblical creationism. In other instances teachers have independently taught creationism at their own volition. This section includes cases where courts have banned the teaching of alternatives to evolution. A recent notable case *Kitzmiller v. Dover*, was the first to squarely assess the constitutionality of teaching intelligent design. Though this case also dealt with a disclaimer, it is included in this section because the policy in question was fundamentally about teaching an alternative to neo-Darwinism, in this case intelligent design.

A. Hendren v. Campbell[145]

1. Summary

Two parents sued the Indiana Textbook Commission asserting that its approval of a biology textbook entitled *A Search for Order in Complexity* abused its discretion and violated both the First Amendment of the Federal Constitution and the Indiana State Constitution.[146] An Indiana superior court

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[142] Francis J. Beckwith, *A Liberty Not Fully Evolved?: The Case of Rodney LeVake and the Right of Public School Teachers to Criticize Darwinism*, 39 SAN DIEGO L. REV. 1311, 1319 (2002).

[143] *Id.* at 1319-21.

[144] *Id.* at 1323-25.

[145] Hendren v. Campbell, No. S577-0139 (Marion Super. Ct. Ind. Apr. 14, 1977), *available at* http://www.talkorigins.org/faqs/hendren/hendren_v_camp bell.pdf.

[146] *Id.* The Indiana State Constitution required that "[t]he Commission on textbook adoptions shall not approve a textbook which contains anything of a partisan or sectarian character." *Id.*

found that "the text consistantly [sic] presents creationism in a positive light and evolution in a negative posture."[147] The court further found that the textbook references "the 'wonderful findings of God's creation' and 'divine creation' as being the only correct viewpoint to be considered" and that "biblical creation is consistantly [sic] presented as the *only* correct 'scientific' view."[148] According to the court, the important question "is whether a text obviously designed to present *only* the view of Biblical Creationism in a favorable light is constitutionally acceptable in the public schools of Indiana."[149] Though the text purported to be fair in its presentation of evolution and creationism, the court found that "[t]he record and the text itself do not support this assertion of fairness,"[150] and declared the textbook unconstitutional. Having considered statements from creationist organizations and from the textbook's publisher,[151] the court also found that "the purpose of *A Search for Order in Complexity* is the promotion and inclusion of fundamentalist Christian doctrine in the public schools."[152]

2. Importance and Commentary

The *Hendren* court was sensitive to those who felt evolution was hostile towards their religious beliefs, as it quoted Justice Black's famous statement in his concurring opinion in *Epperson* where he recognized that many view evolution as an "anti-religious [d]octrine[]."[153] It further noted that "it is not the function of the courts to determine the validity or fallacy of any religious doctrine" and grasped the difficulty of this issue, recognizing that "the judiciary has long had an abborence [sic] to wandering into the thicket of conflicting dogmas and creeds."[154] The court was apparently willing to tolerate some level of government support for religion, as it observed that the U.S. Supreme Court "has not required *total* separation between church and state."[155] The court also noted that "a sense of neutrality has been a goal"[156] of First Amendment law, where the "government . . . shows no partiality to any one group"[157] and passes laws that sanction

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147 *Id.* at 6.
148 *Id.* at 10.
149 *Id.* at 19-20.
150 *Hendren*, No. S577-0139 at 19, *available at* http://www.talkorigins.org /faqs/hendren/hendren_v_campbell.pdf.
151 *Id.* at 4-5.
152 *Id.* at 19.
153 *Id.* at 17 (quoting Epperson v. Arkansas, 393 U.S. 97, 113 (1968) (Black, J., concurring)).
154 *Id.* at 18.
155 *Id.* at 13.
156 *Hendren*, No. S577-0139 at 13.
157 *Id.* at 13 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)).

"neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility."[158]

Seeking to enforce religious neutrality, the court built upon a prior ruling in *Daniel v. Waters* (*see* Section IV(A)) which found it unconstitutional to put the Biblical version of creation in a "preferential position,"[159] and also justified its holding by citing the Indiana Constitution's requirement that "no preference shall be given" to any religious viewpoint.[160] It is important to note that this court did not reject the textbook by concluding that it presented a religious viewpoint about creation. Rather, it was concerned about the bias of the text and its slant towards creationism and against evolution.[161] This reasoning would be unlikely to stand today, for if a bias or preference can render a textbook unconstitutional, then nearly every biology textbook used in public schools would be unconstitutional because they are heavily biased towards evolution, and any mentions of non-evolutionary viewpoints are nearly always negative.[162] Moreover, as will be discussed further below, various courts since *Hendren* have explicitly held that supporting creationism is unconstitutional.[163] Nonetheless, *Hendren* highlights a principle worth remembering: viewpoints about biological origins should be taught objectively and without bias, without any intent to denigrate one viewpoint. At the very least, this case would seem to lend support to those teaching about both the scientific strengths and weaknesses of evolution, especially when attempting to eliminate a pro-evolution preference or bias in the textbook and the required curriculum.

B. McLean v. Arkansas. Board. of Education[164]

1. Summary

A federal district trial court held that an Arkansas law requiring schools to give balanced treatment of evolution and creationism was unconstitutional.[165] Creationism was explicitly defined as the young earth creationist viewpoint.[166] The court began with an extensive recounting of the

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158 *Id.* at 14 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970)).

159 *Id.* at 18.

160 *Id.* at 18-19.

161 *Id.* at 20-21 ("The question is whether a text obviously designed to present only the view of Biblical Creationism in a favorable light is constitutionally acceptable in the public schools of Indiana.").

162 *See e.g.,* DOUGLAS J. FUTUYMA, EVOLUTION 529-536 (2005); DOUGLAS FUTUYMA EVOLUTIONARY BIOLOGY 759-760 (3d ed. 1998); SYLVIA S. MADER, ESSENTIALS OF BIOLOGY 230 (2007); SYLVIA S. MADER, HUMAN BIOLOGY 472 (6th ed. 2000); PETER H. RAVEN AND GEORGE B. JOHNSON, BIOLOGY 455 (6th ed. 2002).

163 *See infra* notes 164-224, 248-305 and accompanying text.

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

165 *Id.* at 1272.

166 *Id.* at 1264.

religious activism surrounding the passage of the law and by recounting a long history of anti-evolution activities among Arkansas citizens it called Christian "Fundamentalists."[167] The court found the law failed both the purpose and effect prongs of the *Lemon* test.[168] Due to "the publicly announced motives of the legislative sponsor made contemporaneously with the legislative process; [and] the lack of any legislative investigation, debate or consultation with any educators or scientists," the law was found to have been motivated by religion.[169] Furthermore, the court found that since "creation science is inspired by the Book of Genesis and that [the definition of creation science under the act] is consistent with a literal interpretation of Genesis" there was "no doubt that a major effect of the Act is the advancement of particular religious beliefs."[170] The court applied a definition of science provided by Michael Ruse, a prominent Darwinian philosopher of science, who testified that a subject must meet five distinct criteria to be considered scientific: 1) it must be guided by natural law, 2) it must be explained by natural law, 3) it must be testable against the empirical world, 4) it must be tentative in its conclusions, and 5) it must be falsifiable.[171] The court concluded that creation-science failed all of these criteria, and therefore "[s]ince creation science is not science, the conclusion is inescapable that the only real effect of Act 590 is the advancement of religion."[172]

2. Importance and Commentary

This was the first federal court ruling in the U.S. to squarely address the constitutionality of teaching "creation science" and hold it to be unconstitutional. The ruling has been highly criticized by some philosophers of science who believed it "canonized a false stereotype of what science is and how it works."[173] In fact, about 10 years after the ruling, Michael Ruse "repudiated his previous support for the demarcation principle[s]"[174] that formed the basis of the *McLean*'s definition of science. Other philosophers of science concur with Ruse's position. Martin Eger has explained that, "[d]emarcation arguments have collapsed. Philosophers of science don't hold them anymore. They may still enjoy acceptance in the popular world, but that's a different world."[175] Likewise, Larry Laudan observes that, "there is no demarcation line between science and non-science, or between science

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[167] *Id.* at 1259-65.
[168] *Id.* at 1272.
[169] *Id.* at 1264.
[170] *McLean*, 529 F. Supp. at 1266.
[171] *Id.* at 1267.
[172] *Id.* at 1272.
[173] Larry Laudan, *The Demise of the Demarcation Problem, in* BUT IS IT SCIENCE? 337-50 (Michael Ruse ed.,1988).
[174] David K. DeWolf, Stephen C. Meyer & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 74 (2000).
[175] *Id.* at 70.

and pseudo-science, which would win assent from a majority of philosophers.[176]

While this federal district case has been widely discussed, its expansive reasoning seems to have had little direct impact upon the Supreme Court's majority ruling when later dealing with the teaching of creationism. In *Edwards v. Aguillard*, the Supreme Court majority largely ignored the *McLean* reasoning and held that creationism was unconstitutional simply because it postulated a "supernatural creator."[177]

The *McLean* ruling did observe that if creation science had been "science," then it would have been appropriate for public schools:

> The second part of the three-pronged test for establishment reaches only those statutes having as their *primary* effect the advancement of religion. Secondary effects which advance religion are not constitutionally fatal. Since creation science is not science, the conclusion is inescapable that the *only* real effect of Act 590 is the advancement of religion.[178]

Under this reasoning, had creation science been deemed science, it would have passed the effect prong of the *Lemon* inquiry because any effects upon religion would have been considered secondary. The implication is that the teaching of scientific viewpoints is not unconstitutional even if the propositions of that viewpoint coincide with the teachings of some religious viewpoints, because the primary effect of their teaching would advance science. This implies that teaching legitimate scientific critiques of evolution, or legitimate scientific alternatives to evolution, would pose no constitutional violations. In such circumstances, any effects upon religion would be "incidental."[179]

C. Edwards v. Aguillard[180]

1. Summary

The Louisiana State Legislature passed a "balanced treatment" act stating that no school is required to teach either evolution or creation science, but if one view is taught, the other must also be taught.[181] The U.S. Supreme Court struck down the statute, finding it failed the purpose prong of the *Lemon* test.[182] Although Louisiana claimed that the law had the secular purpose of advancing academic freedom, the majority found that the state's

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[176] LARRY LAUDAN, BEYOND POSITIVISM AND RELATIVISM: THEORY, METHOD, AND EVIDENCE 210 (1996).

[177] Edwards v. Aguillard, 482 U.S. 578, 592-93 (1987).

[178] McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1272 (E.D. Ark. 1982).

[179] Crowley v. Smithsonian Inst., 462 F. Supp. 725, 727 (D.C. 1978); *see also* DeWolf, West & Luskin, *supra* note 4, at 46-48.

[180] *Edwards,* 482 U.S. at 578.

[181] *Id.* at 581.

[182] *Id.* at 586.

alleged legislative purpose was "a sham."[183] The actual legislative purpose, the Court said, was to advance "the religious belief that a supernatural creator was responsible for the creation of humankind."[184] The Court's inquiry into legislative purpose examined "the statute on its face, its legislative history, or its interpretation by a responsible administrative agency" because "the plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose."[185] The Court found that although the law's given purpose was to protect academic freedom, the act "was not designed to further that goal"[186] because it gave teachers no more teaching freedom than they previously possessed. The legislative history documented that the Act's primary purpose was to "provide [a] persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution . . . ."[187] Because the law lacked a secular purpose, it violated the first prong of the *Lemon* test and was therefore unconstitutional.[188] No inquiry was made into the effect prong of the *Lemon* test because the law failed the purpose prong.

2. Importance and Commentary

Edwards v. Aguillard is the most recent case over the teaching of biological origins to reach the U.S. Supreme Court. The opinion has been widely cited as having declared "creationism" unconstitutional. Surprisingly, Eugenie Scott, a leading advocate of evolution education,[189] wrote soon after the release of the *Edwards* opinion that the ruling does *not* prohibit teachers from teaching creationism.[190] However, Dr. Scott's stated viewpoint conflicts with how various lower courts have interpreted *Edwards* as having held that teaching "creationism" is unconstitutional.[191] As one lower court interpreted the ruling, "[t]he import of *Edwards* is that the Supreme Court turned the proscription against teaching creation science in the public school system into a national prohibition."[192] Regardless, important statements and critiques

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[183] *Id.* at 587.
[184] *Id.* at 592.
[185] *Id.* at 594.
[186] *Edwards*, 482 U.S. at 586.
[187] *Id.* at 592.
[188] *Id.* at 588-89.
[189] Scott has been called "perhaps the nation's most high-profile Darwinist." Geoff Brumfiel, *Who Has Designs on Your Students' Minds?* NATURE, Apr. 28, 2005, at 1065.
[190] "Reports of the death of 'scientific creationism,' however, are premature. The Supreme Court decision says only that the Louisiana law violates constitutional separation of church and state; it does not say that no one can teach scientific creationism—and unfortunately many individual teachers do." Eugenie C. Scott, *Creationism Lives*, NATURE, Sept. 24, 1987, at 282.
[191] *See, e.g.,* Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994); Webster v. New Lenox Sch. Dist. No. 122*,* 917 F.2d 1004, 1008 (7th Cir. 1990).
[192] Kitzmiller v. Dover Area Sch. Bd., 400 F. Supp. 2d 707, 712 (M.D. Pa. 2005).

of current law can be gleaned from the majority, concurring, and dissenting opinions in *Edwards*.

a. Majority Opinion

A key point of law from the majority ruling is that teaching of a "supernatural creator" is unconstitutional because it constitutes a "religious viewpoint."[193] Nonetheless, *Edwards* contains important language that seems to support the ability of teachers to teach legitimate *scientific* views that dissent from neo-Darwinism. The majority ruling recognized that teachers have an academic flexibility" to "supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life."[194] The Court also clarified that questioning the scientific validity of evolution is not unconstitutional and may in fact be encouraged: "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . [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."[195]

The Court also elaborated upon the requirements of *Lemon*'s purpose prong, explaining that "[a] religious purpose alone is not enough to invalidate an act of a state legislature," and for a law to be unconstitutional, "[t]he religious purpose must predominate."[196] Like the incidental effect test where a law is unconstitutional only if the "primary" effect advances religion, under *Edwards*, religious purposes are permissible so long as they do not "predominate."[197]

b. Concurring Opinions

Justices O'Connor and Powell concurred with the majority, explaining that *creation ex nihilo* ("creation out of nothing") represented "the ultimate religious statement."[198] They did not, however, deny that "the underpinnings of creationism may be supported by scientific evidence."[199] They recognized that the Establishment Clause is not violated "simply because the material to be taught happens to coincide or harmonize with the tenets of some or all religions."[200] Like other cases, this implies that non-

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[193] *Id.* at 591-92.

[194] Edwards v. Aguillard, 482 U.S. 578, 587 (1987).

[195] *Id.* at 593-94.

[196] *Id.* at 599.

[197] *Id.*

[198] *Id.* at 600 (quoting McLean v. Ark. Bd. of Educ., 529 F. Supp. 1255, 1265 (E.D. Ark. 1982) (Powell, J., concurring)).

[199] *Id.* at 604 (quoting Aguillard v. Edwards, 765 F.2d 1251, 1257 (5th Cir. 1985)).

[200] *Edwards*, 482 U.S. at 605 (Powell, J., concurring) (internal citations and quotations omitted).

evolutionary views may be taught so long as they represent legitimate scientific views. If the primary effect of teaching a subject advances science, then any coincidental harmony with religious teachings would be considered non-fatal incidental, or secondary, effects.

Justice White also concurred, noting that while he might have concluded that the statute did not have a purpose to further religious belief, that he "cannot say that the two courts below are so wrong that they should be reversed," and thus affirmed overturning the statute.[201]

c. Dissenting Opinion

In his dissent, with which Justice Rehnquist joined, Justice Scalia agreed with Justices Powell and O'Connor that "we will not presume that a law's purpose is to advance religion merely because it happens to coincide or harmonize with the tenets of some or all religions."[202] But Scalia stated he saw no reason to presume creation science was a religious belief and argued it was "a collection of scientific data supporting the theory that life abruptly appeared on earth."[203]

Similar to Justice Black's concurring opinion in *Epperson*, Scalia was concerned over the Court's attempt to determine the motives of legislators.[204] Scalia believes government action is permissible even if some policymakers have a mixture of religious and secular curricular concerns.[205] Scalia also wrote a scathing critique of the majority's use of the *Lemon* test's purpose prong, recognizing that religiously motivated policies can have great public benefit: "Today's religious activism may give us the Balanced Treatment Act . . . yesterday's resulted in the abolition of slavery, and tomorrow's may bring relief for famine victims."[206] According to Scalia, public policies motivated by religious convictions are part of our political heritage,[207] and to invalidate a law "merely because it was supported strongly by organized religions or by adherents of particular faiths . . . would deprive religious men and women of their right to participate in the political process."[208]

Finally, one of Scalia's dissenting statements may reflect his personal, insider's understanding of the majority's biases and why they decided against the Louisiana statute:

> *Infinitely less* can we say (or should we say) that the scientific evidence for evolution is so conclusive that no one

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201 *Id.* at 609 (White, J., concurring).
202 *Id.* at 615 (Scalia, J., dissenting) (internal citations and quotations omitted).
203 *Id.* at 629.
204 *Id.* at 612.
205 *Id.* at 614.
206 *Edwards*, 482 U.S. at 615 (Scalia, J., dissenting).
207 *Id*.
208 *Id*.

> could be gullible enough to believe that there is any real scientific evidence to the contrary, so that the legislation's stated purpose must be a lie. Yet that illiberal judgment, that *Scopes*-in-reverse, is ultimately the basis on which the Court's facile rejection of the Louisiana Legislature's purpose must rest.[209]

If Scalia were writing a Supreme Court ruling today, it seems clear he would permit the teaching of non-evolutionary views so long as they were found to be scientific.

D. Webster v. New Lenox School District #122[210]

1. Summary

In *Webster v. New Lenox School District*, the Seventh Circuit Court of Appeals held that a teacher does not have freedom of speech to teach creationism in public schools.[211] The case began when a student complained that Ray Webster, a junior high school social sciences teacher, had violated the separation of church and state through his in-class instruction.[212] The district's superintendent inquired into Webster's activities, and Webster replied that he had taught "creation science," but he did not believe that he was advocating religion.[213] Webster was told to stop teaching creation science because the district feared he was establishing religion.[214] Webster sued, contending that the school district had violated his First and Fourteenth Amendment rights.[215] The court rejected his claims and held that an individual teacher has no right to ignore the directives of his administrators.[216] Since the U.S. Supreme Court in *Edwards v. Aguillard* had held that creation science was religion, the Seventh Circuit found that "[g]iven the school board's important pedagogical interest in establishing the curriculum and legitimate concern with possible establishment clause violations, the school board's prohibition on the teaching of creation science to junior high students was appropriate."[217]

2. Importance and Commentary

The main thrust of *Webster* is that a teacher can be ordered to stop teaching "creation science" by a school district because it constitutes a

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209 *Id.* at 634.
210 Webster v. New Lenox Sch. Dist. No. 122, 917 F.2d 1004 (7th Cir. 1990).
211 *Id.* at 1004.
212 *Id.* at 1005.
213 *Id.* at 1006.
214 *Id.* at 1005.
215 *Id.*
216 *Webster*, 917 F.2d at 1005.
217 *Id.*

religious viewpoint.[218] *Webster* is a major case wherein a lower court interpreted *Edwards v. Aguillard* as having declared the teaching of creationism unconstitutional.[219] The ruling even goes so far as to imply that school districts are *obligated* to prohibit the teaching of creationism. Prior to the student's complaint in *Webster*, there was no evidence to suggest that the school district had any policy against teaching creationism.[220] However, under *Webster*, teaching creation science establishes religion and violates the Constitution even if the school district has not explicitly prohibited teaching creation science.[221] *Webster* not only gives school districts authority to prevent a teacher from teaching creation science, it implies an obligation to ensure that religion is not established.[222] Thus, districts may be required to ensure that creation science is not taught, and the district itself could be at risk of a lawsuit if it knowingly permits a teacher to teach creation science.

E. Bishop v. Aronov[223]

1. Summary

A federal appellate court ruled that a public university can restrict the academic freedom of university faculty to promote religious alternatives to evolution in the classroom.[224] Phillip Bishop was employed as an assistant professor of Health, Physical Education, and Recreation in the College of Education at the University of Alabama.[225] During his in-class instruction and optional after-class discussions, Bishop discussed his Christian religious beliefs and also stated his view that there is a "creative force behind human physiology . . . that man was created by God and was not the by-product of evolution."[226] Bishop's supervisor then sent a memorandum ordering him to discontinue "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes . . . ."[227] Bishop sued the university requesting "declaratory and injunctive relief for violations of his free speech rights" as well as violations of his free exercise rights.[228] The appellate panel found that Bishop's classroom was not a public forum, and

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218 *Id.* at 1008.

219 *Id.* at 1006 n.1("In *Edwards* . . . the Supreme Court determined that creation science, as defined in the Louisiana act in question, was a nonevolutionary theory of origin that 'embodies the religious belief that a supernatural creator was responsible for the creation of humankind.'").

220 *Id.* at 1005-06.

221 *Id.* at 1008.

222 *Webster*, 917 F.2d at 1008.

223 Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991).

224 *Id.* at 1077-78.

225 *Id.* at 1066.

226 *Id.* at 1068-69.

227 *Id.* at 1069.

228 *Id.* at 1070.

thus the ability of the university to limit his free speech rights was governed by the U.S. Supreme Court's ruling in *Hazelwood School District v. Kuhlmeier*, which held that during instructional time, "school officials may impose *reasonable restrictions* on the speech of students, teachers, and other members of the school community."[229] The court held that the University's restrictions on Bishop's speech were "reasonable" because "[t]he University issued its memorandum purportedly to avoid an establishment of religion by Dr. Bishop's conduct which connected the University to a particular religious viewpoint."[230]

2. Importance and Commentary

This case follows *Webster* and others by interpreting *Edwards* as having declared the teaching of creationism to be unconstitutional.[231] Nonetheless, this court did not reach the specific question of whether Dr. Bishop's actions actually established religion. Instead, it granted broad discretion to the university, holding that it "can restrict speech that falls short of an establishment violation" where faculty speech is "suspect" or there is the mere "potential" for an Establishment Clause violation.[232] Thus, this ruling holds that even in the university setting, where faculty are generally afforded a high level of academic freedom, public universities can restrict the teaching of creationism out of mere concerns or suspicions that an Establishment Clause violation may occur.

A strong argument can be made that this court should have reached the question of whether Bishop's speech actually established religion. Lacking clear guidance from prior case law, Bishop's administrators chose to prohibit his speech out of concerns that it could potentially be unconstitutional. The court thus faced questions over the permissibility of faculty speech that fell into a zone of constitutional ambiguity. Rather than providing clear guidance for both Bishop's administrators and future educators over whether such speech actually established religion, this appellate court deferred to the discretion of administrators.

By failing to address the constitutionality of Bishop's in-class instruction, the court in essence made the university administrators the arbitrator of what speech is, or is not, constitutionally protected, so long as "their actions are reasonably related to legitimate pedagogical concerns."[233] If administrators have such legitimate concerns, such concerns should be legitimated because a court reaches a determination that the speech

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[229] *Bishop*, 926 F.2d at 1071 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988)).

[230] *Id.* at 1077.

[231] *Id.* ("The creation/design aspect of his lecture could have lent itself to an analysis as found in *Edwards v. Aguillard* . . . .").

[232] *Id.*

[233] *Id.* (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266-67 (1988)).

established religion. If the speech does not establish religion, then unless we are to disregard the free speech rights of university faculty, it is difficult to argue that the administrators have legitimate concerns.

Courts likely create this zone of deference towards administrator discretion out of a policy to prevent litigation and judgments against schools. Such thinking is misguided because while it may protect schools against litigation from students, this policy in fact encourages litigation against schools from teachers like Bishop who would assert their free speech rights. At first glance, abolishing this zone of deference might seem to put schools in a difficult position: if schools allow the speech they run the risk of lawsuits from students over religious establishment, but if they prohibit the speech they risk lawsuits from teachers over an abridgment of free speech. But such a catch-22 would only exist temporarily until courts create clearer guidelines about what speech is, or is not, constitutionally permissible. Indeed, Bishop's suit shows that maintaining this zone of deference is no way to protect schools from litigation. In creating this zone of deference, courts are essentially abdicating their responsibility to assess and protect the rights of both students *and teachers.*

In the foundational case *Marbury v. Madison,* Justice Marshall instructed future generations of jurists that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[234] By failing to address the constitutionality of faculty speech, courts like *Bishop* abdicate their responsibility to determine the precise contours of the Establishment Clause and provide guidance for future administrators, teachers, students, and any other would be plaintiffs about what faculty speech is, or is not, constitutionally permissible.

F. Helland v. South Bend Community School Corp.[235]

1. Summary

A substitute teacher, Peter Helland, sued his school district claiming he was wrongly fired due to his Christian religious beliefs.[236] The teacher had a history of negative performance evaluations, including reports that he "failed to follow lesson plans left for him by the teachers for whom he substituted and that he failed to maintain control of his classes."[237] Regarding Establishment Clause violations, he had been repeatedly accused of proselytizing students in the classroom, including reading the Bible to classes and "professing his belief in the Biblical version of creation in a fifth grade science class."[238] Helland even "agreed not to give the students an

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234 Marbury v. Madison, 5 U.S. 137, 177 (1803).
235 Helland v. South Bend Cmty. Sch. Corp., 93 F.3d 327 (7th Cir. 1996).
236 *Id.* at 328-29.
237 *Id.* at 329.
238 *Id.*

assignment if they agreed not to tell anyone about the discussion" regarding creationism.[239] After Helland failed to heed repeated warnings regarding his performance and reading of the Bible in the classroom, the district fired the teacher.[240] The court found that the teacher could prove no discrimination against his religious beliefs, and ruled that the district had acted properly in removing him from the list of substitute teachers.[241]

2. Importance and Commentary

Like *LeVake*, this case deals primarily with employment law. However, it closely follows *Webster* by holding that creationism is a religious viewpoint and that districts may not only require teachers to stop teaching creationism, they have an obligation to do so.[242] According to the court, Helland's reading of the Biblical story of creation in the classroom was "in contravention not only of the Constitution, but also of the lesson plans left for him" and represented the use of his classes for religious indoctrination.[243] The court found that "[a] school can direct a teacher to refrain from expressions of religious viewpoints in the classroom and like settings" because the district "has a constitutional duty to make certain, given the Religion Clauses, that subsidized teachers do not inculcate religion."[244] In short, *Helland* asserts that high school teachers have no academic freedom to teach creationism because that is a religious viewpoint, and concurs with *Webster* in holding that school districts have an obligation to prevent the teaching of creationism.[245]

G. Kitzmiller v. Dover Area School District[246]

1. Summary

Kitzmiller v. Dover Area School District was the first case to assess the constitutionality of teaching intelligent design in public schools.[247] In November 2004, the Dover Area School Board adopted a policy (the "ID-policy") requiring that an oral disclaimer be read to biology classes before teaching evolution.[248] The disclaimer stated evolution is a "[t]heory . . . not a fact" and "[g]aps in the Theory exist for which there is no evidence."[249] The

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239 *Id.*
240 *Id.*
241 *Helland*, 93 F.3d at 329.
242 *Id.* at 331.
243 *Id.*
244 *Id.* (internal citations and quotations omitted).
245 *Id.*
246 Kitzmiller v. Dover Area Sch. Bd., 400 F. Supp. 2d 707 (M.D. Pa. 2005).
247 *Id.* at 707.
248 *Id.* at 708-09.
249 *Id.* at 708.

disclaimer further required teachers to state, "Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, Of Pandas and People, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves."[250] On December 14, 2004, eleven parents of students represented by attorneys working with the ACLU and Americans United for the Separation of Church and State filed suit against the district, alleging the oral disclaimer established religion.[251] After a six-week trial, Judge John E. Jones issued a 139-page opinion finding the Dover's ID-policy unconstitutional because (1) Dover School Board members had religious motives and (2) the effect of teaching ID advances religion because intelligent design is creationism, an unconstitutional religious viewpoint.[252]

The judge held that intelligent design postulates a "supernatural creator," an unconstitutional "religious viewpoint" according to *Edwards*,[253] and stated that an "objective observer would know that reference to ID and teaching about 'gaps' and 'problems' in Evolutionary Theory are creationist, religious strategies that evolved from earlier forms of creationism."[254] The court argued that teaching ID necessarily invites religion into the classroom as it sets up what will be perceived by students as a "God-friendly" science.[255] The judge issued an injunction prohibiting the Dover Area School District "from requiring teachers to denigrate or disparage the scientific theory of evolution, and from requiring teachers to refer to a religious, alternative theory known as ID."[256] Relying upon *Freiler*,[257] the judge likewise prohibited the reading of the oral disclaimer because he found it urged students "to contemplate alternative religious concepts."[258] Judge Jones went further than merely striking down Dover's ID-policy by giving various reasons why he believed ID was not science:

> (1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that

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250 *Id.* at 708-09.

251 *Id.* at 709-10.

252 *Kitzmiller*, 400 F. Supp. 2d at 765.

253 *Id.* at 712, 718 ("The import of *Edwards* is that the Supreme Court turned the proscription against teaching creation science in the public school system into a national prohibition. . . . The Supreme Court further held that the belief that a supernatural creator was responsible for the creation of human kind is a religious viewpoint and that the Act at issue '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.' Therefore, as noted, the import of *Edwards* is that the Supreme Court made national the prohibition against teaching creation science in the public school system.").

254 *Id.* at 716.

255 *Id*.

256 *Id.* at 766.

257 *See infra* notes 335-360 and accompanying text.

258 *Kitzmiller*, 400 F. Supp. 2d at 764.

> doomed creation science in the 1980s; and (3) ID's negative attacks on evolution have been refuted by the scientific community. . . . [4] ID has failed to gain acceptance in the scientific community, [5] it has not generated peer-reviewed publications, [6] nor has it been the subject of testing and research.[259]

For these reasons, the judge found that ID is not science, and therefore argued that "[s]ince ID is not science, the conclusion is inescapable that the only real effect of the ID Policy is the advancement of religion."[260]

2. Importance and Commentary

As noted, *Kitzmiller v. Dover* was the first case to assess the constitutionality of teaching ID in public schools and found it to be unconstitutional.[261] Yet the origins of this controversy were not exactly as they are described in the ruling. The ruling implies that the Dover School Board passed its ID-policy with the support of the Discovery Institute, a leading pro-ID organization.[262] But Discovery Institute expended much effort attempting to dissuade the Dover School Board from passing its ID-policy and rather suggested Dover implement a policy which focused on teaching only the scientific evidence for and against evolution without getting into alternative theories like intelligent design.[263] This is consistent with the long-standing and prevailing view of leaders within the ID movement who feel that intelligent design should not be required in public school science classrooms, but rather that schools should focus on critical analysis of evolution.[264]

Dover passed its ID-policy against the strong policy advice of leading pro-ID organizations, and leading ID proponents foresaw that *Kitzmiller* was a poor test case for ID because the Dover School Board members had clear religious motives for passing their ID-policy. Judge Jones could have recognized the religious motives of Dover board members and held that the policy failed the "purpose prong" of the *Lemon* test, and then

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[259] *Id.* at 735.

[260] *Id.* at 764. It is arguable that the judge employed his own "contrived dualism" by asserting that anything that is not science must be religion, thereby ignoring that many historical and philosophical claims are considered neither "science" nor "religion."

[261] *Id.* at 707.

[262] *Id.* at 750, 753, 759, 763.

[263] *See* DeWolf, West & Luskin, *supra* note 4, at 9-12; Statement by Seth L. Cooper Concerning Discovery Institute and the Decision in *Kitzmiller v. Dover Area School Board* Intelligent Design Case, http://www.evolutionnews.org/2005/12/statement_by_seth_l_cooper_con.html (Aug. 18, 2006).

[264] Leading groups in the ID movement, such as Discovery Institute and Intelligent Design Network agree that while intelligent design is constitutional, it should not be required for teaching in schools. *See* Discovery Institute's Science Education Policy, at http://www.discovery.org/a/3164.

ended his analysis, as did the U.S. Supreme Court when deciding *Edwards v. Aguillard*.[265] But this court chose not to practice judicial economy and instead reached a holding on the "effect" of teaching ID, finding that ID is not science, but is creationism, an unconstitutional religious viewpoint.[266] However, there are good reasons to believe that *Kitzmiller* will not be considered persuasive to future courts dealing with intelligent design.[267]

a. Judicial Overreach Diminishes the Credibility of the Ruling

Despite the fact that the *Kitzmiller* ruling was never appealed to a higher court and is not binding precedent outside of the parties directly involved in the lawsuit, the court gave sweeping commentary indicating that it sought to settle these matters for all others:

> [T]he Court is confident that no other tribunal in the United States is in a better position than are we to traipse into this controversial area. Finally, we will offer our conclusion on whether ID is science not just because it is essential to our holding that an Establishment Clause violation has occurred in this case, but also in the hope that it may prevent the obvious waste of judicial and other resources which would be occasioned by a subsequent trial involving the precise question which is before us.[268]

This statement seems to imply that the trial court judge intended his ruling to be perceived as one handed down by the U.S. Supreme Court, settling this issue for all future courts.[269] Yet this statement will likely serve to diminish the persuasive impact this ruling will have upon other federal or state judges who feel competent to decide these matters for their own courts. Indeed, the statement also hints of Judge Jones's intent to use the lower federal judiciary as a vehicle for policy-making. After the ruling, Judge Jones admitted his "fervent hope" that his opinion "could serve as a primer for school boards and other people who were considering this [issue]"[270] and also stated his wish to prevent such "litigation [being] replicated someplace else."[271] Judge

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[265] *Kitzmiller*, 400 F. Supp. 2d at 763. In *Edwards*, the U.S. Supreme Court recognized that once a religious purpose was found for a legislative act, the government action was unconstitutional, and the policy of judicial economy made it inappropriate to rule on other factors unnecessary to the holding in the case. Thus, the Supreme Court declined to rule on the "effect prong" in *Edwards*. *See* Edwards v. Aguillard, 482 U.S. 578, 578, 593 (1987).

[266] *Kitzmiller*, 400 F. Supp. 2d at 765.

[267] For a more extensive treatment of these arguments, see generally DeWolf, West & Luskin, *supra* note 4.

[268] *Kitzmiller*, 400 F. Supp. 2d at 735.

[269] *Id.*

[270] Lisa L. Granite, *One for the History Books*, PA. LAW., July-Aug. 2006, at 17, 22.

[271] Sherri Kimmel, *Of* Dover *and Design*, DICKINSON MAG. (Spring 2006), *available at* http://www.dickinson.edu/magazine/print.cfm?article=74 (quoting Judge Jones).

Jones specifically admitted his intent that his trial court ruling would influence outcomes for school boards outside of the parties in the case:

> I wrote the opinion in a comprehensive way because I knew that the dispute was possibly going to be replicated someplace else. And what I wanted to do was make the opinion sort of a primer that people could read. . . . I thought that if other school boards and other boards of education could read it, they would possibly be more enlightened about what the dispute was all about.[272]

The court also inappropriately invaded territories outside the scope of the judiciary by attempting to define science as methodological naturalism (when even philosophers have no consensus on the definition of science[273]), attempting to adjudicate the proper relationship of science and religion, and by unnecessarily ruling on scientific debates outside its expertise.[274] Even anti-ID legal scholars have expressed concerns that this aspect of the *Kitzmiller* ruling represents judicial over-reach, as Jay Wexler writes:

> [T]he important issue for evaluating the decision is not whether ID actually is science—a question that sounds in philosophy of science—but rather whether judges should be deciding in their written opinions that ID is or is not science as a matter of law. On this question, I think the answer is "no," particularly when the overall question posed to a court is whether teaching ID endorses *religion*, not whether ID is or is not *science*. The part of *Kitzmiller* that finds ID not to be science is unnecessary, unconvincing, not particularly suited to the judicial role, and even perhaps dangerous both to science and to freedom of religion.[275]

The judicial over-reach and activist, policy-making intentions of the judge may cause other courts to question whether the *Kitzmiller* ruling represents carefully considered legal work.[276]

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[272] *NewsHour: Documentary Explores Key Case on 'Intelligent Design'* (PBS television broadcast Nov. 13, 2007) (transcript *available at* http://www.pbs.org/newshour/bb/education/july-dec07/evolution_11-13.html) (quoting Judge John E. Jones III).

[273] *See supra* notes 175-178 and accompanying text.

[274] A more extensive critique of the *Kitzmiller* ruling can be found in DAVID K. DEWOLF, JOHN G. WEST, CASEY LUSKIN & JONATHAN WITT, TRAIPSING INTO EVOLUTION: INTELLIGENT DESIGN AND THE *KITZMILLER VS. DOVER* DECISION (2006).

[275] Wexler, *supra* note 4, at 93 (footnotes omitted).

[276] For a more extensive discussion of the activism inherent in the *Kitzmiller* ruling, *see* DEWOLF, WEST, LUSKIN & WITT, *supra* note 274, at 14-17.

b. Extensive Copying from the Plaintiffs' Findings of Fact and Conclusions of Law Diminishes the Credibility of the Section on Whether ID is Science

Another aspect of the *Kitzmiller* ruling that may cause jurists to doubt its persuasiveness is the fact that over 90% of its celebrated section on whether ID is science was copied verbatim or nearly-verbatim from the plaintiffs' "Findings of Facts and Conclusions of Law," proposed by attorneys working with the ACLU.[277] While there is no question that courts are permitted to draw upon such documents when constructing rulings and that such behavior does *not* constitute any kind of unethical "plagiarism," case law suggests that large-scale judicial copying is highly disapproved of by courts,[278] even when the extent of the copying does not provide grounds to overrule the lower court. The famous appellate judge James Skelly Wright expounded the policy preference against judicial copying in a passage favorably cited by the U.S. Supreme Court:

> I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case.[279]

The policies underlying disapproval of judicial copying would seem to apply to the *Kitzmiller* ruling, as the copying was highly extensive in the most celebrated and far-reaching section of the ruling and led to the incorporation of errors and misquotes, a canonization of the "zeal and advocacy" of the plaintiffs' counsel.[280] Some of these copied errors include:

- Incorrectly alleging a wholesale lack of research and peer-reviewed publications supporting ID;[281]
- Misquoting language from the "Wedge Document," a fundraising document of the Discovery Institute discussed at trial, thereby twisting the organization's stance on the relationship of religion and science;[282]

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[277] *See* John G. West & David K. DeWolf, *A Comparison of Judge Jones' Opinion in* Kitzmiller v. Dover *with Plaintiffs' Proposed "Findings of Fact and Conclusions of Law*, http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=1186 (last visited Jan. 6, 2009).

[278] *See* Anderson v. Bessemer City, 470 U.S. 564, 572 (1985); United States v. El Paso Natural Gas Co., 376 U.S. 651, 656 n.4 (1964); In re Cmty. Bank of N. Va., 418 F.3d 277, 300 (3d Cir. 2005); Bright v. Westmoreland County, 380 F.3d 729, 731 (3d Cir. 2004).

[279] El Paso Natural Gas Co., 376 U.S. at 656, n.4.

[280] *Id.*

[281] *See* West & DeWolf, *supra* note 277, at 3.

- Falsely claiming that Michael Behe said that various scientific articles about evolution were "not 'good enough'" when in fact at trial, Behe stated precisely the opposite, stating: "[I]t's not that they aren't good enough. It's simply that they are addressed to a different subject";[283]
- Wrongly claiming that intelligent design "requires supernatural creation" when supporters of intelligent design at trial testified precisely the opposite.[284]

Such copied errors could diminish the value of the section on whether ID is science when evaluated by future courts.

c. The Kitzmiller *Ruling Did Not Strike Down the Actual Theory of Intelligent Design*

The *Kitzmiller* ruling was predicated upon a false definition of intelligent design. As noted, it asserted that ID "requires supernatural creation,"[285] but this ignored testimony from pro-ID biologists that ID does not require supernatural causation.[286] In effect, the ruling reshaped the square peg of ID to force-fit it into the round hole of the "no-supernatural rule" carved out by the Supreme Court in *Edwards*.[287] Yet ID proponents span a wide variety of religious and non-religious viewpoints[288] and the scientific theory of ID merely appeals to an intelligent cause, not a necessarily supernatural cause. Indeed, the ruling ignored passages in Dover's pro-ID textbook that explain this aspect of the theory of intelligent design:

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[282] Casey Luskin, *The Darwinist Misinformation Train Makes a Long Stop in Florida*, EVOLUTION NEWS & VIEWS, (Mar. 14, 2008), http://www.evolutionnews.org/2008/03/the_darwinist_misinformation_t.html.

[283] *See* West & DeWolf, *supra* note 277, at 3.

[284] *Id.*

[285] Kitzmiller v. Dover Area Sch. Bd., 400 F. Supp. 2d 707, 721 (M.D. Pa. 2005).

[286] When Scott Minnich was asked at trial "whether intelligent design requires the action of a supernatural creator," he replied, "It does not." (Minnich Test. Tr. 45-46, Nov. 3, 2005). Similarly, when Michael Behe was asked an analogous question, he replied, "No, it doesn't." (Behe Test. Tr. 86, Oct. 17, 2005).

[287] Edwards v. Aguillard, 482 U.S. 578, 592-94 (1987).

[288] For example, Antony Flew, a noted design theorist and famous philosopher, was a celebrated atheist at the time he publicly announced his scientific support for intelligent design. *See* BIOLA University, BIOLA News & Communications, http://www.biola.edu/antonyflew/ (last visited Feb. 16, 2009). Some other notably self-proclaimed non-theists who support intelligent design include atheist philosopher of science Bradley Monton, secular humanist sociologist Steve Fuller, and atheist legal scholar Thomas Nagel. *See* STEVE FULLER, DISSENT OVER DESCENT: INTELLIGENT DESIGN'S CHALLENGE TO DARWINISM 9 (Penguin, 2008) ("I am a secular humanist."); Bradley Monton, ID, http://spot.colorado.edu/~monton/BradleyMonton/ID.html (last visited Feb. 16, 2009) ("[E]ven though I am an atheist, I'm of the opinion that the arguments for intelligent design are stronger than most realize."); Thomas Nagel, *Public Education and Intelligent Design*, 36 PHIL. & PUB. AFF. 187, 202 (2008) ("My own situation is that of an atheist who, in spite of being an avid consumer of popular science, has for a long time been skeptical of the claims of traditional evolutionary theory to be the whole story about the history of life.").

> [S]cientists from within Western culture failed to distinguish between *intelligence, which can be recognized by uniform sensory experience, and the supernatural, which cannot*. Today we recognize that appeals to intelligent design may be considered in science, as illustrated by current NASA search for extraterrestrial intelligence (SETI). Archaeology has pioneered the development of methods for distinguishing the effects of natural and intelligent causes . . . [I]f we go further, and conclude that the intelligence responsible for biological origins is outside the universe (supernatural) or within it, we do so without the help of science. . . . *All [ID] implies is that life had an intelligent source*.[289]

The theory of intelligent design therefore does not speculate about whether the intelligence responsible for life was natural or supernatural out of a desire to respect the limits of scientific inquiry.[290] ID-critics have capitalized on the no-supernatural rule created by *Edwards* and have misrepresented ID to say it necessarily requires a "supernatural designer."[291] Yet clearly ID recognizes that science cannot study the supernatural and thereby does not even violate "methodological naturalism," the controversial definition of science canonized by the *Kitzmiller* ruling.[292] ID could only be force-fit into the Supreme Court's definition of "creationism" through a misrepresentation of the theory.

d. The Kitzmiller *Ruling Used False Evidence to Claim That ID is Not Science*

The ruling asserted that ID "has not generated peer-reviewed publications"[293] and has not "been the subject of testing and research."[294] Yet the court was presented with evidence of various peer reviewed publications published by ID proponents in mainstream scientific publications supporting

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[289] DEAN H. KENYON & PERCIVAL DAVIS, OF PANDAS AND PEOPLE 126-127, 161 (2d ed. 1993) (emphasis added).

[290] "I wasn't comfortable with the typical vocabulary that for the most part creationists were using *because it didn't express what I was trying to do*. They were wanting to bring God into the discussion, *and I was wanting to stay within the empirical domain and do what you can do legitimately there*. . . ." (Thaxton Dep. 52:5 – 52:11, July 19, 2005), Kitzmiller v. Dover Area Sch. Dist. (M.D. Pa., Dec. 20, 2005) (No. 4:04-CV-2688), *available at* http://www2.ncseweb.org/kvd/depo/2005-07-19_deposition_Thaxton_escript.pdf (emphasis added).

[291] (Pls.'s Opp'n to Mot. For Summ. J. at 2), Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 720 (M.D. Pa. 2005), *available at* http://www.aclupa.org/downloads/PsBriefopposingSJpdf.pdf.

[292] Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 720 (M.D. Pa. 2005).

[293] *Id.* at 735.

[294] *Id.*

core claims of ID.[295] Biologist Scott Minnich also presented slides of his own laboratory experiments testing (and supporting) irreducible complexity for the bacterial flagellum.[296] The ruling ignored this evidence.

e. Failure to Treat Religion in a Neutral Fashion

A cardinal rule of constitutional law is that courts must never declare a religious belief false.[297] Yet the ruling held it is "utterly false" to believe that evolution "is antithetical to a belief in the existence of a supreme being."[298] Additionally, the ruling construed the religious beliefs, motives, and larger philosophical implications associated with intelligent design against the theory, but showed no interest in examining how this rule might impact the teaching of evolution, given the anti-religious beliefs, motives, or larger philosophical implications that many draw from neo-Darwinism.[299] Future courts confronting this issue might find the reasoning in *Kitzmiller* to be unhelpful if they wish to follow *Epperson*'s call for "neutrality" and avoid adopting rules that, if applied fairly, could jeopardize the teaching of evolution.

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[295] Brief (Revised) of Amicus Curiae Discovery Institute app. at 1–15, *Kitzmiller* (No. 4:04-cv-2688), *available at* www.westlaw.com (Motions, Pleadings, and Filings of *Kitzmiller*, 400 F. Supp. 2d 707); *see* Scott Minnich, (Test. Tr. 34, Nov. 4, 2005), *available at* www.westlaw.com (Petitions, Briefs, and Filings of *Kitzmiller*, 400 F. Supp. 2d 707); Barbara Forrest, (Test. Tr. 33-34, 79-80, Oct. 5, 2005), (Test. Tr. 79-80, Oct. 6, 2005); Brief of Amicus Curiae Foundation for Thought and Ethics, at appendix D 8-18, *available at* www.westlaw.com (Motions, Pleadings, and Filings of *Kitzmiller*, 400 F. Supp. 2d 707).

[296] (Minnich Test. Tr. at 103–112) *available at* www.westlaw.com (Motions, Pleadings, and Filings of *Kitzmiller*, 400 F. Supp. 2d 707).

[297] *See* U.S. v. Ballard, 322 U.S. 78, 86-87 (1944) ("'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect'. . . . Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.") (internal citations and quotations omitted); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . .").

[298] *Kitzmiller*, 400 F. Supp. 2d at 765.

[299] *See* DeWolf, West & Luskin, *supra* note 4, at 42-54 (discussing intelligent design, its implications, and the treatment of religion in the *Kitzmiller* analysis).

f. One Court's Opinion Does Not Negate the Evidence for Design from the Biological Data

The scientific questions over intelligent design continue to be debated by scientists before and after this ruling.[300] This debate will ultimately be settled by scientists who give design a fair hearing, not by courts. An educator choosing to teach ID for the right reasons—*to improve science instruction*—might still legally teach about ID.

Finally, because of the harsh injunction issued in this case that Dover teachers may not "denigrate or disparage the scientific theory of evolution,"[301] the *Kitzmiller* ruling, like *LeVake*, highlights the need to protect teacher academic freedom to present genuine scientific critique of evolution.

H. Hurst v. Newman[302]

1. Summary

In January 2006, the El Tejon school district in Southern California approved an elective inter-session high school course entitled "Philosophy of Intelligent Design."[303] The course syllabus included various videos advocating young earth creationism, intelligent design, or evolution.[304] The school district was soon thereafter sued by parents of students represented by attorneys working with Americans United for the Separation of Church and State.[305] The case did not go to trial, as the district cancelled the course and settled outside of court.[306] The settlement agreement created a rule that "[n]o school, over which the [El Tejon] School District has authority, including the

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[300] Michael Behe, "Whether ID is a Science: A Response to the Opinion of the Court in *Kitzmiller vs. Dover Area School District*," in DEWOLF, WEST, LUSKIN & WITT, *supra* note 274, at 92 ("On the day after the judge's opinion, December 21, 2005, as before, the cell is run by amazingly complex, functional machinery that in any other context would immediately be recognized as designed. On December 21, 2005, as before, there are no non-design explanations for the molecular machinery of life, only wishful speculations and Just-So stories."); *see also, e.g.*, Staff, About Irreducible Complexity: Responding to Darwinists Claiming to Have Explained Away the Challenge of Irreducible Complexity, http://www.discovery.org/a/3408 (last visited Mar.17, 2008) (reply from pro-intelligent design scientists about next article); Evolution of "Irreducible Complexity" Explained, http://waddle.uoregon.edu/?id= 482 (last visited Aug.18, 2006).

[301] *Kitzmiller*, 400 F. Supp. 2d at 766.

[302] Hurst v. Newman, No. 1:06-CV-00036-OWW-SMS (E.D. Cal. Jan. 17, 2006), http://www2.ncseweb.org/wp/?page_id=111 (follow "Complaint" hyperlink) (last visited Oct. 11, 2008).

[303] *Id.* at (Compl. ¶ 1.)

[304] *Id*.

[305] *Id*. at (Compl. ¶¶ 20, 41.)

[306] Hurst v. Newman, No. 1:06-CV-00036-OWW-SMS (E.D. Cal. Jan. 17, 2006), http://www2.ncseweb.org/wp/?page_id=111 (follow "Stipulated Order" hyperlink) (last visited Oct. 11, 2008).

High School, shall offer, presently or in the future, the course entitled 'Philosophy of Design' or 'Philosophy of Intelligent Design' or any other course that promotes or endorses creationism, creation science, or intelligent design."[307] No ruling of law was therefore issued in the case.

2. Importance and Commentary

This case raises the question of whether intelligent design can be taught in non-science courses, such as the elective philosophy course in El Tejon School District. Ironically, Barry Lynn, director of Americans United for the Separation of Church and State, the group that helped filed this lawsuit, had previously stated regarding intelligent design that "when it comes to matters of religion and philosophy, they can be discussed objectively in public schools, but not in biology class."[308]

Mr. Lynn may appear to be applying inconsistent rules given that it was his organization that chose to file the lawsuit. However, a closer examination of the facts may justify the choice of Americans United to sue the district, but for different reasons than those offered by Mr. Lynn. The original syllabus for this "Philosophy of Intelligent Design" course included various videos and other materials that explicitly advocated Biblical young earth creationism.[309] The *Kitzmiller* ruling recognized that ID does not advocate for a young earth.[310] Thus, even if it is constitutional to discuss intelligent design in a philosophy course, the Biblical creationist materials made the El Tejon course legally problematic. Even the pro-ID Discovery Institute urged the district to cancel the course due to constitutional concerns, arguing that "the course title 'Philosophy of design' misrepresents intelligent design by promoting young earth creationism under the guise of intelligent design."[311] While Americans United displayed some hypocrisy for attacking the course because it discussed intelligent design, the course was legally problematic for reasons separate from ID.

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[307] *Id*. at (Stipulated Order ¶ 2.)

[308] Elisabeth Bumiller, *Furor Erupts over Bush's Remarks on Intelligent Design*, SAN FRANCISCO CHRON., Aug. 3, 2005, *available at* http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/08/03/MNGFOE1VHN1.DTL.

[309] Hurst v. Newman, No. 1:06-CV-00036-OWW-SMS (E.D. Cal. Jan. 17, 2006) (Compl. ¶ 1), http://www2.ncseweb.org/wp/?page_id=111 (follow "Complaint" hyperlink) (last visited Oct. 11, 2008).

[310] *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 722 (M.D. Pa. 2005); *see also* Scott, *supra* note 18, at 128 ("[M]ost ID proponents do not embrace a Young Earth, Flood Geology, and sudden creation tenets associated with YEC.").

[311] *See* Letter from Casey Luskin, Program Officer in Public Policy & Legal Affairs with Discovery Institute to John W. Wight, Superintendent of El Tejon School District (Jan. 11, 2006), http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=662; *see also Intelligent Design Group Urges California High School to Change Course or Remove Intelligent Design*, http://www.evolutionnews.org/2006/01/intelligent_design_group_urges.html.

Despite the problems with this particular course, schools do have broad leeway to teach about subjects—religious or otherwise—in certain non-science courses, as long as there is no establishment of religion. The Tenth Circuit wrote that there is "[a] difference between teaching *about* religion, which is acceptable, and teaching religion, which is not."[312] Such reasoning stems from U.S. Supreme Court precedent that has even held that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."[313] While many would dispute the claim that intelligent design is religion, it is clear that virtually any subject—religion or otherwise—can be discussed in public schools if taught in a pedagogically appropriate manner.

Although no ruling was issued in this case, lessons can be learned. School districts should be careful about what material they incorporate into classrooms, even when dealing with non-science courses. While some nonevolutionary views may be permissible to advance in public schools, Biblical creationist materials have been firmly deemed unconstitutional by courts.[314] If intelligent design is to be taught, it should not be conflated with unconstitutional Biblical creationist materials. Moreover, there currently exists a lack of judicial clarity as to how districts can legally implement the teaching of alternatives to evolution in non-science courses. It seems clear that while schools cannot endorse religion, they can teach about nonevolutionary viewpoints in a neutral, objective fashion so long as it is done without advancing religion. A final lesson to be learned is that school districts should be wary of promises from anti-ID groups who claim to believe it is permissible to teach ID in non-science courses.

IV. CASES REJECTING DISCLAIMERS REGARDING THE TEACHING OF EVOLUTION

The final major category of cases deals with government bodies that implemented a disclaimer regarding the teaching of evolution. In each case the disclaimer was struck down as unconstitutional. Some of these disclaimers also dealt with teaching alternatives to evolution, and could also fit in the prior category.

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[312] Roberts v. Madigan, 921 F.2d 1047, 1055 (10th Cir. 1990) (quoting Roberts v. Madigan, 702 F. Supp. 1505, 1517 (D. Colo. 1989)).

[313] Stone v. Graham, 449 U.S. 39, 42 (1980) (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963)).

[314] *See supra* notes 145-221 and accompanying text.

A. Daniel v. Waters[315]

1. Summary

The Sixth Circuit struck down a Tennessee statute requiring that biology textbooks may not teach any "theory about origins or creation of man and his world"[316] unless it contained a disclaimer which "specifically states that it is a theory . . . and is not represented to be scientific fact."[317] The statute also required that textbooks must give "an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible."[318] The appellate court held that the statute was analogous to the Monkey laws passed in the 1920s as "the purpose of establishing the Biblical version of the creation of man over the Darwinian theory of the evolution of man is as clear in the 1973 statute as it was in the statute of 1925."[319] While it lacked the criminal sanctions of the Tennessee Monkey law, it found that the law violated *Epperson* because it "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with . . . a particular interpretation of the Book of Genesis . . . ."[320] Because the statute was "tailored to the principles or prohibitions of [a] religious sect or dogma,"[321] it was unconstitutional.

2. Importance and Commentary

This was the first case to address and strike down an evolution-disclaimer in a textbook. The court found this disclaimer prohibited the use of a textbook "unless it also contains a disclaimer stating that such doctrine is 'a theory as to the origin and creation of man and his world and is not represented to be scientific fact.'"[322] Unlike later cases, the court did not take issue with the language in the disclaimer calling evolution "a theory" and not "scientific fact." Rather, its primary concern was the fact that the disclaimer required the Biblical account of creation to be mentioned such that the Bible is given a "preferential position" over theories based upon "scientific research and reasoning."[323] *Daniel* thus represents one of the earliest cases to prohibit the teaching of Biblical creationism in the classroom.

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315 Daniel v. Waters, 515 F.2d 485 (6th Cir. 1975).
316 *Id.* at 487.
317 *Id.*
318 *Id.*
319 *Id.* at 487.
320 *Id.* at 489-490.
321 *Daniel*, 515 F.2d at 490.
322 *Id.* at 487.
323 *Id.* at 489.

B. Steele v. Waters[324]

1. Summary

The Tennessee State Supreme Court held that the Tennessee textbook statute violated both the Federal and Tennessee State Constitutions.[325] A Tennessee Chancery Court had already declared the statute unconstitutional, and Waters, the Chairman of the Tennessee State Textbook Commission, appealed the ruling.[326] Before the Tennessee high court ruled on the case, the Sixth Circuit had issued its opinion in *Daniel v. Waters*, striking down the same statute.[327] The Tennessee State Supreme Court's ruling gave scant legal analysis, and instead merely observed that the Sixth Circuit had held that "[t]he provisions of the Tennessee statute are obviously in violation of the first [sic] Amendment prohibition on any law 'respecting the establishment of religion'."[328] Echoing the Sixth Circuit's reasoning, the court held that

> [t]he requirement that some religious concepts of creation, adhered to presumably by some Tennessee citizens, be excluded on such grounds in favor of the Bible of the Jews and the Christians represents still another method of preferential treatment of particular faiths by state law and, of course, is forbidden by the establishment [sic] Clause of the First Amendment.[329]

2. Importance and Commentary

The Tennessee Supreme Court was clear that the most offensive aspect of this statute was that it emplaced the Biblical story of creation into the classroom in preference to other religious views. While this early case seems to leave open the possibility that various religious views could be taught in the science classroom provided that no "preferential treatment"[330] is given to any one view, such possibilities have since been foreclosed by subsequent U.S. Supreme Court rulings. Nonetheless, *Steele* stands for the proposition that policies regarding controversial curricular subjects are on safer legal ground when they strive for objectivity and viewpoint neutrality. This bodes well for those who seek to improve science education by introducing scientific viewpoints that dissent from Darwin in addition to the

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324 Steele v. Waters, 527 S.W.2d 72 (Tenn. 1975) (per curiam).
325 *Id.* at 72.
326 *Id.* at 73.
327 *Id.*
328 *Id.*
329 *Id.*
330 *Steele*, 527 S.W.2d at 73.

standard one-sided pro-evolution-only viewpoint taught in most biology textbooks.

C. Freiler v. Tangipahoa Parish Board of Education[331]

1. Summary

The Tangipahoa Parish Board of Education in Louisiana required the reading of an oral disclaimer to students before evolution was taught.[332] The disclaimer stated that the Parish's teaching of evolution was "not intended to influence or dissuade the Biblical version of Creation or any other concept," and that "[i]t is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on . . . the origin of life . . . ."[333] Parents of children in the Parish brought suit alleging the disclaimer violated the Establishment Clause.[334] The Fifth Circuit Court of Appeals applied the *Lemon* test to the disclaimer.[335] Regarding the purpose prong, the Parish Board argued it adopted the disclaimer "(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution."[336] The court found that the first purpose was "a sham" because critical thinking "requires that students approach new concepts with an open mind and a willingness to alter and shift existing viewpoints," and that in contrast, the disclaimer implies that "evolution as taught in the classroom need not affect what they already know."[337] However, the court found that the second and third purposes were legitimate and actual secular purposes.[338] Because such legitimate secular purposes existed, the disclaimer passed the first prong of the *Lemon* test.[339] The court found the disclaimer failed the effect prong because the primary effect of the disclaimer was to "encourag[e] students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular."[340] The disclaimer was therefore declared unconstitutional.[341] Rehearings were denied by both the Fifth Circuit en banc, and the U.S.

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[331] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).
[332] *Id.* at 341.
[333] *Id.* at 341.
[334] *Id.*
[335] *Id.* at 343.
[336] *Id.* at 344.
[337] *Freiler*, 185 F.3d at 345.
[338] *Id.* at 345.
[339] *Id.*
[340] *Id.* at 346.
[341] *Id.* at 348.

Supreme Court, leaving the Fifth Circuit panel opinion as the final ruling in this case.[342]

2. Importance and Commentary

This case represents another wherein an "evolution disclaimer" was successfully challenged. Importantly, the Fifth Circuit panel ruling in *Freiler* legitimizes various secular purposes for the special treatment of evolution in curricular policies. The court noted that "a purpose is no less secular simply because it is infused with a religious element,"[343] and "the fact that evolution, the subject about which the School Board sought to disclaim any orthodoxy of belief, is religiously charged . . . and the fact that sensitivities and sensibilities to which the School Board sought to reduce offense are religious in nature, does not *per se* establish that those avowed purposes are religious purposes."[344] The court explicitly validated those purposes because "local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms."[345] Thus, the purposes of encouraging critical thinking, disclaiming orthodoxy of belief, and reducing student/parent offense from teaching evolution, were all found to be legitimate secular purposes for crafting evolution policies. These legitimate secular purposes rebut the charge "singling-out" evolution for special treatment in educational policies implies unconstitutional religious motives on the part of policymakers.

Problems of constitutionality aside, it should be noted that disclaimers are not ideal solutions to current problems with teaching evolution, as they predispose students to skepticism towards evolution before even presenting *any* scientific evidence; they only *tell* students about supposed deficiencies with evolution rather than actually helping students develop critical thinking skills and teaching them science. Rather than simply *telling* students to "question evolution," scientific instruction is best enhanced by *presenting* students with more scientific evidence regarding evolution, and then allowing them to engage in critical thinking exercises and evaluate the scientific strengths and weakness of modern evolutionary biology.

a. Points from Dissenting Opinions from the Denials of Rehearing of Freiler

As noted, the Fifth Circuit en banc denied the defendant a rehearing of the case; however, the denial passed narrowly and six judges from the Fifth Circuit dissented from the denial of the petition for rehearing.[346]

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342 *See* Tangipahoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251 (2000).
343 *Freiler*, 185 F.3d at 345.
344 *Id.*
345 *Id.* at 346.
346 *Freiler*, 530 U.S. at 1251.

Writing for the dissenting minority, Judge Barksdale charged that the Fifth Circuit appellate panel "transformed neutrality into intolerance."[347] The dissent argued that the disclaimer's mention of the Biblical doctrine of creation should not have rendered the disclaimer unconstitutional because it did not endorse the Biblical view and expressed sensitivity to the "tension" between evolution and religion. The dissent states, "The theory of evolution may be viewed by some as anti-religious. The disclaimer recognizes this historic tension between evolution (scientific concept) and other theories or concepts about the origin of life and matter, using the "Biblical version of Creation" as but *an example* of such other concepts."[348] Because "an estimated 95% of the parish students are adherents to the Biblical concept of creation," it was not inappropriate "to *give context to the message, but without promoting that concept or expressing intolerance for any other.*"[349] This language provides strong justification for why districts might find a legitimate need to craft policies treating evolution in a special manner.

When the U.S. Supreme Court denied the defendant's appeal, Justice Scalia, writing for Justices Thomas and Rehnquist, also criticized the Fifth Circuit's rulings. Scalia criticized the Fifth Circuit panel's failure to give deference to the school board's stated purposes for the disclaimer. Scalia also felt the Fifth Circuit misapplied the effect prong of the *Lemon* test as "[f]ar from advancing religion, the 'principal or primary effect' of the disclaimer at issue here is merely to advance freedom of thought."[350] According to Scalia, the other justices believed "the Fifth Circuit's conclusion that '[t]he disclaimer . . . encourages students to read and meditate upon religion in general and the 'Biblical version of Creation' in particular,' . . . lacks any support in the text of the invalidated document."[351] Scalia argued the disclaimer did not endorse any alternative theory but rather "neutrally encourages students 'closely [to] examine *each* alternative' before forming an opinion."[352]

This typically sharp Scalian dissent called the denial of rehearing en banc by the Fifth Circuit "incoherent."[353] The en banc denial of rehearing had stated that a disclaimer could tell students that the district (1) did not intend to tell students that evolution is the only explanation, (2) could inform students of their right to follow their religion, or (3) encourage students to evaluate all explanations of life's origins, including those not taught in the classroom.[354] But Scalia charged that "the disclaimer contains . . . nothing

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[347] Freiler v. Tangipahoa Parish Bd. of Educ., 201 F.3d 602, 608 (5th Cir. 2000), *cert. denied*, 530 U.S. 1251 (2000) (Barksdale, J., dissenting).

[348] *Id*. at 606.

[349] *Id.* at 607.

[350] *Freiler*, 530 U.S. at 1253 (Scalia, J., dissenting).

[351] *Id.* at 1254 (quoting Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 346 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000)).

[352] *Id.* at 1254.

[353] *Id.*

[354] *Id.* at 1254.

more than what this statement purports to allow . . . ."[355] Scalia concluded with a scathing summary of the law:

> In *Epperson v. Arkansas*, we invalidated a statute that forbade the teaching of evolution in public schools; in *Edwards v. Aguillard* we invalidated a statute that required the teaching of creationism whenever evolution was also taught; today we permit a Court of Appeals to push the much beloved secular legend of the [Scopes] Monkey Trial one step further. We stand by in silence while a deeply divided Fifth Circuit bars a school district from even suggesting to students that other theories besides evolution—including, but not limited to, the Biblical theory of creation—are worthy of their consideration. I dissent.[356]

Were such a viewpoint endorsed by a Supreme Court majority, the Court would undoubtedly uphold far less ambitious policies that merely require the teaching of scientific dissent from evolution but do not include the teachings of the Bible.

D. Selman v. Cobb County Board of Education[357]

1. Summary

Selman arose when the Cobb County School District in Cobb County, Georgia enacted a policy requiring the emplacement of a sticker-disclaimer inside biology textbooks.[358] The short, written disclaimer stated: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered."[359]

Five parents of children in the district filed suit, alleging the disclaimer established religion.[360] The federal district court judge agreed and stated that, although the sticker did appear to have a secular purpose, it had the effect of endorsing religion and thus failed the second prong of the *Lemon* test.[361]

Plaintiffs argued that the district was inappropriately singling out evolution, exposing a religious purpose.[362] But the court rejected this argument because "evolution is the only theory of origin being taught in

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355 *Id.*
356 *Freiler*, 530 U.S. at 1255 (Scalia, J., dissenting) (internal citations omitted).
357 Selman v. Cobb County Bd. of Educ., 449 F.3d 1320 (11th Cir. 2006).
358 *Id.* at 1322.
359 *Id.* at 1324.
360 *Id.* at 1324-25.
361 *Id.* at 1328.
362 *Id.* at 1286.

Cobb County classrooms" and "evolution was the only topic in the curriculum, scientific or otherwise, that was creating controversy at the time of the adoption of the textbooks and Sticker."[363] Thus the court noted that "[t]he School Board's singling out of evolution is understandable in this context."[364] The court then found two secular purposes for the sticker. The purpose of "[f]ostering critical thinking is a clearly secular purpose . . . because [the disclaimer] tells students to approach the material on evolution with an open mind, to study it carefully, and to give it critical consideration."[365] The court also found another legitimate secular purpose for the disclaimer was "presenting evolution in a manner that is not unnecessarily hostile" in order to "reduce[] offense to students and parents whose beliefs may conflict with the teaching of evolution."[366]

While the sticker passed the purpose prong of the *Lemon* analysis, the judge ruled that the disclaimer failed the effect prong of the *Lemon* test.[367] The court observed that "citizens around the country have been aware of the historical debate between evolution and religion."[368] The court found that the school district did not intend to endorse religion, but nonetheless "the Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders."[369] In this particular case, "the informed, reasonable observer would know that a significant number of Cobb County citizens had voiced opposition to the teaching of evolution for religious reasons" and "put pressure on the School Board to implement certain measures that would nevertheless dilute the teaching of evolution."[370] Although the district did not intend to endorse religion, "the informed, reasonable observer would perceive the School Board to be aligning itself with proponents of religious theories of origin."[371]

Defendants in *Selman* subsequently appealed the judgment of the district court to the Eleventh Circuit Court of Appeals.[372] The appellate court, however, was unable to review the case because the record was both incomplete and inaccurate.[373] Due to "gaps in the record"[374] and "missing

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[363] Selman v. Cobb County Bd. of Educ., 390 F. Supp. 2d 1286, 1302-03 (N.D. Ga. 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006).

[364] *Id.* at 1303.

[365] *Id.* at 1302.

[366] *Id.* at 1305.

[367] *Id.* at 1313.

[368] *Id.* at 1306.

[369] *Selman*, 390 F. Supp. 2d at 1306.

[370] *Id.* at 1307.

[371] *Id.* at 1308.

[372] Selman v. Cobb County Bd. of Educ., 449 F.3d 1320, 1321-22 (11th Cir. 2006).

[373] *Id.* at 1338.

[374] *Id.* at 1322.

links in the documentary chain,"[375] the appellate court found that it could not determine if the evidence in the case supported the factual conclusions of the district court.[376] Writing for the appellate panel, Judge Carnes stated: "Whether we should reverse or affirm the judgment depends on the evidence that was before the district court, and we cannot tell from the record what that evidence was."[377] Of critical importance was assessing whether the collection of letters, petitions, emails, and other documents were received by the district before or after the sticker was adopted.[378] Thus, the appellate court vacated and remanded the case to the district court, offering a non-exclusive list of 18 questions to be answered by the district court.[379] On December 19, 2006, the school district settled with the plaintiffs before the district court addressed any of the 18 questions.[380] The settlement removed the stickers from the textbooks and ended the case without a final statement of law on the stickers.[381]

2. Importance and Commentary

Because the district court's decision was vacated by the Eleventh Circuit, there is no official statement of law from this case, and the district court's ruling should not be considered precedent. However, prior to the appellate ruling, the district court's ruling provoked sharp criticism from legal scholars who alleged that it put constitutional outcomes in the hands of some citizens' perceptions of the actions of the government rather than basing the outcome upon what the government had actually done. This precise flaw in endorsement analysis was predicted years ago by legal scholar Steven D. Smith:

> One consequence of this analysis, however, is that the validity or invalidity of measures intended to assist but not endorse religion becomes wholly dependent upon *misperceptions;* such measures would be struck down only if citizens, or an "objective observer," would attribute to government officials a communicative intent which they did not in fact have. A doctrine which formally adopted misinformation and misperceptions as the standard for determining the constitutionality of a potentially broad array

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375 *Id.* at 1334 (internal citations and quotations omitted).
376 *Id.*
377 *Id.* at 1322.
378 *Selman*, 449 F.3d at 1334-35.
379 *Id.*
380 *See* Selman v. Cobb County Bd. of Educ., No. 1:02-CV-2325-CC (N.D. Ga. Dec. 19, 2006), *available at* http://www2.ncseweb.org/selman/2006-12-19_Sticker_Agreement.pdf.
381 *Id.* at Order ¶ 1.

> of public measures would seem, to put it mildly, anomalous.[382]

Smith recounts another common criticism of the endorsement test, that the "objective informed observer" is nothing more than a projection of a judge's particular perspective that may have no basis in reality:

> The other general kind of answer to the question of whose perceptions count would reject the perceptions of actual citizens as a controlling standard, and instead would adopt the perceptions of a fictitious, judicially created observer. Since *Wallace,* Justice O'Connor has adopted this course. The dispositive question, in her view, is not factual but legal; the question is whether a law or practice would be perceived as endorsement by a hypothetical "objective observer." . . . [A] purely fictitious character will perceive precisely as much, and only as much, as its author wants it to perceive; and there is no empirical touchstone or outside referent upon which a critic could rely to show that the author was wrong.[383]

Such a criticism seems apt in this case where a sticker that had a legitimate secular purpose was deemed unconstitutional due to federal district court Judge Cooper's view of how an "objective" citizen would perceive the sticker, in light of advocacy from community members.[384]

But neither of these criticisms represent the most crucial concerns over the district court's ruling: Judge Cooper's reasoning threatens the political liberties of many Americans who happen to be religious. Under Judge Cooper's ruling, a law is unconstitutional if some citizens believe the government "to be aligning itself with proponents of religious theories of origin."[385] This means that if religious citizens advocate for a particular policy position, even if that position could have legitimate secular benefits and could be passed under legitimate secular motives (as was this disclaimer), the government has acted unconstitutionally if it adopts that position *simply because that policy was supported by many citizens who are religious*. Such a legal rule diminishes the political rights of religious citizens by inhibiting their ability to advocate for policy positions in American politics. Legal scholar Francis Beckwith concurs that the ruling "makes it nearly impossible for religious citizens to remedy public policies that they believe are uniquely hostile to their beliefs."[386] In short, the ruling

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[382] Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the 'No Endorsement' Test*, 86 MICH. L. REV. 266, 290 (1987).

[383] *Id.* at 292.

[384] Selman v. Cobb County Bd. of Educ., 390 F. Supp. 2d 1286, 1305 (N.D. Ga. 2005), *vacated and remanded*, 449 F.3d 1320 (11th Cir. 2006).

[385] *Id.* at 1308.

[386] Francis J. Beckwith, *The Court of Disbelief: The Constitution's Article VI Religious Test Prohibition and the Judiciary's Religious Motive Analysis*, 33 HASTINGS CONST. L.Q. 337, 352 (2006).

discriminates against religious Americans who are advocating for public policies.

Like *Kitzmiller*, Judge Cooper's reasoning also failed to treat religion in a neutral fashion. If his reasoning were applied fairly, it could even place the teaching of evolution in undesirable legal jeopardy. The ruling struck down the sticker because it was supported by Christians in the community.[387] Yet, both before and after this lawsuit, atheists vocally opposed the sticker-disclaimer. For example, in 2002, the Georgia Humanist Society called for its members to act "In Defense of Humanism" and requested that they sign a petition to the Cobb County School Board of Education to oppose the disclaimer.[388] Indeed, Jeffrey Selman, the plaintiff himself, participated in a "Rally for Reason" sponsored by the Atheist Law Center.[389] Much activist opposition to Cobb County's disclaimer by the atheist community was organized through a group called "Internet Infidels."

Internet Infidels is "a non-profit educational organization dedicated to defending and promoting a naturalistic worldview on the Internet" where "naturalism entails the nonexistence of all supernatural beings, including the theistic God."[390] One Internet Infidels user named RufusAtticus (actually a biologist named Reed A. Cartwright, then a graduate student studying biology at the University of Georgia,[391] now a post-doctoral researcher at North Carolina State University[392]) used the Internet Infidels website to organize and promote a petition sent to the Cobb County School Board to oppose their sticker policy.[393]

Discussions of the petition on the Internet Infidels website were accompanied by many anti-religious statements and anti-religious slurs. Cartwright boasted on the website that his "whipping" of a "creationist correspondent" is "recorded in the 'Funny Fundy Friday' thread."[394] One user praised the petitions Cartwright sent to the Cobb County School Board stating, "F-ing awesome response you wrote! Concise, and extremely persuasive to anyone who doesn't have their head stuck in the sand of

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[387] *Selman*, 390 F. Supp. 2d at 1313.

[388] *See* In Defense of Humanism, http://geocities.com/gahumanists/defense.htm.

[389] *See* Atheists to March into Capitol May 6 to Protest Government Denial of Free Speech and Equal Access to Open Forum, *Rally for Reason & Picnic on the Capitol Lawn*, http://www.atheistlaw.org/archived-article.cfm?id=102 (last visited May 19, 2006).

[390] The Secular Web (2008), http://www.infidels.org/.

[391] *See* Posting of RufusAtticus to http://www.iidb.org/vbb/showthread.php?t=69504 where "RufusAtticus" identifies himself as Reed Cartwright (last visited Oct. 27, 2008).

[392] *See* Reed A. Cartwright, SCITUS, http://scit.us/ (last visited Oct. 27, 2008).

[393] *See* Postings of RufusAtticus and other users to http://www.iidb.org/vbb/shoethread.php?=39518 and http://www.iidb.org/vbb/showthread.php?=39518 &page=2 (on file with author).

[394] Posting of Cartwright to http://www.iidb.org/vbb/showthread.php?=39518&page=2 (on file with author).

religious dogma."[395] Another poster in the thread complained against religious proponents of calling evolution a "theory" saying "[t]o some conservative religious people with no core education in science, a 'theory' is something scientists dream up while sipping their trendy liberal Starbucks coffee and/or diddlin' their widdles."[396] When commenting on a quote from Cobb County Board of Education defense attorney Linwood Gun who had stated that "[s]cience and religion are not mutually exclusive," another poster expressed anti-religious sentiments, replying "[w]rong and wrong."[397] While debating the Cobb County policy, one user said, "I don't see how anyone could believe a benevolent god did all this . . . .The world is full of freakish things . . . [and] random from what we can observe."[398] Another poster said: "You know they weren't talking to god when they made this nonsense up. Its [sic] time for these stone-age bible-pushers to start living in the real world."[399]

After the district court's ruling was issued, users expressed additional anger over the proposed policy: "Oh, forgot, no religious person is worried about how the Schroedinger Equation endangers the souls of their precious little lambikins. Besides, that would require more than a nodding equation with 'science', and might even require that they learn more than what their preacher tells them on Sunday morning."[400] The response from another user was, "Those damn fundies."[401] Many other threads on the Internet Infidels website contain similar comments against religion.

These citizens and groups, of course have every right to hold and express their opinions under First Amendment protections of free speech. But under Judge Cooper's reasoning, if Cobb County had rejected the disclaimer, an informed objective observer would supposedly then perceive that Cobb County School Board had "aligned" itself with the viewpoints of these atheist citizens who are extremely antagonistic towards religion. Judge Cooper's logic might have rendered a rejection of the sticker similarly unconstitutional due to public perceptions that the school board was

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[395] *See* Posting of Gooch's Dad to http://www.iidb.org/vbb/showthread.php?=39518 (on file with author).

[396] Posting of Deblateration to http://www.iidb.org/vbb/showthread.php?t=105009&highlight=Cobb+County (Nov. 8, 2004, 11:55 p.m.) (last visited Oct. 27, 2008).

[397] Posting of Hazel-rah to http://www.iidb.org/vbb/showthread.php?t=105009&highlight=Cobb+County (Nov. 9, 2004, 10:33 a.m.) (last visited Oct. 27, 2008).

[398] Posting of Classical to http://www.iidb.org/vbb/showthread.php?t=105009&highlight=Cobb+County&page=3 (Nov. 13, 2004, 05:47 a.m.) (last visited Oct. 27, 2008).

[399] Posting of OdysseusTheInnkeeper to http://www.iidb.org/vbb/showthread.php?t=105009&highlight=Cobb+Count&page=3 (Nov. 14, 2004 03:22 p.m.) (last visited Oct. 27, 2008).

[400] Posting of hagiograph to http://www.iidb.org/vbb/showthread.php?t=105009&highlight=Cobb+County (Nov. 8, 2004, 06:04 a.m.) (last visited Oct. 27, 2008).

[401] Posting of Kciredor reprah to http://www.iidb.org/vbb/showthread.php?t=112090 (Jan. 13, 2005, 11:38 a.m.) (last visited Oct. 27, 2008).

endorsing atheism[402] or inhibiting religion. Such a result is preposterous: it ties the hands of government from taking any action regarding controversial social issues and could even threaten the teaching of evolution, showing that the legal reasoning used in Judge Cooper's ruling is untenable.

Selman ended without a final statement of law as the school district settled with the plaintiffs in an order which prohibited them from "restoring to the science textbooks of students in the Cobb County schools any stickers, labels, stamps, inscriptions, or other warnings or disclaimers bearing language substantially similar to that used on the Sticker."[403] Yet even when announcing the settlement, the district maintained that it believed the stickers were constitutional.[404] Like *Hurst*, this case represents a school district being forced to abandon what it believed was a constitutional policy over threats of an ongoing and expensive lawsuit.

V. EVOLUTION POLICIES THAT HAVE NOT ENGENDERED LAWSUITS

Good litigation strategy dictates that defenders of evolution will not bring suit against policies they feel are unchallengeable, and thus the case-law over the teaching of biological origins naturally selects for lawsuits over unconstitutional policies. Indeed, when proponents of evolution feel that an educational policy is unconstitutional, they typically waste little time in filing lawsuits. (For example, it took less than two months for attorneys working with the ACLU to help parents file a lawsuit after the Dover Area School Board passed its ID policy.) Yet many policies in various states and school districts sanctioning scientific critical analysis of neo-Darwinism have existed for years without facing a challenge in court. This is significant. The range of constitutionally permissible policies for teaching evolution is perhaps best understood not simply by focusing on those that have been challenged and struck down, but by studying policies that have stood the test of time *without* engendered lawsuits.

A number of states and local districts have passed policies sanctioning teaching students about scientific critiques of evolution. From 2003 through 2006, the state of Ohio required that students "[d]escribe how scientists continue to investigate and critically analyze aspects of evolutionary theory."[405] Just a few months after Ohio repealed its policy in

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[402] Kaufman v. McCaughtry, 419 F.3d 678, 681-682 (7th Cir. 2005) ("If we think of religion as taking a position on divinity, then atheism is indeed a form of religion.") (quoting Reed v. Great Lakes Cos., 330 F.3d 931, 934 (7th Cir. 2003)).

[403] Proposed Consent and Judgment Order, December 19, 2006.

[404] Agreement Ends Textbook Sticker Case, Cobb County School Board Press Release (Dec. 19, 2006), *available at* http://www.cobb.k12.ga.us/news/2006/20061219_EvolutionCase.htm.

[405] *See* Associated Press, *Ohio Education Board Drops Disputed Evolution Guidelines*, (Feb. 15, 2006), http://www.firstamendmentcenter.org/news.aspx?id=16483; *see also* OHIO SCIENCE STANDARDS, 2002-2006, 37 (2006) (on file with author).

early 2006, South Carolina enacted a statewide policy requiring that students "[s]ummarize ways that scientists use data from a variety of sources to investigate and critically analyze aspects of evolutionary theory."[406] From 2005 to 2007, Kansas had a similar policy requiring students to learn about many scientific critiques of Darwinian evolution and, in part, regarding the scientific theory of biological evolution, the curriculum standards call for students to learn about the best evidence for modern evolutionary theory, but also to learn about areas where scientists are raising scientific criticisms of the theory.[407]

New Mexico,[408] Minnesota,[409] Missouri,[410] and Pennsylvania[411] have also adopted currently-active statewide standards sanctioning scientific critique of evolution. Since 1996, Alabama has required emplacing a disclaimer into biology textbooks calling evolution "a controversial theory" which "should be approached with an open mind, studied carefully, and critically considered."[412] None of these statewide policies have resulted in lawsuits.

Local districts have also passed similar policies without incident. In 2004, the school district of Grantsburg, Wisconsin passed a policy stating that "[s]tudents shall be able to explain the scientific strengths and weaknesses of evolutionary theory. This policy does not call for the teaching

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[406] South Carolina Biology Science Standards, indicator B-5.6, *available at* http://ed.sc.gov/agency/offices/cso/standards/science/documents/ScienceStandards Nov182005_001.doc.

[407] *See* "Summary of Key Changes to Kansas Science Standards Adopted by the Kansas State Board of Education on November 8, 2005," *available at* http://www.docstoc.com/docs/2296853/Summary-of-Key-Changes-to-Kansas-Science-Standards-adopted-by-the.

[408] Students will "critically analyze the data and observations supporting the conclusion that the species living on Earth today are related by descent from the ancestral one-celled organisms." New Mexico Science Content Standards, Benchmarks and Performance Standards, Standard II (Life Science) (Biological Evolution) (9) (Aug. 28, 2003), *available at* http://sde.state.nm.us/MathScience/ standards/science _standards.pdf.

[409] "The student will be able to explain how scientific and technological innovations as well as new evidence can challenge portions of or entire accepted theories and models including . . . [the] theory of evolution." Minnesota Academic Standards, History and Nature of Science, Grades 9-12, (Dec. 19, 2003), *available at* http://tis. mpls.k12.mn.us/Science.html (Download Academic Standard Document).

[410] "Identify and analyze current theories that are being questioned, and compare them to new theories that have emerged to challenge older ones (e.g., Theory of Evolution, theories of extinction, global warming)." Missouri Science Standards (Apr. 22, 2005), *available at* http://www.dese.mo.gov/divimprove/curriculum/GLE/SciGLE_FINAL-4.2005.pdf

[411] Students will "[c]ritically evaluate the status of existing theories (e.g., germ theory of disease, wave theory of light, classification of subatomic particles, theory of evolution, epidemiology of aids)." Pennsylvania Academic Standards for Science and Technology, Standard 3.2.12 (Aug. 30, 2006), *available at* http://csats.psu.edu/PA standards/stStandards.pdf.

[412] Alabama State Board of Education, Resolution (Nov. 8, 2001), *available at* http://www.alsde.edu/html/boe_resolutions2.asp?id=309.

of Creationism or Intelligent Design."[413] In 2006, Lancaster, California also passed a policy stating that evolution should not be treated as "unalterable fact" and that "[d]iscussions that question the theory may be appropriate as long as they do not stray from current criteria of scientific fact, hypothesis, and theory."[414] That same year, Mississippi passed a law protecting intellectual openness in the classroom when discussing biological origins which stated that "[n]o local school board, school superintendent or school principal shall prohibit a public school classroom teacher from discussing and answering questions from individual students on the origin of life."[415] Also in 2006, Ouachita Parish in Louisiana passed a policy that explicitly protects the rights of teachers to voluntarily critique controversial scientific theories such as Darwinian evolution:

> [T]he teaching of some scientific subjects, such as biological evolution, the chemical origins of life, global warming, and human cloning, can cause controversy . . . .
>
> . . . [T]eachers shall be permitted to help students understand, analyze, critique, and review in an objective manner the scientific strengths and weaknesses of existing scientific theories pertinent to the course being taught.[416]

Ouachita's policy has stood since that time without any incident of a lawsuit. One attorney working with the ACLU charged that he thought the policy was a guise for teaching religion, but nonetheless admitted that, "[o]n its face," the policy "is not objectionable."[417]

A similar policy was passed at the statewide level of Louisiana in 2008 requiring that Louisiana schools "create and foster an environment . . . that promotes critical thinking skills, logical analysis, and open and objective discussion of scientific theories being studied including, but not limited to, evolution, the origins of life, global warming, and human cloning."[418] This "Science Education Act" contains a specific provision that it "shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion."[419] Such legal provisions imply that if the Establishment Clause is breached during classroom instruction, then such

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[413] *See* Discovery Institute, *Wisconsin School Board Adopts Improved Policy Fully Teaching Evolution, Not Creationism* (Dec. 7, 2004), *available at* http://www.discovery.org/a/2323.

[414] *See* Discovery Institute, *"Masterful" Federal Ruling on Intelligent Design Was Copied from ACLU* (Dec. 12, 2006), *available at* http://www.discovery. org/a/3828.

[415] H.B. No. 214, 2006 Reg. Sess. (Miss. 2006), *available at* http://billstatus.ls.state.ms.us/documents/2006/html/HB/0200-0299/HB0214SG.htm.

[416] Ouachita Parish Science Curriculum Policy Adopted November 29, 2006, http://www.opsb.net/downloads/forms/Ouachita_Parish_Science_Curriculum_ Policy.pdf.

[417] Barbara Leader, *School Board Commended for Science Education*, NEWS STAR, Dec. 1, 2006 at 1B (on file with author).

[418] Louisiana Science Education Act 473, cg. 17 (2008).

[419] *Id.*

action would not protected by the law. Thus, the law itself could never sanction any religious advocacy in the classroom. While the law is relatively new and the response to it remains to be seen, ACLU Executive Director Marjorie Esman reportedly acknowledged that "if the Act is utilized as written, it should be fine; though she is not sure it will be handled that way."[420]

The common element throughout these unchallenged policies is that they permit an open atmosphere that sanctions subjecting evolution to scientific scrutiny through instruction in the science classroom. The conspicuous absence of lawsuits over these types of policies supports the view that public schools may engage in legitimate scientific critique of neo-Darwinism when done for legitimate secular purposes. Even the ACLU and Americans United for the Separation of Church and State acknowledge that "any genuinely scientific evidence for or against any explanation of life may be taught."[421]

VI. CONCLUSION

Educators and jurists are increasingly confronted with the need to address the teaching of biological origins in public schools. A close examination of the case law reveals that cases broadly fall into three categories: (1) those dealing with attempts to ban evolution, (2) cases dealing with the teaching of alternatives to evolution, and (3) those challenging the use of evolution-disclaimers. All attempts to ban evolution have failed and the rights of educators to teach evolution have been consistently upheld. Courts have found that teaching creationism as an alternative to evolution is unconstitutional. Additionally, courts have yet to validate any attempt to give students oral or written disclaimers about evolution. But no court has ever stated that teachers cannot teach legitimate scientific critiques of modern evolutionary biology in an atmosphere of intellectual openness. In fact, some rulings suggest precisely the opposite. Many threads can be found in the case law indicating that unilateral support for evolution is not legally required in schools:

- Genuine scientific critique of evolution is permissible so long as it is done to enhance the effectiveness of science education. As noted, the U.S. Supreme Court explicitly held that, "We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught. . . . Teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done

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[420] WWLTV.com, *ACLU Plans to Keep Eye on Science Bill* (June 24, 2008), http://www.wwltv.com/local/stories/wwl062408tpscienceact.37767059.html.

[421] ACLU, Joint Statement of Current Law on Religion in the Public Schools (Apr. 12, 1995), http://www.aclu.org/religion/schools/16146leg19950412.html.

with the clear secular intent of enhancing the effectiveness of science instruction."[422]

- Districts can pass policies specifically dealing with the teaching of evolution under legitimate secular purposes. Legitimate secular purposes include encouraging critical thinking, defusing the controversy caused by teaching evolution, disclaiming orthodoxy in the classroom, reducing student/parent offense from teaching evolution, and intending to enhance science instruction.
- Teachers may teach about scientific critiques of Darwinism when responding to student questions and when they have taught the required curriculum regarding evolution.
- Alternatives to evolution may be taught so long as they are scientific. Religious alternatives to evolution, such as creationism, are unconstitutional to teach in public schools. But a bona fide scientific alternative to evolution—even if it has tenets that coincide with some religious viewpoints—should be constitutional to teach because any effects upon religion would then be secondary or incidental effects, and not constitutionally fatal.

Additionally, many policies that sanction scientific critique of evolution have not attracted lawsuits, suggesting they lack constitutional flaws. The history of case decisions—and education policies that have withstood the test of time without the challenge of a lawsuit—indicate that evolution may be taught critically so long as it is done with the secular intent of improving science education, and so long as religion is not established in the classroom. Such an approach appears to be on the firmest legal ground when the classroom instruction engages in objective, neutral, and balanced scientific coverage of the topic.[423]

Other authorities support such a pedagogical approach to teaching evolution. In the conference report to the No Child Left Behind Act, the U.S. Congress declared that "[w]here topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society."[424] This congressional statement was later

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[422] Edwards v. Aguillard, 482 U.S. 578, 594 (1987).

[423] This undermines the common presumption that teaching any viewpoints that dissent from neo-Darwinism necessarily represents fruit of a "poisonous tree." *See* Todd R. Olin, *Fruit of the Poison Tree: A First Amendment Analysis of the History and Character of Intelligent Design Education*, 90 MINN. L. REV. 1107 (2006); Asma T. Uddin, *Evolution Towards Neutrality: Evolution Disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted Fruits of a Poisonous Tree*, 8 RUTGERS J. OF L. & RELIG. (2007), *available at* http://org.law. rutgers.edu/publications/law-religion/articles/Uddin.pdf.

[424] H.R. Rep. No. 107-334, at 78 (2001).

supported by the U.S. Department of Education.[425] Indeed, the statewide science standards or laws of no fewer than ten states have sanctioned scientific critique of evolution at various points over the past five years.[426] None of these policies have been challenged in court.

Educators teaching evolution will benefit from understanding this complex and evolving area of law so that evolution curricula in public schools may stay within proper constitutional boundaries, while not hindering science education by falsely presuming that evolution may never be taught with an "open mind" or be subjected to scientific critique. And there is one final noteworthy authority that might support challenging Charles Darwin: the great scientist himself. In *Origin of Species*, Darwin wrote: "A fair result can be obtained only by fully stating and balancing the facts and arguments on both sides of each question."[427] Educators that choose to improve science education by teaching both the scientific evidence supporting modern Darwinian theory, as well as the scientific evidence that challenges this view, can rest assured that they are on firm legal ground and that Darwin may be smiling approvingly from whichever realm of the afterlife he resides today.

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[425] Letter from Gene Hickock, Acting Deputy Secretary, U.S. Dept. of Educ. (Mar. 8, 2004), *available at* http://www.discovery.org/scripts/viewDB/index.php?program=News-Archived&command=view&id=1899.

[426] *See supra* notes 409-424 and accompanying text.

[427] CHARLES DARWIN, THE ORIGIN OF SPECIES 66 (J. W. Burrow eds., Penguin Group 1985) (1859).